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The Analysis section features two articles. William Stewart’s, ‘Civil and Criminal Liability arising out of the Rule Making Powers of Governing Bodies: Issues suggested by the Formula One 2005 Season’ with a focus on the legal issues involved in changes in safety rules in F1 racing. The second article is Jill Pilgrim, David Martin and Will Binder’s, ‘Far from the Finish line: Transsexualism and the Athletic Competition’, provides analysis of the medical, legal and ethical issues around sports participation by transgendered athletes. The S&LJ would like to thank the Fordham Intellectual Property, Media and Entertainment Law Journal in agreeing to us reproducing this article.

As far as the rest of the Journal, the regular contributions of Walter Cairn’s Sports Law Current Survey can also be found together with a Book Review of a recent publication on Cricket and the Law.

One perennial issue that touches on the world of sport is financial corruption. It clearly strikes at the heart of the integrity of any particular sport and administrators need to be vigilant. Horse racing has never been a stranger to allegations of financial corruption. The growth of racing in numerous countries is inextricably linked to the regulatory regimes of gambling which have controlled on and off-course gambling. This problem of financial corruption in horse racing has been shown to be a world-wide phenomenon with periodic reports and investigations concerning allegations of corruption around the globe. Such a scandal has enveloped racing in the UK over the last few years. The most recent development has been the charges brought against Kerron Fallon and a number of other jockeys for conspiracy to defraud. He has subsequently been banned by the Horse Racing Authority (the HRA- which since April 2006 has taken over disciplinary matters from the Jockey Club) from racing in Britain until the criminal trial which is likely not to be before spring 2007. Fallon was first arrested in autumn 2004 and has been on police bail since. It is reported that he is to appeal his ban to the High Court arguing that ‘the decision had the effect of denying him his right to earn a living, and would also effectively end his career as a leading jockey and is disproportionate and accordingly unlawful’. He is licensed to race in Ireland and will continue to be able to participate in races there.

The origin of these most recent allegations of corruption in UK horse racing dates back to October 2002 when a BBC TV Panorama programme claimed that the sport was ‘institutionally corrupt’. Allegations were made that links existed between criminal gangs and leading jockeys and trainers and that betting was used as a way of laundering drug-related money.

The programme revolved round Roger Buffham, the Jockey Club’s former head of security, who acting as a ‘whistle-blower’, made allegations against various individuals; jockeys, trainers and outside criminals. He also alleged a lack of action on the part of the Jockey Club to address the issues he had raised. The Jockey Club is the guardian of racing’s rules formed by a band of enthusiasts in the Star and Garter pub in Pall Mall in 1751. Initially it’s ‘Rules of Racing’ applied only to Newmarket but they soon gained wide acceptance. Within a few years it was the sole authority in British racing, and retained its regulatory powers after the formation of the British Horseracing Board in June 1993.
Editorial

Before the Panorama programme aired, the Jockey Club had sought an injunction in the High Court to ban Buffham from providing the BBC with what was alleged as ‘confidential incriminating information’ (see The Jockey Club V Buffham & BBC [2002] EW HC 1866). Refusing to award the injunction, Mr. Justice Gray ruled that it was in the public interest for this information to be disclosed even though Buffham had signed a confidentiality agreement, on leaving his employment, and been given a ‘golden handshake’ of £50,000. The Judge held that the ‘public interest’ in disclosing this information outweighed the Jockey Club’s right of privacy because it revealed ‘...the existence, or apparent existence, of wide scale corruption in racing.’ And this was of ‘legitimate concern to a large section of the public who either participate in racing or follow it, or who bet on the results of races.’ The view of the court was that the right to privacy protected by Article 8 of the European Convention on Human Rights is not an absolute one. It is subject to the needs of a democratic society to know certain things in the interests of, amongst others, morals, the prevention of crime and the protection of the rights and freedoms of others.

In July 2003, a Security Review Group jointly carried out with the British Horseracing Board, focused on the identification of the nature of the threats to the integrity of horseracing in Great Britain and assessed the breadth and depth of such threats to consider how best the Security Department of the Jockey Club should be structured and organised to deal with the threats to racing’s integrity. A number of recommendation ensued including the severe restriction of the use of mobile phones by jockeys at a racecourse during racing and security in weighing-rooms has been improved. In addition, trainers are not able to bet on any horse on betting exchanges.

Whether Fallon will be able to challenge his suspension pending his trial and challenge any subsequent ban imposed by the HRA is unclear. Some guidance might be found in the ACAS Code on Disciplinary and Grievance Procedures 2004, which states that in dealing with individuals charged with criminal offences not related to work this is not in itself reasoning for disciplinary action, but may be if it makes the ‘employee unsuitable for their type of work’. Suspensions pending the trial would seem to be reasonable and fall within the disciplinary rules of the HRA.

As far as any subsequent ban, guidance can also be found in the case of Bradley v The Jockey Club (2004) EW HC 2164. In November 2002, the former national hunt jockey, Graham Bradley was banned for eight years (reduced on appeal to five years) for breaching Jockey Club rules following quickly on the heels of the screening of the Panorama programme. Bradley appealed to the High Court in 2004 against the disqualification from racing. He challenged the imposition of the penalty, contending that it was disproportionate and unlawful. It was argued that a proportionate penalty would have been measured in weeks or months rather than years. However Richards J. upheld the ban by stating “in my judgment the Board was fully entitled to conclude, as the final result of its balancing exercise, that a period of five years’ disqualification was a proportionate penalty. Such a conclusion was within the limits of the discretionary area of judgment open to the Board in the application of the test of proportionality; it was within the range of reasonable responses to the question of where a fair balance lies between the conflicting interests. In my judgment there is no basis for the court, in the exercise of its supervisory jurisdiction, to hold that the Board acted unlawfully in imposing that penalty.”

Bradley seems to clarify the ambiguity of decision in Colgan v Kennel Club (2001, unreported) in indicating that the court is not entitled to put itself in the position of the tribunal in sentencing. A decision on (length for example) of sentence may be wrong, but the court may only interfere with the decision when the tribunal stepped outside its discretionary area of judgment.

Both the criminal prosecutions and the on-going strengthening and enforcement of the internal security measures in line with practice of good governance within UK racing are likely to continue to have a high profile for some time to come. The integrity of horse racing is still very much at stake.

Finally, it must be stressed that the Journal welcomes contributions from all BASL members and other readers in any of the sections of the Journal including reviews of future sports law related publications. Please contact the Editor with any suggested offerings.

Simon Gardiner
s.gardiner@assec.nl
www.britishsportslaw.org
Image woes: Causes of action for misappropriation – Part 1

By Stephen Boyd, Barrister, specialising in commercial and property litigation

1. The use of image rights in modern marketing practice

It appears that Britain has gone ‘celebrity mad’. According to the Economist:

“The country has a profusion of titles devoted to chronicling even the smallest doings of celebrities. Britons buy almost half as many celebrity magazines as Americans do, despite having a population that is only one-fifth the size. Celebrity news often makes the front page of British tabloid newspapers, providing a formidable distribution channel for stories about celebrity sex, drugs and parenthood. New figures from the Audit Bureau of Circulation show that the ten best-selling celebrity publications and ten most popular tabloids have a combined circulation of 23m.”

Marketing agencies have seized on the appeal of celebrities as an ideal platform for the promotion of their clients’ products and services.

“Celebrity endorsements... give the customer an opportunity to associate himself with a public figure, however fleetingly and remotely. Many, perhaps most, consumers value this association, at least unconsciously”.

Marketing by the use of celebrity images is very prevalent and the value of such activity is enormous. David Beckham, whose brand value was recently estimated at more than $370 million, has a string of global endorsements to his name, including PepsiCo, Vodafone, Marks and Spencer, Siemens and Adidas. Tiger Woods has, among others, a £22m deal with Buick, £10m from Accenture, an undisclosed amount from Tag Heuer watches and £48m from Nike. Even football referees are getting into the act! By the end of 2005, it was estimated that sports sponsorship spending would reach $16.8 billion globally, with Europe accounting for more than a quarter of that. In Britain, almost two thirds of total marketing spend is sports related.

2. Legal status of a celebrity’s image rights

The commercial value of any right, including image rights, can be undermined by the inability to protect that right at law from unauthorised use:

“The existence of goods and services bearing the individual’s name or image (and therefore the possible implied suggestion that the individual has approved or endorsed the products) without authorisation can in some cases seriously damage the value of a celebrity’s licensing rights in his image. Not only does the individual suffer the loss of royalties he might have earned but also his image may depreciate in value by the fixing of his name and image to inferior goods or materials. It may also deprive him of another lucrative endorsement contract due to loss of exclusivity”.

Whether the celebrity can prevent the unauthorised exploitation of his or her image and seek compensation from the opportunist marketer depends upon whether, and to what extent, the law in the relevant country recognises and protects image rights. The law in many jurisdictions outside the UK has developed in tandem with the growth of the commercial value of the image of celebrities and a specific image right is recognised in many countries, including most of those in the European Community. It is worth briefly surveying the approach in two such jurisdictions to set a context (and a contrast) for the approach under English law.

A. Overseas jurisdictions

(a) United States of America

The right of publicity, as it is known in the USA, “came about largely because the prior case law of privacy was inadequate to deal with claims based on the commercial and proprietary damage caused by unpermitted advertising use of human identity. It was thought that those who were “celebrities” could suffer no indignity or hurt feelings merely because of exposure in advertising use. While the non-celebrity plaintiff could at least make a show of hurt feelings, the celebrity was thought to be able to make a claim only for the loss of payment of the reasonable value of his or her identity. The traditional law of privacy permitted no such claim. Thus was born the concept of the right of publicity”.

5
The arguments for a discrete law dealing with image rights have been extracted from the American cases and summarised as follows:

(a) significant expenditure of time, effort, talent and finance is often necessary to achieve celebrity (particularly as a sportsperson) and as a result he or she justifiably deserves any money flowing from his or her fame;

(b) the population is incentivised to undertake socially enriching activities by ensuring that the person who undertakes such activities reaps the financial reward;

(c) the unauthorised use of a celebrity’s identity may saturate the market, thus injuring him or her by reducing the demand for his or her image; and

(d) every man and woman should have autonomy over what he or she endorses, be it an idea, a political candidate or a product. As a result, the laws of many American states recognise: “The inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category not just a “kind of” trade mark, copyright, false advertising or right of privacy. Whilst it bears some family resemblances to all these neighbouring areas of the law, the right of publicity has its own unique legal dimensions and reasons for being. The right of publicity is not merely a legal right of the “celebrity” but is a right inherent to everyone to control the commercial use of identity and persona and recovering court damages and the commercial value of an unpermitted taking”.

For example, the California Civil Code provides a cause of action where:

“All person knowingly uses another’s name, voice, signature, photograph, or likeness in any manner, on or in products, merchandise or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, without such a person’s prior consent”.

In addition, at the Federal level, the Lanham Trade Mark Act prohibits use of any “word, term, name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact or false or misleading representation” that is likely to cause confusion, mistake or deception as to affiliation, connection, association, origin, sponsorship or approval between a party and the goods, services or commercial activities of another.

“The courts enforce this body of law vigorously, consistently and extensively. A person’s right to control the commercial use of his or her personality is quite complete”.

(b) France

“As of the 1960s more and more celebrities submitted claims to the French courts that their right to their image had been infringed by unauthorised commercial use. The issue was mainly one of protecting the celebrity against the free ride or risks of tarnishment of his or her name because of apparent endorsement of advertised products or services. The courts, struggling to find a legal ground to sanction this unauthorised use not hurting plaintiffs’ privacy, affirmed an “absolute right in one’s image”.

A general right to privacy was recognised in 1970 when it was incorporated in the new article 9 of the Civil Code.

Generally speaking, the content of this right is considered in a negative manner: it is the right to prohibit the production and distribution of an individual’s likeness without the subject’s consent. The jurisprudence has nevertheless exposed several exceptions to the exercise of the right:

(i) when the image is incidental and was taken in a public place;

(ii) when it concerns a subject of a current event and is published soon after;

(iii) when it concerns the reporting of a trial (whose proceedings are public); and

(iv) when it concerns the likeness of a public figure in his public life.

However, such publication must be made for the purpose of providing information and not for publicity purposes nor for commercial exploitation. When concerned with the publication or distribution of the likeness of public figures, the judge may refer to the going rate (established by expert witness if necessary) in order to award on the basis of lost earnings, at most the sum equivalent to what could have been paid contractually, in accordance with the principles of the allocation of damages.
Image wrongs: Causes of action for misappropriation – Part 1

Using these laws, supermodel Linda Evangelista was able to take successful legal action against a right wing French political party that used a photograph of her dressed as Joan of Arc in its advertising. Another well known case involved Eric Cantona, who was awarded damages for the unauthorised use of his image on the cover of a video.

B. The position under English law

Professor Cornish notes that English law, in contrast: “has steadfastly refused to adopt any embracing principle that a person has a right to his, or her name, or, for that matter, to identifying characteristics, such as voice or image. An entitlement simply to demand that such characteristics without more amount to property in personality is rightly regarded as a step too far”.15

The case most often cited for the rejection of a property right to prevent unauthorised use of identity in advertising is Tolley v. Fry14 where Greer LJ stated that: “some men and women voluntarily enter professions which by their nature invite publicity and public approval or disapproval. It is not unreasonable in their case that they should submit without complaint to their names and occupations and reputations being treated ... almost as public property”.

Similarly, a 19th century judge took the view that unauthorised exploitation of persona “is one of the taxes which persons, by the very eminence they have acquired in the world, have to pay”.

In the absence of a discrete proprietary right in the commercial exploitation of one’s own personality, a celebrity can only complain “if the reproduction or use of [his/her] likeness results in the infringement of some recognised legal right which he/she does own”15 In other words, “plaintiffs lacking the real thing must rely on a confusing number of analogues and neighbouring doctrines”.16 It is to the principal “analogues” and “neighbouring doctrines” – a variety of statutory rights and common law principles, none of which is specifically designed to protect against the unauthorised use of a celebrity’s name or image – that I now turn.

I. Defamation

The law of defamation does not prohibit the unauthorised use of the name or image of the claimant; rather, it protects the reputation of the claimant.

“The gist of the action is the defendant either lowers the plaintiff in the estimation of reasonable, right thinking members of society, or causes such citizens to shun or avoid him”.17

In Tolley v. Fry15 Mr. Tolley, an amateur golfer in the days when there was a clear divide between “gentlemen” (amateurs) and “players” (professionals), succeeded in a claim for defamation when he was caricatured in newspaper advertisements with a packet of Fry’s chocolate sticking out of his pocket. A caddy was represented with him who likened the excellence of the chocolate to the excellence of Mr Tolley’s drive. Below the caricature was a limerick in the following terms: “The caddie to Tolley said, Oh sir
Good shot, Sir! That ball, see it go, Sir
My word how it flies
Like a cartet of Frys
They’re handy, they’re good, and priced low, Sir”

The defamatory meaning of the advertisement was said to be that Mr. Tolley had “prostituted his reputation as an amateur golfer for advertising purposes”.

At first instance, the judge ruled that the advertisement was capable of the alleged defamatory meaning. The Court of Appeal disagreed but their decision was reversed in the House of Lords.

The defendant argued there was no evidence to prove that well-known persons were in the habit of allowing their names to be used for advertising purposes, and that in the absence of such evidence a jury could not be allowed to reach the conclusion that the publication impliedly represented that the plaintiff had given such permission. Viscount Hailsham said:

“I am not satisfied that it would not be open to a jury, acting on their knowledge as ordinary citizens, to assume that no respectable firm would have the effrontery and bad taste to take the name and reputation of a well known man for an advertisement commending their goods without first obtaining his consent”.

Lord Blanesburgh, in a minority of one, took the view that the caricature was so vulgar that no-one could have suspected Mr Tolley had anything to do with its publication: “That publication was, surely, only another instance of the toll levied on distinction for the delection of vulgarity”20

Given that these days all sports stars with image rights worth exploiting are professional, it seems unlikely that such a case will ever arise again. However, it is suggested that the following factual scenarios might give rise to a claim:

(a) if a footballer signed an exclusive boot deal with Nike in a blaze of publicity, and proclaimed loudly how he always wore Nike boots because they were the best, and then Reebok used the footballer’s name and
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...image to endorse its rival boots, an action might lie for defamation based on the alleged innuendo that the footballer did not honour his contracts;

(b) if the image of a reformed alcoholic footballer was used to endorse liquor, an action might lie for defamation based on the alleged innuendo that the footballer was still drinking.

II. Copyright
The law of copyright in the UK confers a copyright in original literary, dramatic and artistic works, as well as in sound recordings, films, broadcasts and cable programmes, in the typographical arrangements of published editions. Copyright is not of great use, however, for an individual seeking to control the exploitation of his image rights. There is no copyright in a face or in a name. There is copyright in graphical representation, for example, of a cartoon character, but this will not help real people. There may be copyright in a signature. There is copyright in a photograph, but, absent a contractual assignment, it belongs to the photographer, not the subject of the photograph, and also in the Premier League logo and club badges.

III. Passing off
The tort of passing off prevents parties passing their goods or services off as the claimant’s goods or services, ie exploiting without authority the goodwill that the claimant enjoys in the market place. On its face, it would appear to provide a useful remedy against the unauthorised use of the name or image of a sportsman or woman to endorse goods or services. However, until recently, that has not been the case, as the courts have shown a reluctance to use the tort to protect celebrities from the unauthorised use of their names and images. However, the recent case of Irvine v Talksport has come closer than any other to according recognition and protection to the right of a sportsperson to control his or her image.

The source of the problem historically was the idea (derived from the concept of the tort as “passing off your goods for the goods of the claimant”) that the claimant had to be engaged in the same field of activity as the defendant. The leading case was McCulloch v Lewis A May Limited where the plaintiff was a well known children’s radio broadcaster under the name “Uncle Mac”. The defendant began distributing Puffed Wheat under the name “Uncle Mac’s Puffed Wheat”, and the plaintiff sued for passing off. The court held that, as the plaintiff was not engaged in any degree in producing or marketing Puffed Wheat, there was no field of activity common to the plaintiff and the defendant and the defendant therefore could not be said to have invaded any proprietary right of the plaintiff or to have passed off the goods or the business of the plaintiff. Wynn-Parry J was:

“satisfied that there is discoverable in all those [cases] in which the court has intervened the factor that there was a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged and that it was the presence of that factor that grounded the jurisdiction of the court”.

In other words, the celebrity would have to show he or she was engaged in the actual marketing and selling to the public of products or services endorsed with his or her name or image. Further, in the view of the English courts, the commercial practice of character merchandising and licensing was not sufficiently widespread that the public would assume that any product using the sportsman’s name or image was endorsed or authorised by the sportsperson.

This requirement had severely restricted the usefulness of the tort of passing off, in the sports sector as elsewhere. In the Irvine case however, the “Uncle Mac” approach was disapproved and not followed.

Eddie Irvine was a prominent driver in the FIA Formula One world championship. Talksport runs an eponymous radio station. In 1999 it embarked on a special promotional campaign to mark the rebranding of the station from Talk Radio to Talksport, and its acquisition of the right to broadcast coverage of the FIA Formula One world championship. It sent just under 1,000 media buyers a pack which contained, a pair of white shorts (on the back of which was a representation of the skid mark left on a road when a car accelerates too forcefully) and a leaflet bearing a number of photographs, including one of Mr Irvine. The original photograph, the right to copy which had been acquired from a sporting photograph agency (so that copyright in the photograph was not an issue), showed Mr Irvine holding a mobile telephone. The agency manipulated the photograph to cut out the mobile telephone and replace it with an image of a portable radio to which the words “Talk Radio” had been added. Mr Irvine contended that the distribution of the brochure bearing that manipulated picture of him falsely implied that he endorsed Talksport, and was an actionable passing off.

Laddie J noted that “the law of passing off responds to changes in the nature of trade”, and that the old cases may not reflect recent developments.
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Having surveyed the authorities, Laddie J concluded that: "The law of passing off now is of greater width than as applied by Wynne-Parry J in McCulloch v May. If someone acquires a valuable reputation or goodwill, the law of passing off will protect it from unlicensed use by other parties. Such use will frequently be damaging in the direct sense that it will involve selling inferior goods or services under the guise that they are from the claimant. But the action is not restricted to protecting against that sort of damage. The law will vindicate the claimant's exclusive right to the reputation or goodwill. It will not allow others to so use goodwill as to reduce, blur or diminish its exclusivity. It follows that it is not necessary to show that the claimant and the defendant share a common field of activity or that sales of products or services will be diminished either substantially or directly at least in the short term... Even without the evidence given at the trial of this action, the court can take judicial notice of the fact that it is common for famous people to protect their names and images by way of endorsement. They do it not only in their own field of expertise but, depending on the extent of their fame or notoriety, wider afield also... Manufacturers and retailers recognise the realities of the marketplace when they pay for well known personalities to endorse their goods. The law of passing off should do likewise. There appears to be no good reason why the law of passing off in this modern form and in modern trade circumstances should not apply to cases of false endorsement."

Despite unchallenged evidence that “Mr Irvine would not get out of bed for less than £25,000”, Laddie J awarded him damages of only £2,000 on the basis that this was a “reasonable endorsement fee”. However, Mr Irvine appealed and the Court of Appeal substituted a figure of £25,000 for the judge’s figure of £2,000. Jonathan Parker LJ held that a reasonable endorsement fee in the context of the case

“must represent the fee which, on a balance of probabilities, [Talksport] would have had to pay in order to obtain lawfully that which it in fact obtained unlawfully... it is not a fee which [Talksport] could have afforded to pay.”

Laddie J’s ruling that “Mr Irvine has a property right in his goodwill which he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third party’s goods or services” is a very significant step forward in the recognition of image rights under English law. It provides a proper cause of action that reflects modern marketing practice, and makes the strained use of other causes of action less imperative. A celebrity who is the victim of a false endorsement will “need to prove at least two interrelated facts. First, that at the time of the acts complained of, he had a significant reputation or goodwill”. Second, that the actions of the defendant gave rise to a false message which would be understood by a not insignificant section of his market that his goods have been endorsed, recommended or are approved of by the claimant.”

It is relevant to point out that Talksport appealed on the issue of misrepresentation, relying on the spoof nature of the pack and contending that it was manifestly intended as a joke and that was how the recipients would have regarded it. Parker LJ was not impressed. He thought the fact that the pack was humorous was irrelevant and said: "I find it difficult to conceive of a clearer way of conveying, by way of a quasi-photographic image, the message that a celebrity has endorsed a particular radio station than by depicting the celebrity listening intently to a radio bearing the station’s logo.”

It was not long before the Irvine precedent was used by ex-England cricketer Ian Botham to extract a settlement payment of several thousand pounds from Diageo for using his image, without his authority, to promote Guinness. The case involved an image of Mr Botham playing in the 1981 Ashes series against Australia. The image was unmanipulated, ie Guinness was promoted simply against a backdrop of Mr Botham playing cricket, which could fairly be argued to distinguish the case from the Irvine case. Clearly, however, Diageo did not want to take the chance. It is important to bear in mind that, as the law now stands, it is not enough to show that an image has been used for commercial purposes by the defendant. Mere use of the name or image of a person need not, and frequently does not, imply endorsement. A claimant must go further and show there was an implicit representation of endorsement or that members of the target audience would believe that to be the case. In the Australian case of Honey v Australian Airlines Ltd, an athlete objected to his image appearing on certain posters and covers of publications to promote the defendant airline. The photograph was an action shot of Mr Honey in full flight doing the long jump. Australian Airlines’ name and logo appeared at the bottom of the poster, ie not in a prominent position. The judge rejected the claim, holding that association in itself was insufficient to imply an endorsement. It had not been shown that a significant segment of people seeing the poster would be likely to associate Mr Honey with the airline. To similar effect is the Australian case of Newton-John v Scholl-Plough where the singer/actress Olivia Newton-John complained about the use of a photograph of a “look-alike” model in an advertisement headed: “Olivia? No. Maybelline”. The court held there was no liability for passing off because there was no representation of an association. The advertisement had used Ms Newton-John’s image, but only to attract attention. Even a casual reader could see
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immediately that it was not Ms Newton-John in the advertisement.

Laddie J carefully distinguished cases involving the unauthorised use of a celebrity’s name and image for endorsement purposes from cases involving the unauthorised reproduction of the name or image of the celebrity on merchandise (ie character merchandising).

He said:

“In my view nothing said above touches on the quite separate issues which may arise in character merchandising cases ... In those cases the defendant’s activities do not imply any endorsement. For example, although it was a trade mark registration case, in Elvis Presley Trade Marks much of the argument turned on whether the appellant had merchandising rights in the name of Elvis Presley or in his image. It wanted to prevent third parties from selling products such as bars of soap and drinking mugs bearing the name of the performer and photographs of him. There could be no question of the performer endorsing anything since he had been dead for many years. So the argument being advanced was one which amounted to an attempt to create a quasi copyright in the name and images. The Court of Appeal’s rejection of that is, with respect, consistent with a long line of authority.”

However, Laddie J did leave the door slightly ajar to the development of further protection for the celebrity in this context, stating:

“Whether such a new right may be created either by development of the common law or as a result of the passing of the Human Rights Act, is not relevant to this action.”

Contact: stephen.boyd@selleystemachers.co.uk

Part 2 of this article to be published in Issue 14(2) (2006).

1 Of 1/9/95
2 Treece, Commercial Exploitation of Names, Likenesses and Personal Histories 51 Texas L Rev 637 (1973)
3 Independent Digital 180/4
4 Steele, “Personality Merchandising, Licensing Rights and the March of the Turtles” 1997 SJU 14
5 McCarthy, The Rights of Publicity and Privacy, 4-10.
7 McCarthy (see above) paragraphs 1-2 and 1-3.
9 In Germany, Bayern Munich soccer star Oliver Kahn recently succeeded in a battle over image rights. He took the makers of the computer game FIFA 2003 to court for using his image on the front cover.
12 Henry, paragraph 11.123.
13 Cornish, Intellectual Property (5th edition) paragraph 16-34.
14 1931 1 KB 467 CA.
15 Per Laddie J in Elvis Presley Trade Marks 1997 RBC 543 and 548.
16 Goodenough “Rehearsing Privacy and Publicity” 1997 1 IPR 37 at 65.
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22 Merchandising Corporation of America Inc. v Harbord Inc. 1983 FSR 32 (case concerning “Adam Ant”).
23 Exxon Corporation v Exxon Insurance Consultants International Ltd 1969 Ch 119.
24 Section 11(1)(a).
25 Football Association Premier League Ltd v Panin UK Ltd 2003 EWCA Civ 996
26 2002 WLR 2355, see also the Australian case of Henderson v Radio Corporation Pty Ltd(1968) RPC 218 and Hamroo v Harriam School (1984) RPC 677
27 1947 2 All ER B45.
28 1L, 29 April 2002 (unreported elsewhere).
29 2003 EWCA Civ 423 1 April 2003.
30 Paragraph 106.
31 Mr Irvine could show a history of previous endorsements as evidence of significant reputation goodwill.
32 Per Laddie J at paragraph 46
33 Irvine at para 58
34 1989 14 IPR 294
35 1986 F.1R. 233
36 “[This] case is concerned with endorsement. When someone endorses a product or a service he tells the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product. Merchandising is rather different. It involves exploiting images, scenes or articles which have become famous. To take a topical example, when the recent film, Star Wars Episode 1, was about to be exhibited, a large number of toys, posters, garments and the like were put on sale, each of which bore an image of or reproduced a character or object in the film. The purpose of this was to make available a large number of products which could be bought by members of the public who found the film enjoyable and wanted a reminder of it. The manufacture and distribution of this type of spin-off product is referred to as merchandising. It is not a necessary feature of merchandising that members of the public will think the products are in any sense endorsed by the film makers or actors. Merchandising will include any where there is a perception of endorsement and some where there may not be, but in all cases the products are tied into and are a reminder of the film itself. An example of merchandising is the sale of the merchandising relating to the late Diana, Princess of Wales. A porcelain plate bearing her image could hardly be thought of as being endorsed by her, but the enhanced sales which may be achieved by virtue of the presence of the image is a form of merchandising”.
37 In Longman v Aboriginal Products (1977) FSR 62, the members of Swedish pop group “Abba” sued the defendants for making and distributing, without their permission, badges, t-shirts and pillowcases featuring the band’s name and picture. Oliver J doubted that any confusion was likely, but held that there was a “true case of merchandising” and that the defendants were trading on the goodwill of the band.

Contact: stephen.boyd@selleystemachers.co.uk

Part 2 of this article to be published in Issue 14(2) (2006).

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Interview with Sir Hugh Laddie
21 March 2006

By Stephen Boyd

SB: The law in many jurisdictions outside the UK has developed in tandem with the growth of the commercial value of the image of celebrities and a specific image right is recognised in many countries, including most of those in the UK. J. Thomas McCarthy, senior professor at the University of San Francisco School of Law, and leading commentator in the US on the rights of publicity and privacy, says “English law often seems tied to the legal categories of the past and, up to the present, unable to accommodate itself to the modern commercial realities of licensing and merchandising. Isn’t it time we had a specific image right here?

HL: I think it’s only right that I should lay my stall out at the beginning of this interview. I come from an IP background but I have absorbed the origins of the IP system in the UK. Fundamental to the way our economy works, is that people are allowed to trade in whatever way they want. The starting point is that monopolies are a bad thing because they undermine competition. It was the refusal to allow unjustified monopolies which resulted in the passing of the Statute of Monopolies 400 years ago. It is not necessary to look exclusively to the western economic model. For example, one of the reasons why we think that the west was economically more advanced than the Soviet Union was that the Soviet Union had a command economy where most products were produced by state monopolies. That meant no competition and no competition meant no real development. You can see effectively a time capsule of this in India where the Hindustan Motor Corporation made and still makes Ambassador cars. They started in 1952 with a design based closely on the design of the Morris Oxford of 1948. Because the Indian government wouldn’t allow in any competing cars, the Ambassador car in a virtually unmodified form reigned supreme in India for 40 years while the rest of the world made ever better and more refined cars. There was no need for car design to keep pace in India because there was effectively a state monopoly. Once the state monopoly went, and foreign cars were allowed in, the Hindustan Motor Corporation found that it needed to make a modern car. That it now does. It had to make new cars and get up to date with new technology. And that, I think, is an example of the importance of competition. I think we have historically always started with the view that you should be allowed to do what you like in trade and that monopolies have to be justified.

I think that, until recently, there has been no real economic justification for image rights. Every day of the week, newspapers contain images of people for commercial reasons. They contain images of buildings. They do this because that is part and parcel of bringing the news to peoples’ attention. Books have pictures of people on. When Kitty Kelly writes an unauthorised biography of somebody, it will contain photographs of the victim. This is done for commercial reasons. I don’t see anything wrong in that. I don’t see any great need for an image right. What is it that you are trying to achieve by creating an image right? I have found it difficult to identify a general economic benefit from creating such an additional monopoly. Certainly nothing which would justify the restriction on competition and a free market, which the creation of such a monopoly would entail. But one of the characteristics of English common law is that, whether one likes it or not, it does change with time. I see that you have referred to Thomas McCarthy at San Francisco School of Law, and he alleges that English law doesn’t keep up with the times. Well, it’s true that our law always lags behind commerce. It does not change with every passing fad. But I think that there comes a time when our law recognises what the commercial reality is on the ground. Once it has become accepted that the market recognises that people have a legitimate commercial interest in their own images, the law will recognise that, whether by development of the law of passing off, or by developing a new branch of law; say unfair competition or whatever, the law will recognise it. My view is that, in fact, we will get to something very much like an image right here, if not by legislation then by gradual expansion of the current law of passing off, or the development of a form of unfair competition.

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of Eddie Irvine, the Formula 1 racing driver, holding a radio to his ear, with the word Talksport written on, gave the impression that Mr Irvine endorsed the Talksport channel. Therefore I held that that amounted to passing off. I can see that developing further. What is happening in the market place is that many major personalities are applying for, and obtaining, registrations of trademarks consisting of pictures of themselves. Eventually the public will accept that images belong to the personality and, once the public accepts that as a commercial reality, then I think the law will follow in the public’s wake. So if the public perception is that using an image without permission will be trespassing on something, which is recognised as being something to which the personality has a right, I think the law will develop. I am by no means convinced that it will do much good to the economy, but that’s another matter. I think it will happen.

SB: So far as the development of the Irvine principle is concerned, there appear to be prerequisites of a significant reputation and of a message going out to a significant proportion of the audience that the celebrity has endorsed a particular product or service. It does not at the moment extend to simply an association so, for example, there was an Australian case involving a long-jumper who was pictured in full flight at the bottom of a poster advertising Australian Airlines. He brought proceedings in Australia, alleging passing off. The court there held that an association of itself was inadequate because not enough people would think that that amounted to an endorsement. You say that the Irvine principle is likely to develop: is it likely to develop to encompass cases involving association, or do you think there will always be the need for an endorsement?

HL: First of all, I don’t think you should call it the Irvine principle. What happened in the Irvine case was that I sought to explain his entitlement to sue on a standard passing off basis. That included, of course, saying that he had a reputation and that the public was likely to be deceived into believing that he had endorsed the defendant’s radio programme. So the way in which the judgment was structured was that it was a standard passing off judgment; one would not call it the Irvine principle. However, having given the purist explanation for it, you then compare that judgment, which I don’t think was in any way a breakthrough, with the Uncle Mac decision in the 1940s where, in very similar circumstances, the case of endorsement was made out, but the court wouldn’t allow a celebrity, whose image was used quite clearly to endorse a product, to succeed in passing off. However, the appreciation of the public has changed over the years and that has allowed the courts to change the frontier of the law of passing off, without apparently changing the principles. But you’re right that, if passing off in its current form is the way in which you succeed in a case

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where an image is taken, you’re going to be left with a requirement of showing reputation and a perception of endorsement. In its current form, the law of passing off would not cover dilution or, more precisely, that’s not where most people think the current law of passing off is. But the law of passing off is part of a wider area of law which covers trademarks. In relation to registered trademarks, we know that under the Trademark Directive you can succeed in an infringement action if you can prove that there is a likelihood of confusion. The European Court of Justice in its Sabel judgment has confirmed that that means confusion as to origin and not mere association. However, the Directive also contains another provision relating to famous marks. Most Benelux lawyers would say that that actually brings the principles of Benelux law of association into the law of the trademarks at least in relation to famous marks. If it does that for famous marks, I cannot believe that the principles that apply in the law of trademarks will be isolated from what happens in the law of passing off. To put it more broadly, what happens in the law of registered trademarks won’t be isolated from what happens in the common law. Common law can be developed by judicial interpretation. So, first of all, there’s an impetus, by way of registered trademark law, to acknowledge association. In addition there are some passing off cases where it is very difficult indeed not to think that it’s really association that is at the heart of the finding against the defendant, rather than anything else. If you look at the Court of Appeal’s decision in the Elderflower Champagne case, it’s quite clearly association that they are talking about, nothing else.
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The Court of Appeal says that it was dealing with a passing off case, but the language of the judgment is the language of association. Nobody was going to believe that Elderflower Champagne had anything whatsoever to do with French Champagne. No member of the public was going to be confused as to origin, but the Court of Appeal said that what the defendant was doing, by using the word “champagne” in relation to its beverage, was damaging the exclusivity of the word champagne. This is what Benelux lawyers would call ‘dilution’ of the champagne reputation. So I think, as always, the common law is flexible and, with time, I think it is likely it will go beyond the current boundaries of passing off.

SB: To include association?
HL: Yes. I’m not convinced that we haven’t even got there already as a result of the Elderflower Champagne case. I haven’t got the Court of Appeal judgment in that case in the forefront of my mind, but my recollection is of passing off.

SB: If the right did extend to mere association, rather than endorsement, it would make unnecessary the kind of evidence that is necessary at the moment by calling members of the public to testify as to their impression of a particular advertisement. What do you think about that?
HL: There was a hidden assumption in that question, namely that it is necessary to call members of public in a passing off case. It is true that members of the public are called. Everyone who brings a passing off claim calls such evidence. Some time ago we got rid of the idea of having surveys, not least because normally the people who organised them and their expert witnesses were mauled mercilessly in the witness box – they didn’t like it. However, lawyers still call members of the public to testify. In my view, the only value of that evidence is to show the judge the variety of possible views that members of the public may have. In the end, he will decide whether the defendant’s actions are confusing the courts be protecting? They would be protecting the exclusivity of the word ‘champagne’. Once you start down that path you then start saying – what else deserves to be protected and what else deserves to have exclusivity recognised? I don’t think it takes long before you end up by saying people who are famous should have the right to stop themselves being exploited for commercial reasons by others. That still, of course, doesn’t give an image right to someone who is not famous. If you’re not careful, someone who is not famous, but who happens to be, say, incorporated in an advertising shot, will claim an image right. I can’t see what justification there would be for giving such a person a right to prevent the advertisement going out, or to seek some form of compensation even if the law expands to give celebrities such rights. I think there are significant public policy considerations against granting such a wide and potentially restrictive rights to everyone. It would create a massive increase in monopolies. I cannot see what the benefits of such a right would be to society or to commerce. It seems to me to be just another IP right created on the basis that, if IP rights are good, more IP rights are better: that’s a principle I don’t subscribe to. I believe that IP rights may be acceptable if the general economic benefit created by them outweighs their anti-competitive impact, but not otherwise. If you want to expand them, explain why they’re justified. The basic rule should that traders should be free to do what they want, save and to the extent that there’s a good reason for saying they can’t.

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witnesses in the witness box to say ‘I thought there was an association’, because they will not to take the risk that the judge would say that “there was no association and no members of the public to say they thought there was”. And, anyway, the lawyers will like to cover their clients against the possibility that this was old fashioned passing off as well. They wouldn’t want to give up a potentially good claim in passing off. So the evidence is likely to be much the same. It will be introduced on the belt and braces principle until such time as the courts say it is not necessary.

SB: But would the extension that you are talking about cover look-alikes?
HL: Look-alikes are there to achieve the impression that it’s the original person. I don’t actually see look-a-likes as being much different in principle to the use of the real image of the celebrity.

SB: What about merchandising? You were at pains in the Irvine case to draw a distinction between merchandising and endorsement. For example, last year I received a birthday card, which had David Beckham’s face on the front and emitted a taped impression of his voice when you opened the card. That’s purely merchandising, of course; there’s no endorsement there. What do you think about the possibility of the law extending to protect celebrities from the use of their image, voice, picture on things like cups and t-shirts, birthday cards etc.?
HL: I think it’s really a continuation of what I have said about image rights. Personally, I don’t believe there’s a driving sociological or economic need to prevent that sort of thing but, of course, I can see from the way things are going that, if the public believes that your birthday card with David Beckham’s image on it was in some way a commercial activity exploited by David Beckham, or his licensees, in a way it justifies an extension of the law of passing off to that as well. But even if you don’t go down that route, and you just say mere association is enough then, of course, such cards will not be possible and neither will mugs with the picture of a living personality, or a dead personality, like Princess Diana. If you have this sort of right extended, then nobody can put out a mug bearing a picture of Princess Diana or David Beckham. Personally, I think we should guard against extending IP rights.

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It’s a little bit precious that people should want to ensure that they’re only viewed in the most favourable light or always want a rake off. There’s too much snout in the trough as far as I am concerned. However, I am a realist and there’s a big market out there. There are some very powerful advocates in favour of extending the law and by and large the common law bends to or acknowledges commercial pressure.

SB: But in America, for example, personality rights or the ‘right of publicity’, as it’s called out there, is very strenuously enforced, particularly in California and New York.
HL: Absolutely. But America is a stronghold of the view that IP rights are good, therefore the more IP rights the better. I think that they are on many occasions wrong. It’s no surprise that in America they extend IP rights. I would expect America to be in the vanguard because there is a very vocal and powerful lobby, which advocates expansion of intellectual property rights. This lobby is not restricted to pushing for personality rights. In many areas there is a push for more and wider intellectual property rights. For example, the Americans now say that you can patent methods of doing business. Of course, the American economy couldn’t have reached its current size and success if there had been such patents. What would it have done to the American economy if Mr Ford had been able to patent the production line? It would have held back American business by 15 to 20 years, but you know at the moment the large voices in America are the voices in favour of more. I don’t agree with it. I certainly don’t believe our decision whether to give protection to personality rights should be determined by looking at what the Americans have done.
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SB: So far as Europe is concerned and the Human Rights Convention, do you think that the extension that you were talking about will come by way of convergence by reference to the European Convention on Human Rights, article 8 and article 1 of the First Protocol?

HL: I think that in this country there is some caution about using human rights principles to expand proprietary rights. But the human rights influence may come in indirectly. If human rights legislation on the continent results in ever greater protection for image rights and personality rights, it is the fact that those rights are now recognised by our continental colleagues, rather than the way they got there, which is likely to influence us. We may not do it by going back to human rights legislation itself, but merely by riding the wave of increased rights created on the continent by that legislation. Legislation helps to reinforce these rights. We then face those reinforced rights breaking like a wave on our shores and we are likely to go the same way. Image rights are now seen as something commercially worth protecting, so my expectation is that’s the way it will go here, even if I don’t think it’s necessarily a good thing and even if, on the continent, part of the justification for such rights is human rights legislation.

SB: The UK and Ireland are probably the only countries in Europe that don’t have a discrete image right.

HL: Absolutely. But the reality is, in my view, that we are part of the European Union and the currents in the European Union are felt here. It will be progressively harder for us to turn a blind eye to the sort of right that is recognised on the continent and from which English personalities could just as well benefit as German and French personalities. As I say, the tide is running in one direction and I suspect that we will end up being carried along by it. I don’t even think it will take that long. There will be some hard cases, which will advance rights in this country and then, before you know it, you’ll have personality rights.

SB: So that will come by an extension of passing off and/or unfair competition?

HL: That’s my guess. I think that’s probably the way it will come.

SB: Supported by convergence with Europe and possibly with reference to the Human Rights Convention?

HL: Yes, possibly. For example, the reference to ‘unfair competition’, in the extremely loose and unstructured language used by Lord Justice Aldous in his judgment in the Arsenal case, could be used as a stepping stone.

SB: Turning to the Arsenal and Read case, was the Court of Appeal correct?

HL: No, absolutely wrong. That’s their prerogative. But they were absolutely wrong. The Arsenal and Read case is very interesting. The only question I sent off to the European Court of Justice was whether, to be in breach of a registered trademark, the defendant must have used the sign in a trademark sense. I had held as a fact that the use by Mr Read was not in a trademark sense. He was certainly using the word Arsenal on his scarves but he was not using it to designate the football club as the origin or producer of the scarves. There was only one question the European Court of Justice was asked, namely, does the defendant’s use have to be use in a trademark sense before he can be found to have infringed a registered trademark. To that, there was a simple answer, which actually had been reinforced time and time again by the European Court of Justice. Since Read, they keep on referring back to Arsenal v Read, saying it’s a case which shows that use has to be of the mark in a trademark sense and as an indication of origin. That was their job. We have a set of rules in Europe which rules cover everybody. The judiciary and the European Court of Justice have no more entitlement to breach those rules than anybody else. The European Court of Justice does not have jurisdiction to decide issues of fact. Arsenal v Read is an extraordinary example of a case where the European Court of Justice decided to just make up facts for itself and substitute them for a decision of the national trial judge. When the case came back to me, I said it had no jurisdiction to decide questions of fact and ignored its judgment in this respect. I then received an extremely interesting phone call from a very good friend of mine who is an extremely senior judge in the national court of another Member State. He said he had seen a short note that I had refused to follow the European Court of Justice and he couldn’t believe it. He asked if I could send him a copy of the judgment, which I did. Three or four days later, he phoned back and told me that the senior court in his country had for some years been very unhappy about the fact the European Court of Justice seems to spend its time deciding issues of fact and that it is doing things which it has no jurisdiction to do, instead of just dealing with issues of law. He had
come to the conclusion that my judgment – or more precisely my refusal to accept the rewriting of the facts by the European Court of Justice – was right. In my view, the European Court of Justice’s judgment was grotesquely unfair to Mr Read. His counsel was not allowed to address the European Court of Justice on issues of fact because issues of fact are not for the European Court of Justice to decide. It was only when they saw the Advocate General’s opinion that they realised the Advocate General had gone off and dug up a whole lot of so-called facts for himself. I think that is not a legal system of which we can be proud. I made it quite clear in my judgment that there was a way around my refusal to endorse what the European Court of Justice had done, which was for the national court, that is to say the Court of Appeal, to say that I had got the facts wrong. Effectively I invited the Court of Appeal here to say that I had got the facts wrong, and that Mr Read had used the word Arsenal in a trademark sense. I think the Court of Appeal ducked the issue. So I think the Court of Appeal was wrong and the European Court of Justice was wrong, but both the European Court of Justice and the Court of Appeal had more votes than I did. I am happy to say that I would not have changed a word in my judgment, even having seen the Court of Appeal’s decision, not one word.

SB: Do you have any views on whether the Data Protection Act is available to protect celebrity image rights?

HL: Well, I did a number of Data Protection Act cases when I was on the bench and what strikes me is that the Data Protection Act promises more than it delivers. People think that they can protect their data and that the Act gives them a wide right to stop all sorts of things, but it’s not like that at all. I don’t actually see the Data Protection Act being a way round this gap, not at all. I think if you’re going to change this by legislation you have to face up to it – you’re going to have to create a new right, which is a modern version of passing off or unfair competition or some image right per se. I don’t think the Data Protection Act is a ready mechanism for doing it. It’s actually quite restricted in its application. The Court of Appeal has construed it on a number of occasions in a way that I don’t think lends itself at all to branching out into personality rights.

SB: Thank you.
Deloitte Annual Review of Football Finance

By Dan Jones, Deloitte Sports Business Group

The football industry is dynamic, driven by a mixture of evolutionary developments and the occasional ‘big bang’ revolution. It is now a hugely different landscape to that which existed when Deloitte’s first Annual Review was published in 1992. Looking forward in the short/medium term, for clubs towards the top end of the English football pyramid (say, the top 30 or so clubs), we summarise below some of the key strategic challenges. In particular, the international context of global player and fan markets, overseas ownership and governance pressures has become increasingly important.
Deloitte Annual Review of Football Finance

Highlights

Europe’s premier leagues
- The ‘big five’ European leagues – the top-tier leagues in England, France, Germany, Italy and Spain – generated revenues of €6.3 billion in 2004/05, an impressive 8% growth on the previous year, with these five leagues accounting for 54% of the €11.6 billion European football market.

- Each of the ‘big five’ European leagues experienced revenue growth in 2004/05, with two of the ‘big five’ leagues – the German Bundesliga and Italian Serie A – returning to double digit revenue growth after a period where revenues were flat.

- Whilst the English Premier League continues to be the highest earning domestic league with revenues of almost €2 billion, the German Bundesliga showed the largest growth in 2004/05 with a 17% increase to over €1.2 billion, driven mainly by increases in broadcasting and commercial income.

- Looking forward, several leagues are likely to experience significant revenue growth in future seasons thanks mainly to intense competition within broadcast markets resulting in increased rights fees for football.

- Three of the ‘big five’ leagues reduced wages and salaries costs in 2004/05, whilst four of the five showed a reduction in wages to turnover ratios emphasising a general improvement in cost control. Of the five leagues, the Italian Serie A showed the best reduction in the wages to turnover ratio from 73% to 62%.

- All of the ‘big five’ leagues improved operating performance in 2004/05, although only two, the Premier League (£240m) and Bundesliga (£65m) posted operating profits. Serie A showed the largest improvement in operating performance cutting losses by £270m or 79%.

- Whilst other European leagues cannot rival the ‘big five’ in terms of absolute revenues, the majority continue to achieve year on year revenue growth. Comparatively, these leagues rely less on broadcasting income and more on commercial and matchday income streams.

- For many leagues, a significant percentage of revenue is generated by a handful of clubs. This pattern is then replicated in wages and salaries costs, and ultimately in on-field performance. European football’s stakeholders need to monitor the competitive balance, both within leagues and between leagues, in order to ensure that interest in competitions is maintained going forward.

Club profitability
- As forecast, the lower rates of revenue growth continue as England’s top 92 clubs generated total revenue of £1.8 billion in 2004/05, up just 2% from 2003/04.

- The average Premier League club generated revenue of £67m in 2004/05 (£66m in 2003/04), compared to £13m (£12m in 2003/04) for a Championship club.

- Looking forward, we expect an increase of c.6% in aggregate Premier League’s revenues in 2006/07. This will be driven by increased matchday revenue, from Arsenal’s new Emirates Stadium and Manchester United’s expansion of Old Trafford. In addition, improved sponsorship deals will come into effect for some of the larger clubs.

- 2007/08 will be the first year of the new Premier League broadcast deals, with the reported 67% increase in value generated from the recent sale of the live rights likely to drive overall revenues to in excess of £1.7 billion for the 20 Premier League clubs.

- As a result of improved cost control, Premier League clubs’ operating profits increased to a new record of £162m in 2004/05, and only Chelsea and Fulham reported operating losses. The new broadcast deals provide the opportunity for increased profits from 2007/08 if clubs are able to continue to control wage inflation.

- Manchester United reported the highest operating profits in English football (£33m), down from the record £52m the club reported in 2003/04. Liverpool’s success in winning the UEFA Champions League helped boost their operating profits to £25m and reduced the gap between Manchester United and the second placed club.

- Whilst overall the Premier League clubs reported pre-tax losses of £78m (improved from £128m in 2003/04), there were 14 clubs reporting pre-tax profits, up from ten clubs in 2003/04 and five clubs in 2002/03. If
Chelsea’s results are excluded, the Premiership clubs are profitable at a pre-tax level for the first time since 1998/99.

- The Championship play off final continues to represent the biggest financial prize in world football, worth at least £40m to 2006 winners Watford. This figure is likely to grow to over £50m for the 2007 final.

- Championship clubs’ revenues continued the solid improvement of recent years and surpassed the £300m mark for the first time in 2004/05, up 7% to £306m.

- Overall, Football League clubs’ revenues increased by 5% from £440m to £460m, with almost all the £20m increase in revenue relating to the Championship (£19m).

- Despite impressive 7% revenue growth, Championship clubs’ operating losses increased to £42m in 2004/05 from £35m in 2003/04.

- After more than halving their pre-tax losses from £126m in 2002/03 to £47m in 2003/04, Championship clubs’ pre-tax losses increased to £65m in 2004/05. This is largely due to the increase in operating losses and an overall lower profit on the sale of players.

- League 1 and League 2 revenues remained stable in 2004/05. Following a small reduction in wages costs, operating losses fell slightly in League 1, whilst League 2 wages and operating losses remained largely constant. The pre-tax profit picture broadly mirrors that at the operating level in both divisions.

- Overall, the top four divisions made net operating profits of £105m in 2004/05. This is the first time profits have exceeded £100m.

Player costs – wages and transfers

- For the first time in the history of the Premiership, total wages and salaries costs fell. Whilst the reduction of 3% is relatively small, compared to average annual increases of 20% over the past decade it is a highly significant season in the finances of the top clubs in England. The £28m reduction is equivalent to £1.3m per club.

- Chelsea (down £5.9m), Arsenal (down £3.9m), Everton (down £2.3m), Liverpool (down £1.4m) and Tottenham Hotspur (down £1.4m) all achieved reductions while still finishing in some of the top places in the league.

- Despite their reduction in total wages, in absolute terms Chelsea are still some way ahead (£32m) of Manchester United, their nearest rivals in this category.

- The combined effect of a reduction in total wages and the small rise in turnover resulted in the Premiership wages/tturnover ratio falling below 60% for the first time in six years. The number of Premiership clubs with ratios below 50% doubled to four.

- By our estimates, over 90% of the reduction in the total wages costs of clubs in the Premiership has been achieved by a decrease in players’ earnings.

- Football League clubs were not able to capitalise fully on the achievements made in 2003/04 with wages costs rising again by just over 2%. Total wages costs for the Football League in 2004/05 stood at £324m.

- With a larger increase in Football League turnover (almost 5% compared to the 2% rise in salaries and wages) the wages/tturnover ratio fell to just over 70% – the lowest level since 1996/97. An encouraging sign that clubs, on the whole, are managing the growth in wages and salaries in line with turnover growth.

- Within the Football League, however, player wages in the Championship are now almost at the record levels we saw in 2001/02 suggesting that Championship clubs still have some challenges ahead, particularly as there is less correlation between spending and league position in the Championship than in the Premiership.

- Total player costs across all 92 clubs fell back below £1 billion, as we predicted last year, due to a 2% fall in player wages and, more importantly, a 25% fall in net transfer fees payable.

- Net transfer fees, although down by a quarter, were still nearly £200m. Overseas clubs, particularly those in Spain and France, continue to benefit greatly from spending by English clubs.

- In total, over the past two years, almost £0.5 billion has left the English game in transfer payments to non-English clubs and agents. This European investment – allied with homegrown English talent – helped Liverpool win the Champions League in 2004/05 and two English clubs reach European finals in 2005/06.
The level of redistribution of monies from transfer spending by Premiership clubs benefiting clubs in the Football League slowed in 2004/05 to £28m, the lowest level for three years. The primary beneficiary of the funds that flowed down was Leeds United as they offloaded several players following relegation from the Premiership.

Investment in stadia and facilities by the top 92 clubs since the start of the Premiership is now almost £2 billion.

Over the same period, we estimate total revenue into the top 92 clubs has been c.£13.3 billion. This means that around 15 pence of every pound coming into football has been spent on facilities development. This very significant investment to provide fans with improved facilities is a capital investment of which football can and should be justly proud.

Spending on facilities in 2004/05 (of £185m) is dominated by Arsenal’s development of the Emirates Stadium.

Over the past three years Arsenal has invested £278m – primarily related to their new Emirates Stadium – accounting for half of all club expenditure on stadia and facilities across all 92 clubs over that period.

The trend will continue for capital investment to be primarily on a few large projects, as opposed to wholesale developments across the board.

The total injected into football club stadia by the public sector or grants is at least £210m since 2000. If Wembley funding is included the figure rises to £410m.

Attendance levels remain strong, after tremendous growth throughout the 1990s. Average attendances have risen from 21,159 during the first year of the Premiership to 33,887 in 2005/06, a growth of 60%.

Premiership stadia remain over 90% full on average across the 380 games for the ninth successive year.

Although the Football League experienced a slight dip in aggregate attendances in 2005/06, the trend line over recent years is upwards. With total attendance at over 16m, the Football League continues to be one of the best supported football competitions in Europe.

In Europe, Bundesliga average attendances in 2005/06 were over 40,000 per game – comfortably the highest in world football. Meanwhile, attendances in Italy continue their significant decline. Serie A average attendances are estimated to have fallen by 15% to 21,700 in 2005/06. There is a significant strategic challenge in Italian football to modernise its stadia and mobilise its fan base.

Capital employed in the Premiership reached £1.2 billion at the end of the 2004/05 season, continuing the rising trend since summer 2003.

An increase in share capital and retained profits coupled with a decrease in net debt reduced the financial gearing ratio in the Premiership to 130% (2003/04: 189%).

Net bank borrowings by Premiership clubs fell further to £117m, the lowest for four years.

Gross bank borrowings (bank loans and overdrafts excluding any positive cash balances) were £365m. Arsenal accounted for 55% (£200m) of this, as they increased their borrowings as the Emirates Stadium project progressed.

11 Premiership clubs had positive net bank balances (bank balance less overdraft less any bank loans) at the end of the 2004/05 season, breaking the previous record of ten from the year before.

Five Premiership clubs finished the 2004/05 season with net funds rather than net debt – with Aston Villa, Birmingham City and Manchester United from 2003/04 being joined by West Bromwich Albion and Charlton Athletic.

The interest cover ratio has continued the improvement seen in the 2003/04 season, with the overall net interest cost of £33m being comfortably covered by the operating profits of £162m generated in the year.

Cash generation from Premiership clubs’ operational activities continues to be strong, generating £200m of cash before player transfer dealings. Overall, after all other transfer, investment and financing cashflows, the net cash inflow for the Premiership clubs was £125m for 2004/05.
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- Overall therefore, net assets of the Premier clubs have increased from £382m in summer 2004 to £508m in summer 2005. 16 Premier clubs reported net assets compared to 15 in the summer of 2004.

- Capital employed in the Championship also rose again from £292m in 2003/04 to £337m in 2004/05.

- Bank borrowings continue to be relatively more important to Championship clubs than Premier clubs.

Football and tax

- The overall tax burden on English professional football continues to increase. In 2004/05 a record £601m of taxes were levied on the clubs in the top four divisions.

- Premier clubs suffered corporate tax of £22m in 2004/05. Two thirds (14) of the Premier’s clubs recorded pre-tax profits, and if this trend continues corporate tax could become a significant future cost, particularly with the extra revenue from new broadcast rights deals.

- The overall fall in wages and salaries has led to a decrease in employment taxes; both income tax and National Insurance Contributions have fallen for the first time, albeit we expect this to be only a temporary reversal.

- VAT is likely to continue to increase in line with matchday revenue as both prices and seat capacity increase.

- Football League clubs paid an estimated £158m in total tax in 2004/05, despite again recording operating losses, with their share of the overall tax liability slightly increasing compared to the Premier.

- Since the Premier began in 1992/93, we estimate that over £4.3 billion in tax has been paid by clubs in the top four divisions of English football. We estimate that this total will have been up to £5 billion by the end of the 2005/06 season.

Football and tax

The overall tax burden on English professional football continued to rise in 2004/05. However, the growth is slowing and the tax profile is evolving. The increased focus on cost control has led to total wages and salaries falling for the first time since the Premier began and as a result, a fall in employment taxes. Combined with this drop in wages, continued revenue growth has led to a record number of Premier clubs recording profits at the pre-tax level.

In the near future, particularly when the next broadcasting rights deal monies come through, corporate tax may start to become a significant issue for a number of top clubs – a nice new problem for many club Finance Directors and shareholders to face. Increasing matchday revenue has continued the growth in VAT and as a result in 2004/05 the total tax bill for the 92 top professional clubs broke the £600m barrier for the first time.

The tax take – how it gets to £600m

Chart 1 shows our estimated split of tax paid by English professional football for 2004/05 and, for comparison, 2003/04 and 1995/96.

![Chart 1: The estimated tax generated for Government by English professional football clubs](source: Deloitte analysis)
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Comment

- Our estimates show total income and corporation tax, National Insurance Contributions (NIC) and VAT to be at least £601m in 2004/05 compared with £587m in 2003/04, which represents an increase of £14m (2%).

- Last year we forecast that if clubs continued to control salary costs the share of the total tax take relating to PAYE could fall. During 2004/05 it did just that. The PAYE share fell from 53% to 50% and more remarkably from £312m to £302m in absolute terms. A number of factors contributed to this decrease; the first fall in total wages and salaries since the Premiership began in 1992/93, no recent increases in income tax rates, and larger contributions by VAT and corporate tax.

- In line with the reduction in PAYE in the year, the NIC take has also fallen. The level of NIC fell to 28% of the total tax burden, and if current rates remain constant, this proportion is unlikely to change significantly in the medium term.

- The level of VAT has increased significantly, up 7% to £110m in 2004/05. This is driven by the increase in matchday revenue in the year. VAT has increased to 18% of the total tax take and its share may edge towards 20% next year before falling back again as the effects of the new TV rights deals on wages come through.

- Historically, clubs have made losses year on year and therefore have not paid corporation tax. Even if profitable in an individual year, brought forward losses have extinguished any corporate tax liability on that profit. Corporation tax has not generally been a significant issue for clubs, but during 2004/05, corporation tax increased significantly, from £3m to £21m. Although it currently remains a small part (4%) of overall taxes suffered, we may start to see corporation tax increase significantly as clubs continue to maximise revenue and adopt cost control measures that result in pre-tax profits. At the pre-tax level, the Premiership clubs (excluding Chelsea) recorded significant profits (£62m) for the first time since 1998/99, with 14 Premiership clubs reporting pre-tax profits in 2004/05. Looking forward, if clubs continue to generate pre-tax profits on a regular basis, then once existing tax losses are utilised, corporate tax may become an increasingly large part of the overall tax burden.

- A significant proportion of the overall corporation tax charge relates to Arsenal (£111m) and Manchester United (£4m), as a number of the ‘newly-profitable’ clubs continue to utilise existing losses to offset any potential tax charge on reported profits. Few of the Football League clubs have historically shown a corporation tax charge and this continues to be the case. One notable exception was Crewe Alexandra, who made a pre-tax profit and showed a corporation tax charge for the second year in succession.

- In 2004/05, a number of clubs show a tax credit rather than a charge, as they start to recognise an accounting benefit from existing tax losses which they expect to set against future profits. This may become more common if clubs start to forecast pre-tax profits on a regular basis.

Who pays what

Table 1 below summarises our assessment of the respective contributions of PAYE, NIC, VAT and corporate tax by the Premiership and the Football League clubs.

<table>
<thead>
<tr>
<th>Tax year/season</th>
<th>Premiership</th>
<th>Football League</th>
<th>Total</th>
<th>Increase/ (decrease)</th>
<th>%</th>
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</thead>
<tbody>
<tr>
<td>PAYE 2004/05</td>
<td>239</td>
<td>63</td>
<td>302</td>
<td>(10)</td>
<td>3</td>
</tr>
<tr>
<td>2003/04</td>
<td>248</td>
<td>64</td>
<td>312</td>
<td></td>
<td></td>
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<tr>
<td>NIC 2004/05</td>
<td>109</td>
<td>59</td>
<td>168</td>
<td>(1)</td>
<td>–</td>
</tr>
<tr>
<td>2003/04</td>
<td>113</td>
<td>56</td>
<td>169</td>
<td></td>
<td></td>
</tr>
<tr>
<td>VAT 2004/05</td>
<td>73</td>
<td>37</td>
<td>110</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>2003/04</td>
<td>69</td>
<td>34</td>
<td>103</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corp. tax 2004/05</td>
<td>22</td>
<td>(1)</td>
<td>21</td>
<td>18</td>
<td>600</td>
</tr>
<tr>
<td>2003/04</td>
<td>4</td>
<td>(1)</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total 2004/05</td>
<td>443</td>
<td>158</td>
<td>601</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>2003/04</td>
<td>454</td>
<td>153</td>
<td>587</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Deloitte analysis.
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Comment

- Premiership clubs continue to contribute 74% of the total tax burden in 2004/05. The Premiership clubs have paid £9m more in 2004/05 than in 2003/04 – a 2% increase. The tax burden on Football League Clubs increased by £5m, or 3%.

- The breakdown of this figure shows that Premiership clubs continue to account for 79% of the PAYE (£239m) but a reduced proportion of NIC, at 65% (£109m). Again, this illustrates the fact that NIC impacts more significantly on the lower incomes of players and employees in the Football League (PAYE of £63m and NIC of £59m). Any further increase in rates may cause NIC to exceed PAYE in the Football League.

- In aggregate, Premiership clubs and their employees paid employment taxes (PAYE and NIC) of £348m in 2004/05, a decrease of 4% (£13m). In the Football League total employment taxes increased to £122m, an increase of 2% (£2m). This highlights the success of efforts made to control wages and salaries by the top four divisions in England. This success will come under pressure as broadcast monies from the leagues’ excellent recent broadcasting deals flow in.

- The VAT bill for the Premiership and the Football League increased again, by 7% in 2004/05. Last year we stated that we expected VAT liabilities to increase in line with matchday income in the short and medium term. We see no reason why this forecast should be revised.

- Corporate tax has become a factor for a number of Premiership clubs in 2004/05. It will be interesting to see whether clubs can continue to achieve profits before tax going forward, and therefore whether corporate tax becomes a regular issue for clubs.

How the tax take has grown

In Chart 2 we show the overall growth in the tax contribution to the Treasury from 1995/96 to 2004/05.

Comment

- Whilst the total employment taxes paid to Government by English professional clubs has fallen for the first time in the period of our review, the overall tax burden has increased to over £600m for the first time. The 2% increase in the year is the lowest to date, but the increases in VAT and corporate tax have ensured that the absolute tax liability continues to increase.

- The overall tax burden on the top four divisions of English football has increased by 303% between 1995/96 and 2004/05, which represents a CAGR of 17%. Over the same period total revenues have increased by 247%, a CAGR of 15% whilst wages and salaries have increased by 285%, which represents a CAGR of 16%.

- Despite the significant increase in VAT in 2004/05, the overall growth in VAT since 1995/96 is still significantly less than the overall growth figure for tax at 189%, or a CAGR of 13%. This indicates that the rate of growth of matchday income continues to lag behind the growth in wages and although we expect this difference to close slightly next year, it will widen again in the medium term.
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- The Chancellor has received over £4.3 billion from English professional football in the period since 1992/93 when the Premiership began. By the end of 2005/06, we expect this figure will be near to £5 billion.

Conclusion
Professional football in England continues to contribute large amounts of money to the Treasury. In 2004/05, the total tax burden of £601m equates to approximately 45% of total turnover, or five months of revenue, which is a significant amount for the game to suffer. As discussed, whilst increased control of wages and salaries is likely to see total employment taxes stabilise (or even decrease) in the short term, they will grow again in the medium term. Combined with the continued growth in matchday revenue and the return to pre-tax profit of a number of Premiership clubs, this will mean that the overall tax bill for English professional football will increase albeit at a slower rate than has historically been the case (and possibly with a brief absolute reduction in the 2005/06 season). Tax will continue to be a significant cost to the industry going forward and its contribution to Government coffers should be remembered along with the clubs’ excellent community and grass roots activities in forming a balanced view of the top clubs’ contribution to society.
Civil and Criminal Liability arising out of the rule making powers of Governing Bodies: Issues suggested by the Formula One 2005 season

By William J Stewart, LL.B (Hons), LL.M. Solicitor, Lecturer-in-law, University of Stirling.

Abstract
This article looks at how, if at all, rule changes in fast moving situations in complex sports could attract civil or criminal liability for making the rules of a sport. It starts by outlining the present law in general terms. It then examines a set of complex facts from sport. These facts are drawn from ‘real-life’ events in Formula 1 motor racing in the 2005 season but with the hypothetical assumption, contrary to the truth, (I) that someone was injured, and that (ii) English law might apply. This example was attractive because of its complexity and because many of the actors were aware of the legal environment: to an extent, law was ‘a part of the story.’ The main focus of interest is a rule introduced, before the season commenced, to preclude the changing of tyres. Heretofore, drivers could, and did, change tyres when they stopped for fuel. Motives for the introduction of the rule may have been mixed and this issue is discussed. Contrary to the position in the 1960 and 1970’s Formula one may be called a safe sport. This can only be said because of its tremendous safety record and because considerable effort has been lavished on the sport by those who run it to make sure what could be deadly dangerous is, in fact, safe. So it was no surprise that the new rule did specifically make provision for changing a dangerous tyre. At various stages in events, significant figures in the sport suggested that the rule might be dangerous or that it might incur some liability somewhere. This article uses these events, essentially as a hypothetical, to examine the legal issues that confront, or could confront, regulators in such circumstances. All ended well in Formula One. Other sports and other circumstances could lead to different results as, of course, might the applicability of law other than English law. For practitioners it might be of interest to see what kind of factual matrix brought about suggestions of legal responsibility for rule change. The data documented ought to be of interest to practitioners and theoreticians because even such facts as are apparent show the pressures and tensions that exist in sport between safety and competitiveness and the tensions that the legal environment can exert upon internal regulation.

The principal conclusion is that a rule-making body might well make a sudden rule change in favour of safety, but that where safety is in doubt, longer reflection may well be indicated. Another related conclusion is that safety is a dynamic issue and that what appears to be a perfectly safe rule might require to be reconsidered, perhaps swiftly, in light of experience. The tyre study shows what a challenge this may be for a regulator.

Introduction
Relatively recent legal developments in civil liability have meant that in the case of accidents, claimants’ lawyers will be interested to examine the regulatory apparatus with a view to founding claims against regulators. Where death or injury is caused through gross lack of care, criminal liability may have to be considered. The criminal liability of governing bodies or their officers has hardly been considered at all. This article examines a recent rule change in a specific sport, Formula One motor racing, to consider the general legal issues that might arise in the event of death or serious injury consequent upon the exercise of regulatory power by way of introduction of new rules.

So far as tort liability is concerned, it is well known, at least since Watson v British Boxing Board of Control, that in certain situations governing bodies may be liable for harm to participants arising out of the regulatory regime. While the decision was said to have been initially greeted with at least dismay if not horror, it has been generally appreciated that each case would turn on its own facts and circumstances. For the purposes of this article it is noteworthy that in one recent Queen’s Bench decision dealing with motor sport, Wattleworth v. Goodwood Road Racing Co Ltd, the general understanding of Watson was applied, a duty being found to apply to the race promoter by virtue of the Occupiers’ Liability Act 1957 and upon the Royal Automobile Club Motor Sports Association Ltd. by its granting a licence and by its specific assumption of responsibility.
Civil and Criminal Liability arising out of the rule making powers of Governing Bodies: Issues suggested by the Formula One 2005 season

So far as criminal liability is concerned, criminal liability arising out of the governance of a sport has hardly been discussed let alone encountered. The obvious reason is that most governing bodies, like the FIA, are responsible, thoughtful and careful. They take scientific and technical advice. They take independent legal advice where there may be doubt. So the circumstances necessary to raise the issue just do not arise all that often in a modern professional sporting context. The most obvious charge in a fatal case would be manslaughter. Of the variants of that crime, in the circumstances considered in this paper, the charge would be involuntary manslaughter by gross negligence. In R.v. Adomako the legal approach was set out as requiring essentially the civil test to be met by way of the existence of a duty together with a need for the negligence to be gross which exceeds the usual civil standard. A case against a governing body might proceed against a single individual for that individuals own acts or omissions. But a prosecution difficulty might be that sport is run by unincorporated bodies and incorporated bodies rather than by a single individual, albeit dominant individuals are often encountered. English law has difficulties with the concept of corporate manslaughter. The position at the time of writing, so far as relevant to this paper, appears to be that a corporation can be charged with manslaughter and that the charge would be involuntary manslaughter by gross negligence. There have been successful convictions. The need to find a controlling mind is important in securing a conviction in the English Jurisprudence, but the law, especially in relation to the need to identify a controlling mind has been the subject of sustained academic criticism. In 2006 the Home Office published a discussion paper with a draft Corporate Manslaughter Bill. More controversially, contrary to the proposals in England, some argue for high ranking individuals generally responsible for safety systems to be amenable to punishment.

This article seeks to look at general legal issues, albeit using English law as the model. If a case actually arose in England, domestic legislation would apply, including perhaps prosecution under Health and Safety Legislation which is beyond the scope of this article. It is right to note that in the UK such legislation may fill a gap left by homicide laws.

Tyre safety and Formula One in 2005

**Formula One**
The focus of this article is a rule change in relation to tyres used in formula one racing. In any legal examination whether criminal or civil the context will be of relevance. It is probably well known that Formula One changed as a sport with the introduction of advertising in 1968 as a result of rule changes in 1967. Now the full name of the teams often incorporates the name of the sponsor: Scuderia Ferrari Marlboro, Mild Seven Renault F1 Team and Lucky Strike BAR Honda. Sponsorship currently runs into the hundreds of millions of pounds. The sport developed to take advantage of this advertising. An ex racer and ex-team boss, ‘Bernie’ Ecclestone eventually, through various corporate arrangements, took a dominant role in managing the commercial rights of the sport. Partly through his efforts huge sums became available to the sport. However, as the bulk of that money came through media rights and the television coverage, the sport has had to take account of the attraction of the ‘show’ to the viewers so long as it has wanted to maintain the income. As a result of struggles between the competitor teams and the governing body, much of what happens in Formula One is governed by a secret ‘Concorde Agreement.’ Despite the secrecy of the Concorde Agreement (and its renegotiated successors), it is generally known that the money the teams receive is to an extent dependent on the ‘Concorde Agreement’ which provides their share of a share of the monies received for broadcasting. If the viewers turn off, the cash tap turns down too. So by way of background to this particular issue, it may be suspected and was often suggested, that the recent dominance of Ferrari and Michael Schumacher made the ‘show’ less attractive to those who are not interested in the cars or the technology itself. The Sunday afternoon viewer may have found ‘watching Michael win again’ to be boring. Another spectator complaint is the lack of overtaking (or more accurately ‘passing’). This is a complex topic. Partly the older tracks were not designed for such wide fast cars. Partly and perhaps predominantly, aerodynamic improvements producing downforce have resulted in a situation where the disturbed air makes it difficult to get even a faster car in position to pass. Partly the grip of the tyres makes cornering and traction more efficient. That said, it is certainly the case that tyres ‘going off’ makes such a car easier to pass although more in a ‘sitting duck’ sort of a way than a ‘wheel to wheel’ contest of equals.
Civil and Criminal Liability arising out of the rule making powers of Governing Bodies: Issues suggested by the Formula One 2005 season

The details of history of F1 are beyond the scope of this article. So too are the negotiations believed to be current to renegotiate a new Concorde Agreement; the web of business relationships surrounding Mr Ecclestone; and, the attempts by those with a financial interest in some of Mr. Ecclestone’s ventures to take more control over them. And finally, the attempts by big international manufacturers such as perhaps BMW, McLaren and Toyota to stage their own alternative race series are also beyond the scope of this piece. These are not just the usual academic disclaimers. This listing of other forces at work is part of the context of the discussion of rule change in relation to tyres. Indeed this article is, as explained at the start, hypothetical both because, happily no-one died and because even had that happened, the information required to even consider civil or criminal action is not sufficiently known. An indication of the detail required for such a case can be seen summarised and discussed in Wattleworth.

Formula One Governance

Sports lawyers are familiar with a few ‘standard’ organisational structures. Formula One does not fit all of the ‘standard’ patterns. Formula One is not an Olympic Sport and so the IOC top-down model is not apparent. Nor is there formal promotion and relegation from the so called ‘feeder formulae’. Rather F1 has something of the ‘show’ or ‘circus’ about it. If you have insufficient money you are thrown out as were the Arrows team at the end of the 2002 season; if you have lots of money you can buy a team as did Midland who bought Jordan at the start of the 2005 season.

Instead, at the top, is the Federation Internationale de l’Automobile (FIA). That body was described in Wattleworth as follows:

“Turning to the FIA, that was constituted as a non-profit making organisation, based in Paris, in 1904. It was formed by the agreement of 13 national automobile clubs and was designed to be a forum in which the national motor sports authorities from countries all over the world could agree on rules to be applied in relation to international racing events—so that,...individual racing drivers from different countries could compete with one another on a ‘level playing field’. The FIA, although a legal entity in its own right, is thus in effect an association of national automobile clubs or national sporting authorities (or associations).... The structure of the FIA is set out in its governing statutes. Many of its functions are delegated to commissions, including a safety commission and a circuits commission. It is funded by subscriptions from the member clubs and authorities, from which the FIA derives its authority. In each year the FIA publishes a year book (after approval by its members), containing international regulations applicable to international motor sport as represented by the International Sporting Code with appendices.”

Its present role in the sport is historically determined as with most non-governmental organisations. Formula One was once run by the Federation Internationale du Sport Automobile (FISA) a sporting division of the FIA. There was a celebrated struggle in the early days of the financially enhanced sport when the motor constructors Formula One Constructors’ Association (FOCA) ‘took on’ the established governing body FISA. The ‘rebels’, including Max Mosley, barrister and former racer, assisted by the said Ecclestone, took over control of the sport. The then President, Jean Marie Ballestre first gave up financial control and then his own post. Max Mosley took over as President of FISA and then dissolved that body. Mr. Mosley remains in post today. The FIA retained then and retains now the regulatory power over the sport. Mr. Ecclestone is often referred to as the commercial rights holder – he himself is not the organiser of the events. Nor is the FIA. Grand Prix are usually put on by an organiser or promoter – thus the British Grand Prix at Silverstone is promoted by the owners, the British Racing Drivers Association.

Formula One and Tyres

One of the attractions of formula one is that it has been as much a battle between engineers and designers as the drivers or pilots. Unlike some other open-wheeled series, there is, at present, no designated supplier of the chassis or the engines. Even where teams are supplied by the same tyre manufacturer, they may be racing on entirely different rubber compounds.

Presently there are two tyre suppliers Michelin and Bridgestone. Being the link between the vehicle and the road the tyre can be the determining factor. In recent times, the dominance of the Ferrari team has been attributed in part to the partnership with their tyre supplier Bridgestone. At one stage in the 2003 season Ferrari had stopped winning races and a complaint to the FIA about the Michelin Tyre, which was upheld, stopped the progress of the Michelin runners in their pursuit of the championship. Ferrari results improved and they went on to win.
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Championships have often turned on a single point.\(^41\) The time taken for tyre changing is very important. There are two components to this which do need to be separated. There is the time to change the tyre and there is the time to go into the pits. The time to go into the pits varies from circuit to circuit unlike the tyre changing time. So detrimental is a visit to the pits, regardless of the time to change the tyres, (if others are not doing the same) that it is used as a form of penalty for wrongful conduct (a ‘drive-through’ penalty).\(^43\) To stop to change tyres as an ‘extra’ stop could cost much time, track position, points for the race and the loss of championship position. The financial consequences cannot be calculated because of the secrecy of the Concorde Agreement but may be assumed to be serious. It is not just those that are competing for the top positions to whom points are important. It is believed that there is a ‘cut’ above which a team will have its enormous travel bills funded, so even down the field a single point can be very valuable.

One common problem with tyres, of special relevance to this study, is flat-spotting.\(^47\) Too much braking can cause the wheel to lock and “the contact patch of the tyre rubs along the track, shredding smoking rubber and leaving a tyre no longer fully circular but with a flat spot – or more accurately a flat patch.”\(^48\) The flat-spotting results in vibration which affects vision making it difficult to drive and difficult to see pit signals.\(^49\) Braking, quite important when travelling at speeds in excess of 180 mph, is compromised.\(^50\) Sometimes it might be possible for a small patch to be rectified by some careful driving\(^51\) but heretofore it would have been a reason to change the tyre at an opportune moment.

The Tyre Rule Change

It was previously open to drivers to change tyres at any time. For the 2005 season it was decided to change the rule. For this there could be many reasons. The main one appears to be the hope that this would reduce the cost of tyre supply. Another seems to be that it was thought that using a single tyre through the race would make for more exciting racing.\(^52\) D irectly to the point was Minardi team Principal, Paul Stoddart. He is reported as commenting:

> “Say it’s lap two, someone has a big shunt, and there’s debris all over the place. Your driver comes on the radio, and says ‘I’ve just been over lots of crap – what do I do? Come in or what?’ The guy on the pit wall, instead of saying ‘I’ve just been over lots of crap – what do I do? Come in or what?’ The guy on the pit wall, instead of saying ‘I’ve just been over lots of crap – what do I do? Come in or what?’”

In the course of writing this article an incident on track raised some of the issues which could be and were foreseen. At the European Grand Prix on Sunday 29 May 2005, Kimi Räikkönen driving a McLaren, flat spotted when leading the race around lap 34. The obvious consequences described above resulted – vibration and difficulty with vision. The other consequences were just as obvious although in a sense unknown – unknown because in the past the opportunity would be taken to change tyres. The result was that vehicle was subject to enormous stress. It must be understood that the cars are thoroughbreds. Their ability to withstand crash damage at no danger to the pilot is virtually beyond comprehension and a credit to all involved in formula one governance. However, for what they are designed, they are very strong; for what they are not designed, they may not be. Because the tyres were not changed, it is reported that there were another 63,700 of what engineers term undesigned-for gyroscopic precessions.\(^53\) As a result of the stress on the vehicle the suspension failed (not the tyre itself!) and the McLaren crashed out on lap 59.

The Danger

Right from its introduction that rule looked at from a lawyers point of view does not say ‘safety first’. The main proposition is that the tyre must be punctured or damaged. To change a tyre which is not punctured or damaged there must be necessity, clarity and honesty. Those involved in the sport noticed this too. Here is the recently reported view of Sir Frank Williams, team owner of BMW Williams, one of the leading teams in the sport when asked if he thought it might cause problems: “Surely it will ... because you must see some cars struggling at the end. As I read the regulations, if you change tyres – for a flat spot, for example – you will have to explain yourself, and therefore run a risk that your explanation may not be good enough.”\(^54\) This, it was reported, meant that Sir Frank thought this would make for more exciting racing.\(^55\) Within that comment is the suggestion that the driver will perhaps run with his flat spot rather than be penalised. Directly to the point was Sir Frank’s response. He is reported as commenting:

> “Say it’s lap two, someone has a big shunt, and there’s debris all over the place. Your driver comes on the radio, and says ‘I’ve just been over lots of crap – what do I do? Come in or what?’ The guy on the pit wall, instead of saying automatically, ‘Dangerous situation,’ will think, ‘If I bring him in, maybe we’ll get thrown out.’”


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Conclusions

Civil Liability
It is submitted that death caused through the failure of a vehicle through the vibration set up by an unchanged flat-spotted tyre is the very kind of situation to which civil liability as outlined above could apply. The tyre companies are of course potentially liable on the basis of product liability. They should almost always escape at least causally where the teams and the drivers know there is a flat spot. The teams themselves who have the closest knowledge of what is going on, and the power to instruct the employed driver by pit radio, have perhaps the strongest obligations. The purpose of this article is to examine the position of the governing body. Different facts produce different legal outcomes. The FIA could take some comfort from the decision in Wattleworth. Where the rules and the control of safety are delegated to a national body by the FIA, then the local body becomes more proximate in the law of negligence than the FIA and they may be too remote to be burdened by a duty.52

In the case of the tyre rule, however, the rule change is mandated by the FIA itself. The rule change may have had as its main purpose either money to be saved in having fewer expensive tyres to a race or money to be made in having more viewers watch the exciting passing as the tyres go off. The question arises as to whether the rule, which includes explicit mention of safety, is in fact dangerous. The factual background and context would have to be considered in any litigation – not just the words of the rule. The passages already quoted from Sir Frank Williams53 and Mr. Stoddart54 suggest that even at the time of promulgation difficulties could be envisaged.

Matters escalate with the Räikkönen experience. Even ordinary viewers expressed real concern at safety.55 Yet, a ‘hard’ culture within motor-sport might have been reflected in the editorial in Autosport which said, (While there are bound to be calls for improved safety, we’re not sure that they are justified. Räikkönen and McLaren knew the risks of running the last few laps with such a hobbled car. They chose to take them in the name of competition. And after all, isn’t that what we all tune in to watch on a Sunday Afternoon?)56 There are a number of responses to that position. The first is that the risk taken wasn’t only to Mr. Räikkönen. A car failure could have caused others to crash as is not uncommon. Secondly, in the view of the FIA itself, there is the danger that a tyre or other car part could injure a marshal or spectator.57 The key point is that taking into account all of the background material above, any reasonable observer, properly informed would see that the driver and his team would almost have to keep the driver out in a dangerous position. What the rules do not prohibit they permit. In this kind of racing everyone has to be seen to be taking everything to the edge – fans and sponsors would expect no less. Hence after the Räikkönen car failure Ron Dennis the team owner said that he was right to keep the car out and that they discussed it afterwards with the driver and ‘he is comfortable that we took the right decision. We are here to win’58. Long term rivals (and fellow Concorde Agreement partners) Williams backed McLaren, or at least gained the same kudos from fans and sponsors: “If that was on a Williams we would have crashed as well… To give up your position, when it’s a win, is difficult, and you would do everything to hold that off. I can understand what happened with McLaren. Its easy to try and be critical in hindsight but if I look at it we would have done exactly the same thing.”59

Just a week later the bullish tone of Autosport, became muted. The Grand Prix Driver’s Association voiced concerns about the rule.60 Full and proper prominence was given to a report of the views of senior drivers.61 It should be understood that most of these drivers are on one or two year contracts. No matter how good they are they could easily find themselves without a drive. Some are paid huge sums of money; others have their sponsors or family and friends pay for them to be allowed to drive. Thus the ‘leading members’ did ‘not wish to be named.’ One senior driver, perhaps nearing retirement in a few years time has expressed himself ‘on the record’. David Coulthard is reported as saying: (In one way the rules have been good for overtaking and entertainment, but there’s no question it’s more dangerous. I was in a similar position to Kimi. I could hardly see from the vibrations late in the race, but I couldn’t afford to lose my fourth position.)62 If drivers fear to disclose their identities on a legitimate debate about safety, it is submitted, it is fair to assume that they will not be confident about renewal of their contracts if they come in for a tyre change losing position and probably money for their bosses. That too, is or ought to be, appreciated by the FIA.

In a major development with legal overtones, Max Mosley, President of the FIA, Formula One’s governing body reportedly wrote to team bosses and tyre makers (The ‘Mosley letter’) telling them to ‘remember their responsibilities’ and put safety first amid concern over tyre failures.63 Mr. Mosley is directly quoted as saying: “If you are in any doubt about your car, you should always call it in. If you are still in doubt after checking the car in the pits, you should retire it from the race.”64
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He continued: “We do not want to feed the localised and ill-considered hysteria about tyres, nor is this letter in any way a criticism of McLaren Mercedes (most of us would probably have done the same in their place last weekend),” It is contended, that the letter could be described as having a ‘smoking gun’ status here in that it is conceded that standing the rules and the way the sport is conducted, teams will err on the side of danger! In the following extract, Mr. Mosley heaps further responsibility on the teams and at the same time anticipates a defence for track officials:

“Equally, when a car’s mechanical integrity has, or may have, been compromised by a race incident, it is for the team to decide whether to continue, make a pitstop or retire. The race director does of course have the option of a black and orange flag but would use this only in an extreme situation. The team is always better placed to assess the risks than anyone in race control.”

To complete the range of potential defendants in the civil court or the dock to the exclusion of the FIA, the tyre manufacturers are warned too in the Mosley letter. It is reported that he said the FIA lacked the technical resources and knowledge to assess for themselves the structural integrity, wear resistance and strength of a tyre. That is no doubt true, but perhaps irrelevant when discussing continued use of a damaged tyre. The tyre companies are warned:

“Formula One is therefore totally dependent on the tyre suppliers to ensure that no risks are taken in the pursuit of performance… We are confident that we can rely on you to make every effort to see that there are no more tyre failures this season.”

Criminal responsibility

The background about corporate manslaughter has been noted above. Discussion of criminal liability in Formula One does not take place in a vacuum. It may be that already Formula One operates under a general awareness of the general legal environment as a result of tragic events in 1994. One of the things which gave yet more impetus to Formula One’s quest to make the dangerous safe, was the terrible weekend when both Roland Ratzenberger and Ayton Senna died at Imola in 1994. By 1994 the ‘gladiatorial days’, when many on the grid would die before the season was out, were past. So the events were all the more shocking after a period of relative safety. Senna at the time was considered one of the great drivers of all time. The on board video was running on his car and the viewer was sitting along side him before his still mysterious accident. Aside from professionalism and common humanity, the shock to the now ‘softer’ viewing public may have made ever improved safety a commercial imperative. What is not known is how far safety as a primary concern since then was also pushed further up the agenda by the fact that senior people in the team concerned – Williams – were prosecuted by the Italian authorities for manslaughter. Charges were originally brought against Sir Frank Williams and Patrick Head (both still at Williams) Adrian Newey now at Red Bull after a spell at McLaren, Federico Bendinelli of the company who held the race, circuit manager Georgio Poggi and Roland Bruynseraede. All six were acquitted in 1997. The prosecutors appeal was successfully defended in 1999. A fresh prosecution was reportedly commenced before the time bar in 2004 and reports indicate that the men were again acquitted in 2005.

The Italian prosecution resulting from the death of Senna could be a book in its own right. The point for this article is that most sports lawyers will confirm that a client who has been through a case – especially a prosecution – usually has opportunity for reflection. Things which seemed like ‘the done thing’ do not seem so obvious when picked over for years in statements and re-statements. Behaviour is modified. There is every chance to that a prosecution of senior individuals in an industry – however ill-founded – will affect others in the industry. In the case under consideration in this paper, the FIA, through the Mosley letter has specifically put the teams on notice and so any remarks herein about the liability of the FIA apply a fortiori to the teams.

The FIA

In the Senna case, the FIA representative was prosecuted. Had there been a death after the McLaren incident and the expressions of concern, and English law been applicable, could a prosecution be imagined. There are a number of factors in the tyre case which would have raised the issue. First, in most organisations, rule changes take time. New ideas are often given a trial first. Stakeholders are consulted and listened too. That is no doubt the case with the FIA. This particular tyre rule though did appear quite quickly. Secondly, the tyre rule might be a case of mixed motives. Safety appears to have been competing with entertainment values and cost. It is notable that one of the reasons why motor sport was sued in Wattleworth was that Goodwood were faced with mixed motives in their activities. In Wattleworth these were quite innocent mixed motives – Goodwood had required to build banking to satisfy the noise abatement concerns of the local authority – had that not been necessary course design might have been quite different and even safer. Third, complaints affect decisions on liability. Whatever the genesis of the rule, the evidence of
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disquiet from drivers and of concern over the ‘onus’ from teams is the sort of thing which might give cause to a responsible regulator to reconsider the rule forthwith, rather than ‘dig deeper’ by enforcing it. Something which could start out as at worst an error of judgement can be viewed more culpably the longer the situation remains unchanged. Fourth, experience may support litigation. The Räikkönen incident could have resulted in the regulator passing an immediate rule, if that were possible, permitting tyre change during a fuel stop. The tyre issue it may be noted differs considerably from Wattleworth assumption of responsibility for track safety in which it was held the FIA were under no duty. In the tyre episode, the FIA rule itself is the key issue whereas in Wattleworth assumption of responsibility for track safety had been assumed by the RAC.

So far as crime is concerned, the duty of care issues are the starting point only. The next issue is the degree of had been assumed by the RAC. Stopping the danger – rather it was by trying to delineate Wattlew orth assumption of responsibility for track safety the Minardi team boss, is not a lawyer but, being a millionaire businessman, he may have consulted lawyers before expressing his own view after the Mosley letter: “If we have another incident and are not so lucky next time, there are certain jurisdictions where it would be hard to walk away from the responsibility as a governing body. And if, God forbid, it happens, then whatever country you are, whichever group of lawyers you are, lay the blame fairly and squarely where it belongs. Not even at the FIA’s doorstep but at Max’s doorstep.”

Any claim that others also have responsibility to prevent such a death is true and accurate, but not complete. Normally a governing body has the power to prevent the accident caused by a rule by reversing the rule. The Mosley letter may well be seen as clear firm governance. It does accurately lay out the responsibilities of others and thus has claims in both civil law and criminal law to break any chain of causation leading to the rule change. It did also fix the FIA with the necessary knowledge and confirms that having that knowledge they chose not to reverse the rule but rather chose merely to exhort others – others they know well to be under pressure. It is here there may be lessons to learn in that had there been a death before the end of the season, the warning of the McLaren incident and the clamour from drivers and team bosses, would be material which could be put to a court to suggest that what may have started as a reasonable decision was not adjusted as matters came to light. So far as corporate responsibility is concerned, under the present English law there would be a temptation to argue that Max Mosley was a controlling mind, but that would have required careful analysis of the statutes and the actual facts behind the scenes and their applicability to the facts alleged to constitute a crime. Certainly at the level of high-level rule change, there is much more chance of meeting the requirements for identification. On the other hand, this episode suggests that there is something to be said for proposals to change the law which look at the organisation’s behaviour as a whole. If the foundation of the case is the rule itself, issues would arise to the diffuse responsibility for the rule which appears to have gone through the whole constitutional route, Mr. Mosley becomes more distant in the matter and indeed issues of corporate responsibility come more to the fore. However, if the focus is on the failure to exercise emergency powers after it was discovered that the rule was potentially dangerous in its context and in its experience, then criminal responsibility would be directed to any individual or individuals who had may have had that power.

Of course, as Mr. Stoddart noted, the law applicable could depend upon where death takes place, rather than where the fatal rule was promulgated. Unfortunately, issues of international criminal law and European arrest warrants are beyond the scope of this article. The articles cited on law reform often discuss rules from other jurisdictions of wider ambit that are anticipated under a reformed English law. While the temptation is to take from discussions such as that contained in this article grounds for extending liability for ‘corporate killing’ such ‘tougher’ laws can have economic effects. The Scottish Executive’s expert group on Corporate Homicide has recommended that senior management directly responsible for a death might be punished individually. It has already been reported that there are concerns that if there were to be the possibility of senior management being imprisoned by operating a few feet over a border, there could be policy concerns. Formula One has shown that it will take decisions based on external regulation by gravitating out of Europe over Tobacco, so there might well be similar policy concerns if England ever did follow the suggested route in Scotland with a wider law of ‘Corporate Killing.’ England, not Scotland has a round of the F1 World Championship. England, not Scotland, is the headquarters of many of the leading companies involved in the sport.

Whatever, happens in Formula One – and things happen very quickly – this case study and analysis might be of interest to others governing sport. Rule changes at speed and for mixed motives may be dangerous to participants and to the careers or continued liberty of
those governing sport themselves. Those who favour the traditional methods of governance with careful and long gestation of rule changes with "safety first", rather than commerce or spectacle at the forefront of decision, have nothing to fear either from the civil or the criminal law. The study demonstrates that safety is a dynamic issue – what may appear safe on day one might not be so on day five. Regulators require to be flexible enough to deal with information which changes the understanding of safety as such information arises.

While prime responsibility for the health and safety of workers such as drivers remains with the employer, unlike the ordinary employment situation, regulators have the power to control the workers environment. Arguably, there should be direct channels of communication between the worker drivers and the safety branch of the regulator – perhaps confidentially, where, as in this study, the employment may be precarious.

Postscript

One final episode reflects again the speed of developments. As the manuscript was prepared for final submission, extraordinary events took place at the USA grand prix of 19th June 2005. Michelin, tyre supplier to seven of the ten teams discovered a defects in all of their tyres. Such was the defect that it would only cause a problem at one high speed corner. Prior to the rule under discussion it might have been the case that the Michelin company might have had many more tyres available. Against the background of the Mosley letter, it was clear that everyone involved had been put on notice that they were to be "in the frame" rather than the FIA. So it is not surprising and in any event good practice and proper that Michelin wrote to the teams saying that they (Michelin) could not guarantee the safety of the tyres. Michelin then left matters with the FIA but plainly indicated that "The current rules and timescale do not permit the use of an alternative tyre solution and the race must be performed with the qualifying tyres." They made no request for a change of rule or a relaxation. The response of the FIA Race Director and Safety delegate, Mr. Whiting, was to criticise Michelin for not having a lower performance (and thus safer) tyre with them and indeed to intimate that they would be investigated for breach of rule 151c. Mr. Whiting’s solution was that Michelin should inform the teams of the speed at which it was safe to go at the ominously numbered turn 13 and that he for his part would warn them not to obstruct other cars (the six Bridgestone runners) as they slowed for the fast banked turn. Mr. Whiting’s second solution directly addressed the rule in question and pointed out accurately that the teams could check the most affected tyre and change it for genuine safety reasons without penalty. If this meant using more than the allocated number of tyres then (the stewards would consider all the circumstances in deciding what penalty, if any, to apply. After much negotiation, the Michelin runners formed up for the preliminary formation lap and then pulled out of the race, leaving only the six cars of the three Bridgestone teams – much to the fury of the fans who had come from the UK and South America as well as from all over the USA. A request to have a safe race with a temporary chicane failed.

The point here is that issue of liability which appears to have prompted the Mosley letter backfired on those running the FIA. Had they changed the rule when difficulties emerged the race would have been run. They presided over a major public relations disaster perhaps losing goodwill and future revenue from the US market. Their response at the time this article was submitted was to charge the Michelin teams with, inter alia, bringing the sport into disrepute. Rule 74(a) remains in force.

Epilogue

The new electronic format of the Journal allows the following unreferenced final update: (1) the seven Michelin teams were found guilty of the charges above-noted arising out of the US Grand Prix but after new evidence was presented to the FIA Senate, the FIA World Motor Sport Council canceled the guilty verdicts (2) the FIA announced that there would only be one tyre supplier in 2007 and so Michelin later announced its withdrawal from Formula One after 2006; (3) a whispered challenge to Mr. Mosley’s leadership whether by vote of confidence or opposition at election evaporated and he was re-elected unopposed, and in recognition of his contribution to motor sport and road safety, he was made a Chevalier dans l’Ordre de la Légion d’Honneur; (4) Mr. Stoddart, his principal critic, sold his Minardi team and is no longer a Team principal and no longer has a voice in F1. (5) Michael Schumacher, whose Bridgestone tyres could not compete with the Michelin tyres, did not in fact win the World Championship which would have been his eighth and sixth in a row. (6) The rule which was the subject of this article has now been departed from.

I am very grateful for the comments of the anonymous referee, which have improved the article, but who of course bears no responsibility for the final text.
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1. P. Charlish, ‘The Astrid Andersen Case,’ (2004) SLR 85 is mainly concerned with the express powers of the Christchurch District Court which involved the criminal liability of an event organiser for ‘criminal nuisance’ under the New Zealand Crimes Act 1961. It does however examine the English law of manslaughter in such a situation and is thus highly relevant.

2. The views expressed in this article are personal and do not represent the views of any governing body with which the author has been associated.


5. ibid.


7. See Charlish op. cit. (note 1).


13. There is (unfortunately) no Scottish F1 situation and is thus highly relevant.


17. While the actual company in Transco Plc v HM Advocate, 2004 SLT 41 was actually involved in a gas leak it has been considered a key case.

18. Official Programme, Fosters British Grand Prix (2004) p. 25. The first person of a (Lutus) Gold Leaf tobacco and Formula One and Tobacco remain closely associated as the names quoted suggest. However, for what regulation against tobacco advertising threatens that link and is an external threat to F1? See W. Cairns, ‘Current Survey’ (2003) 10(1) SLJ 98. In the context of the debate about the effect of any ‘corporate killing’ legislation on competitiveness between legal lawyers, it is noteworthy that F1 dealt with the external threat of the loss of tobacco revenue in Europe by extending its COMPETE presence to States with lesser regulations, viz China and Bahrain.

19. If the abortive deal to be found in a recent case is a fair indication: Jordan Grand Prix v Worldcup Group Plc., (2003) SLR 18.

20. A company called Formula One Management is noted as being held by W. Cairns, ‘Current Survey,’ (2002) 10(2) SLJ 69.

21. Allegedly after the locus of its agreement at the Place de la Concorde, Paris, rather than suggesting any particular continuing state of harmony. This secrecy in relation to finance is in contrast to NACAR, the most popular motor sport in the US which sets out who gets paid for what.

22. ‘Formula One racing does not offer the most exciting of contests these days, since Michael Schumacher’s domination of this discipline is about as complete as Ian Thorpe’s is in swimming.’ The German seems to determine this to increase the dominance to an yet unseen level of ‘treadmill’...’ W. Cairns, ‘Current Survey’ (2002) 10(2) SLJ 130.

23. Compare Menen with Beards or China. This may explain in part the FIA’s proposal for new regulations for 2008 to reduce downforce by 50%. M. Hughes, ‘Opening Gambit’ Autosport, June 23, 2005.

24. Restrictions placed on spectators by the FIA were removed as a result of intervention by the European Commission: W. Cairns, ‘Current Survey’ (2004) 12(1) SLJB. Details of this Commission investigation and extracts from the agreement can be seen in S. Gardiner, et al, Sports Law (Cavendish Butterworths 2003, p. 1060).


27. It appears as if it was not necessary for Midland to have bought the team. It could have and indeed appeared to have intended, to enter its own team in 2006.

28. This open access is however, a reflection on encouraging safe behaviour can be found in W. Cairns, ‘Current Survey’ (2003) 11(1) SLJ 104.


32. Ibid.

33. Ibid.

34. Ibid.

35. Although typically of the range of commercial interests involved in F1 it was once prompted by Octagon Ltd who took the land on lease from the BRDC. This arrangement was subject to intervention by the Competition Commission. Octagon withdrew and the BRDC became the premier league to ensure the race for reducing the fees that would have to be paid for the race.

36. The heated controversy over its independence which relation to finance is this year as a result of BAR, coincidentally, a ‘manufacturer’ team being suspended for two races, is beyond the scope of this paper.


39. The detail of the complaint, that the tyre width at the end of the race was disallowed (as per 1995) can be found in W. Cairns, ‘Current Survey’ (2003) 11(1) 126.


41. As an indication, two cars which were penalised at the European Grand Prix of 2001 sustained losses of around 16 seconds. A. ‘Brake, ‘Safe or Sorry’’ (undated) http://www.autosport- atlas.com. Teams will spend millions of pounds to gain a single second a lap.

42. This is the example given by Sir Frank Williams below (note 48).


45. ibid.

46. N. Mulvenney, Reuters, 29 may 2005.


52. Baldwin, op cit.


54. ibid.

55. ibid.

56. ibid.

57. ibid.

58. ibid.

59. ibid.

60. ibid.


64. Baldwin, op cit.

65. ibid.

66. ibid.

67. ibid.

68. ibid.


73. ibid.

74. ibid.

75. ibid.

76. ibid.

77. ibid.

78. ibid.

79. ibid.

80. ibid.

81. ibid.

82. ibid.

83. ibid.

84. ibid.

85. ibid.

86. ibid.

87. ibid.

88. ibid.

89. ibid.

90. ibid.

91. ibid.

92. ibid.

93. ibid.

94. ibid.

95. ibid.

96. ibid.
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...to simply complete work as has been agreed with the FIA, the FIM/USA and the ACU [the association for motor cycling]. Doing this ensures compliance with the Track Licence conditions and should ensure that “if it all goes wrong” and we end up in litigation no Goodwood personnel or other individual is going to have to justify why alterations to the specification set down by the FIA were made.” [para 28, emphasis added] While Goodwood and the FIA were held to be under duties in the case everyone was acquitted for having exercised reasonable care.

77. As witnessed by the fact that 2008 rules are presently being discussed.
80. The proposed Corporate Manslaughter Bill did not provide for extra-territorial effect.
81. The findings and recommendations of the Expert Group report on Corporate Homicide.
83. It is noteworthy that the well known Evans v Vowles, [2000] EWCA Civ 318 arose out of a fast moving rule change. In Evans it was the rule interpretation of the referee rather than the governing body. Llanharan did not have a replacement front row forward on their bench. The referee told their captain that they could provide a replacement from within the scrum or that they could, if they wished, opt for non-contestable scrum moves from that point – the choice was theirs but there would be no points on the non-contestable model. The competitive choice was made and with tragic consequences for Vowles. The referee was found liable partly on the basis that he had sufficient time for consideration which, compared to the Formula One tyre episode, was very short indeed. I am grateful to the anonymous referee for this thought.
86. Including charges relevant to this article, viz: ‘failed to ensure that they had a supply of suitable tyres for the race... wrongfully refused to allow their cars to race, subject to a speed restriction in one corner which was safe for such tyres as they had available.’ J. Noble, ‘FIA level severe charges against teams,’ http://www.autosport-atlas.com (viewed Tuesday, 21 June 2005). In theory an order to a racing driver to drive slowly is possible. They used to have to slow down in the pit lane to avoid running down personnel. Now they have computerised and monitored speed limiters to stop them going too fast.
Far from the finish line: Transsexualism and athletic competition

By Jill Pilgrim, General Counsel/Director of Business Affairs, USA Track & Field, Inc. J.D., Columbia School of Law; B.A., Princeton University; David Martin, Emeritus Regents’ Professor of Health Sciences, Georgia State University and Chair, Sport Science Subcommittee, USA Track & Field, Inc.; and Will Binder, B.S., B.A., 1998, Miami University in Oxford, Ohio; J.D., Tulane Law School 2002.

I. Introduction
Athletic competitions have traditionally enjoyed the reputation of being “pure” sport. Since the advent of the ancient Olympic Games, it was man (usually naked) competing against man to the limit of their physical abilities. Some things have changed in the new millennium—women now compete and everybody wears clothing—but the image of purity remains in the realm of athletics. Most spectators and some athletic contestants do not look beyond the thrill, tension, and live spectacle of which athlete jumps higher, throws the ball farthest or hardest, or runs the fastest. Man competes against man; woman competes against woman.

The concept of mixed gender competition did not enter the public consciousness until 1973 when, emboldened by Title IX, schoolgirls started to press for more competitive opportunities. Even then, neither the “tom boy” girls seeking to play on the boys’ soccer team, nor the parents of boys seeking to bar these meddlesome females from the “boys’” team, envisioned the day when transsexuals would be lining up to compete with and against their children. Welcome to the twenty-first century and the next challenge for the sports world: how to integrate persons born into one sex who transform themselves to the opposite sex?

II. Overview: Defining the playing field
A. Distinguishing Gender from Sex
The term “sex” refers to characteristics that distinguish between male and female. “Genotypic sex” or “chromosomal sex” refers to the presence of the female XX or male XY chromosomes in cells, which distinguish the two sexes. “Phenotypic sex” or “morphologic sex” refers to the presence of anatomical and/or biochemical features which are distinctly different in males and females; for example, gonads (testes versus ovaries), hormonal dominance (androgens versus estrogens), internal genitalia (sperm ducts versus Fallopian tubes and uterus), external genitalia (penis and scrotum versus clitoris and labia majora), and secondary sex characteristics (variably developed body hair and breasts). In contrast, the term “gender” refers to the psychosexual individuality resulting in part from the societal manner of rearing (boy versus girl). Thus, whereas “sex” considers what is male and what is female, “gender” considers what is masculine and what is feminine. The two terms are often (incorrectly) used interchangeably.

In the majority of the population, a high degree of congruence exists between sex and gender, such that an individual fitting all the characteristics of the male sex also identifies with the masculine gender. Transgendered individuals are but one example of a group of people exhibiting incongruence between their natal sex and their gender identity. Their sex at the time of birth (hereinafter “Birth-Sex”) does not correspond to their psychosexual identity (hereinafter “Gender-ID”). For some transgendered individuals, their incongruence is so profound that they eventually seek hormonal therapy to alter their secondary sex characteristics and genital reconstructive surgery to better correlate the anatomical and psychological aspects of their sex and gender. After such a surgical/hormonal transformation, these individuals are commonly referred to as transsexuals. A post-operative male-to-female transsexual, for example, will possess the appearance and attitudes of a female, but still retain the chromosomal construct of a male. Transsexuals pursue such physical changes because, despite their past efforts or desire to conform their brain-sex to their Birth-Sex, they learn that the mind’s gender is immutable; the mind cannot change spontaneously from male to female or vice-versa.

In the realm of competitive sport, the existence of transgendered individuals poses a dilemma in some contexts. Because of the well-known biological differences between males and females regarding...
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strength and endurance, certain sports activities separate the sexes to ensure fair play. In order to enforce this separation, and thus prevent men from masquerading as women, the International Olympic Committee (IOC) once required a mandatory sex verification test, using various strategies ranging from visual inspection of genitalia to chromosomal analysis for all females intending to compete in the Olympic Games. Notwithstanding the IOC’s desire to preserve competitive integrity, sex verification testing for female athletes became a public relations fiasco and raised confusing issues for certain other intersexed individuals. Prior to discussing the manifestations of the IOC’s policy, it is necessary to educate ourselves about the world of intersexed individuals.

B. Understanding Transgender Identity

The term “transgendered individual” is not a diagnostic medical term, but rather refers collectively to all persons with gender behaviors and sex identifications that differ from the socially accepted male/masculine and female/feminine behavioral expectations. At least three groups of such individuals have been identified.

1. Cross-Dressers or Transvestites

Cross-dressers or transvestites dress in the clothing of the opposite sex, either for erotic pleasure or for emotional satisfaction. Transsexuals who eventually undergo the surgical/hormonal intervention often initially engage in cross-dressing as part of their gender exploration activities, although not all cross-dressers are transsexuals and not all transsexuals have engaged in cross-dressing behavior.

2. Transgendered Individuals

Transgendered individuals typically begin to perceive that their Gender-ID is the opposite of their Birth-Sex at an early age-four to five years old. Debate continues over whether the gender identity syndrome that characterizes transgenderism is psychiatric in origin, dating back to very early post-natal development, or whether it is biologic in origin, dating back to early fetal development when genetic and hormonal influences set the stage for development as male or female. Recent research involving anatomical studies of the hypothalamus suggests that a particular region essential for sexual behavior—the bed nucleus of the stria terminalis (BST)—is not only larger in men than in women, but also is female-sized in male-to-female transgendered individuals. Thus, gender identity may develop through interactions with brain development and sex hormones.

The American Psychiatric Association specifies three criteria for defining a transgendered individual as transsexual: 1) persistent discomfort about one’s Birth-Sex, 2) at least two years of persistent preoccupation with acquiring the sex characteristics of the other sex, and 3) having reached puberty (the age at which the reproductive organs mature). As to the number of transsexuals in the population, one survey suggests a prevalence of one out of 12,000 to 37,000 people for male-to-female transsexuals and one out of 30,000 to 150,000 for female-to-male. The strong desire among transgendered individuals to harmonize their Birth-Sex with their Gender-ID has led to development of medical strategies for improving this congruence. Much has been learned since the early 1950s, when a young American male named George Jorgensen underwent hormonal and surgical protocols in Denmark that allowed him to return to the United States as a woman, Christine Jorgensen. Her case was the first surgical sex reassignment on a transgendered individual described in the medical literature. Jorgensen and her doctors were subsequently contacted in sizable numbers by both men and women who were also interested in receiving such hormonal and surgical procedures. Clearly, transsexualism was not a unique phenomenon even in the middle of the twentieth century.

After more than fifty years of refinement, a multifaceted treatment protocol is available to transsexuals seeking to surgically align their brain-sex with their physical appearance. These strategies are initiated by detailed interviews to ensure that the patient is genuinely transgendered and free of genetic abnormalities, phenotypic intersexual manifestations (e.g., ambiguous genitalia), and mental disorders such as schizophrenia. Upon confirmation of transgendered status, appropriate hormonal therapy may be initiated as part of a comprehensive changeover to develop and exhibit phenotypic characteristics of the to-be-assumed sex (breast and buttock fat, skin texture, body hair, etc.). Multiple surgeries are eventually required, as the conversion strategy is not restricted to the reproductive organs. Such surgical procedures are often called “sex-change” operations, but this is not correct. When combined with hormonal therapy begun pre-surgery and continued post-operatively, the resulting surgery/hormonal-therapy combination serves as effectively as possible to align an individual’s body phenotype with his/her Gender-ID. It is important to note, however, that transsexual surgery is irreversible and it does not permit post-operative transsexuals the ability to procreate.
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While specific details vary depending upon the experience of the surgical team, the essence of transforming a transgendered male into a post-operative transsexual female includes amputation of the male genitalia, construction of an artificial vagina, and appropriate urethral rearrangement. If such construction is completed successfully, the vagina can fully accept an erect male penis, permitting sexual intercourse. Long-term adjunct female hormonal therapy will cause an accompanying estrogen-induced increase in body fat and decreased skeletal musculature due to a reduction in circulating blood testosterone level. Additional surgical alterations to the eyelids (blepharoplasty), the nose (rhinoplasty), the chin, the buttocks, and the thyroid cartilage often accompany the comprehensive reconstructive conversion to enhance the feminine appearance.

Transforming a transgendered female into a post-operative transsexual male requires a hysterectomy, construction of a penis and scrotum using plastic surgery, appropriate urethral reconfiguration, and removal of the female breasts. The newly constructed penis will not be capable of achieving an erection, and of course, since there are no testes, no sperm are present. Various penile implant devices are available, however, to help such patients achieve a form of sexual intercourse.

One post-operative male-to-female transsexual described herself as “[s]uffering from Gender Identity Disorder (GID)/Transsexuality,” which she characterized as “horrible!” In her paper entitled Culturally-Sensitive Transgender Health Care, psychologist Rachael St. Claire states that: “Transgender persons face numerous complex medical, psychological, and social issues. The transgender person’s process of understanding his or her gender identity and sexual issues can take many years, complicated by social stigmatization, shame, numerous forms of discrimination, and the lack of access to competent health care.” In fact, Dr. St. Claire states that “[t]ransgender persons may avoid seeking health-care because of the fear of stigmatization and shame, as well as the belief that transgender sensitive health-care is not available.”

3. Intersexed Individuals or Hermaphrodites

Alterations in the normal pattern of fetal development can produce any of three variations in chromosomal and phenotypic expression: (1) abnormal sex chromosome complement, (2) males who fail to respond to androgenic hormones, and (3) females who respond inappropriately to male hormones. These individuals may not experience Birth-Sex or Gender-ID incongruence, but their abnormal anatomical and physiological orientation may cause them to not be fully accepted in the context of societal norms and expectations. To appreciate these diverse possibilities, a brief review of principles of sexual biology is helpful.

Genetic sex is established at fertilization by chromosomal interaction. Phenotypic sex is hormonally determined. The brain interacts with the gonads via the anterior pituitary gland using what is best termed a “female default mechanism.” Brain-sex is determined hormonally. The two sex chromosomes appear quite different; there is a huge X and a tiny Y. The ovum and sperm each contain only one of the two. Sperm can carry X or Y, whereas the ovum carries only X. Fertilization, which is a chromosomal pairing, typically produces either XX or XY. Occasionally, this pairing does not occur. There is a genotype known as XO (Turner’s Syndrome), which is manifested phenotypically by female features, short stature, ovaries so immature that they are just streaks of tissue, and an assortment of structural defects. Another genotype is known as XXY, (Klinefelter’s Syndrome), which is manifested phenotypically by male features, long arms and legs, small testes, reduced fertility, and sometimes mental retardation. Many other such variants occur-genetic sex is thus not an binary arrangement.

Ordinarily, XX embryos are destined to become females, and XY embryos become males. At conception, there is a single cell, with no tissues that would identify maleness or femaleness. It is the genetic complement that eventually permits this. An individual will become a male not because he has only one X chromosome, but because he has a Y chromosome. Likewise, a female results because of the absence of a Y chromosome, not because of the presence of two X chromosomes. Very few genes are located on the Y chromosome, but the Y-linked gene Sex-determining Region Y (SRY) is crucial, for it will eventually stimulate the indifferent gonad in the developing embryo to form a testis.

In the first six weeks of development, an indifferent gonad and two parallel duct systems form regardless of genotype. The two duct systems are often called sex cord regions, and develop into the reproductive system. If properly stimulated, a so-called Mullerian duct system forms the female internal genitalia, and a Wolffian duct system forms the male internal genitalia. Further development of one stops growth of the other.

Unless “told” otherwise, the natural trend for the growing embryo is to develop as a female. To form a male, the embryo must be “redirected.” Between days 32 and 65 of fetal development, the SRY gene stimulates the indifferent gonad to form a testis, with the eventual capacity to produce sperm and male hormones such as
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testosterone. After this growth stimulation, the Wolffian duct system needs stimulation, and the Müllerian duct system needs inhibition. This is achieved by hormonal action, namely human chorionic gonadotropin (HCG) produced by the developing placenta. HCG stimulates production of fetal gonadal testosterone (from the interstitial cells) and, Anti-Müllerian Hormone, which suppresses the female duct system.

Thus, what determines normal male versus female development in utero is not the presence or absence of estrogen, but rather, testosterone. The Müllerian (female) ducts only stop growing if they are specifically suppressed. Testosterone has four initial roles: development of the internal genital ducts, formation of external male genitalia, manifestation of secondary sex characteristics, and masculinization of the hypothalamus. Interestingly, this latter function occurs through the eventual action of estrogen, which is produced by conversion of testosterone by an aromatase enzyme. Thus, in male embryos, estrogen acts on the hypothalamus to “program” it into a continual (tonic) hormonal release pattern, which permits constant sperm production. If this “reprogramming” does not occur, the female pattern will dominate—a cyclic (pulsatile) activity resulting in monthly ovum development.

Each step in sexual differentiation and development must proceed correctly; otherwise, the resulting child may be a mosaic with both male and female features—that is, structurally hermaphroditic. One example of such an aberration is congenital adrenal hyperplasia, or adrenogenital syndrome. This condition occurs because the enzymes in the adrenal cortex that convert 17-α-hydroxyprogesterone to 11-desoxycortisol and then to cortisol are absent, thereby eliminating feedback inhibition by cortisol to the hypothalamus. As a result, the hypothalamus and anterior pituitary gland greatly increase their steroid production, especially testosterone and estrogen. Both X chromosomes must be affected, so this aberration can only occur in genotypic females. There is no SRY gene, so ovaries develop, not testes. There is no Anti-Müllerian Hormone, so the internal ductwork is female (oviducts, uterus, etc.). The high testosterone level, however, also stimulates Wolffian duct development, resulting in male secondary sexual characteristics. The high estrogen level masculinizes the hypothalamus. At birth, there is a genotypic girl (XX) who is really a female hermaphrodite, i.e., with ambiguous external genitalia, depending on the extent of masculinization (ranging from clitoral hypertrophy to fusion of the labio-scrotal swellings into a penis). The likely phenotype of a person with congenital adrenal hyperplasia will be masculine, with increased body hair, well-developed skeletal muscle mass, and thickened vocal cords. From an athletic perspective, such an individual could have an advantage in competitive sport, resulting from a female genotype with a male physique.

Many other aberrations exist. One of the more notable athletes, for example, was Stella Walsh, born Stanislawa Walasiewicz in Poland. Ms. Walsh was the 100-meters gold medalist at the Los Angeles Olympic Games in 1932, as well as the first woman under 12 seconds for the distance. She had an illustrious and successful career in athletics, competing well in the 200-meters, the discus, shot put, and pentathlon. In later life, she resided in Cleveland, Ohio, and was killed accidentally as a bystander in a robbery. An autopsy revealed that Ms. Walsh had an XY chromosomal makeup, but ambiguous genitalia. Specifically, she had no female sexual organs. She was a mosaic best described as a male pseudohermaphrodite—very likely an example of androgen insensitivity syndrome. Thus, she was a genotypic male (XY) born without chemical receptors that respond to androgenic hormones such as testosterone. Such individuals cannot menstruate or conceive, but their female-like external genitalia cause them to be reared as female. Emotionally, such individuals feel female, but tend toward growing tall and lean. In Walsh’s case, this also endowed her with elite-level athleticism.

C. Sex Verification Testing

Had Ms. Walsh been born fifty years later, her pseudohermaphroditism might have been revealed by a mandatory sex verification test. From the mid-1960s to the dawn of the present millennium, a sex verification test was routine for female athletes participating in international competitions. Often, the test served merely as a trivial reaffirmation of an athlete’s sex. At the least, it was a minor inconvenience in that a female athlete typically subjected herself to the test only once and then was issued a “femininity card” to be presented at future competitions in lieu of another test. For some athletes, however, the test results became an unwelcome epiphany with traumatic consequences. The following is a summary of sex testing in athletic competition, concluding with the highly publicized case of Dr. Renee Richards.

1. The History of Sex Testing in the Olympic Community

In response to rumors suggesting that men were masquerading as women for the sole purpose of excelling in international athletic competition, the first sex test occurred at the 1966 European Track and Field Championships in Budapest, Hungary. Similar tests were conducted at the 1966 Commonwealth Games in
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Kingston, Jamaica; the 1967 Pan American Games in Winnipeg, Canada; and the 1967 European Cup track and field competition in Kiev, USSR. These initial tests were given to any female intending to compete and amounted to nothing more than women traipsing nude in front of a panel of physicians who were monitoring for appropriately corresponding genitalia. A dark cloud quickly formed over the newly instated sex verification testing as female athletes publicly expressed their humiliation over the manner in which they were being evaluated. Feeling this pressure, the IOC sought alternative methods of testing for femaleness. In 1968, the IOC introduced a mandatory sex chromatin analysis for sex verification at the Olympic Games in Mexico City. The test, known as the Barr body test, took a buccal smear from inside the athlete’s mouth and then analyzed the cells for the presence of a stainable chromatin mass (i.e., the Barr body), which is found only in females. If the Barr body test was positive, the athlete was issued a femininity certification and any doubts concerning her womanhood were laid to rest. If the Barr body test was negative, however, a complete chromosomal examination was conducted on a blood sample, accompanied by a gynecological examination. During the 1970s, the Barr body test was gradually phased out and replaced by a cellular metaphase analysis requiring venipuncture (the sampling of blood). By the end of the 1980s, the Barr body test was rendered entirely obsolete. The IOC authorized this new protocol replacing the Barr body test with the “technically preferable” polymerase chain reaction (PCR) test for the SRY gene. The rationale for the latter’s use was that the presence of the SRY gene on the Y chromosome indicated that the individual was male, and would exclude such an athlete from women’s competition. The IOC inaugurated this new protocol for sex verification testing for international competitions during the 1992 Winter Olympics in Albertville, France. While the IOC was implementing its various methods of sex verification, the International Association of Athletics Federations (IAAF), the international governing body for track and field (known as “athletics” internationally), also considered revamping its sex verification policy. Until 1991, the IAAF utilized the Barr body test. However, when the IOC switched to the PCR test, the IAAF did not follow suit. It decided to abolish mandatory sex testing and implemented a strategy similar to the medical examinations conducted prior to the 1968 Mexico City Summer Olympic Games. The new IAAF protocol granted authority to a medical delegate at an IAAF competition to “arrange for the determination of the [sex] of the competitor should he judge that to be desirable.” Thus, the IAAF employs a suspicion-based medical examination for questionable cases of sex identity rather than a compulsory examination for all female athletes. The IAAF drug testing procedures that call for close observation of an athlete during urine collection therefore provide the opportunity for determining whether further inquiry is necessary. This is believed to serve as an adequate deterrent to males masquerading as females in athletic competition. Just prior to the 1992 Albertville Winter Olympic Games, the IAAF published a report that criticized chromosomal and genetic testing as antiquated and recommended that other sport governing bodies follow its lead by instituting suspicion-based sex verification.

2. Current IOC and International and National Sports Federations’ Policies on Sex Testing

In 1992, the IOC declined to adopt the suspicion-based medical examination policy of the IAAF in favor of the PCR test. Seven years later, at its 109th Session, the IOC discontinued mandatory sex testing. Similar to the discretion reserved to the IAAF medical delegate, the IOC now authorizes its medical commission to conduct a PCR test on an individual basis, should such need arise. The new sex verification protocol, in place at the onset of the 2000 Sydney Summer Olympic Games, was applauded by members of the medical community for protecting the rights and privacy of athletes “while safeguarding fairness of competition.” Only five of the thirty-four international federations of Olympic sports retain compulsory sex verification testing for their international events.

In the United States, most national sport governing bodies or professional sport leagues do not have a clearly identified sex testing policy. For example, the Ladies Professional Golf Association (LPGA), in its qualification application, does not require an applicant to provide proof of femaleness despite that the same application limits the members of its organization to “females at birth.” In the mid 1970s, the United States Tennis Association (USTA), the national governing body for tennis, required all female applicants for the United States Open Tennis Tournament (hereinafter “U.S. Open”) to undergo a Barr body chromosome test. Following Richards v. United States Tennis Association, however, the USTA changed its policy. Currently, the USTA conducts the PCR sex test on a case-by-case basis whenever a controversy arises regarding a competitor’s sex.
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3. When Transsexualism and Sex Verification Testing Collide: Richards v. United States Tennis Association

Dr. Renee Richards was born Richard H. Raskind and in 1974 was nationally ranked thirteenth in the men’s 35-and-over tennis division. In 1975, Raskind underwent a sex reassignment operation and “for all intents and purposes,...became female, psychologically, socially[,] and physically...” With this, Raskind changed his name to Richards, a post-operative male-to-female transsexual. In 1976, Richards attempted to enter the U.S. Open in the women’s division. She was advised by the USTA that in order to qualify she must first pass a sex verification test-the Barr body test. Richards requested that the test be waived on the basis that it was discriminatory. The USTA denied the request. Richards ultimately failed to appear at a qualifying site, essentially withdrawing her application from consideration. Seeking to enter the 1977 U.S. Open, Richards sought a preliminary injunction prohibiting the USTA from subjecting her to a sex verification test, citing a violation of both the New York State Human Rights Law and the Fourteenth Amendment of the United States Constitution. Richards claimed that the USTA’s decision to institute the test was specifically designed to exclude her from competition. In addition, she argued that the medical community deemed the test to be arbitrary and capricious and that imposition of the test would be “insufficient, grossly unfair, inaccurate, fault[ly] and inequitable.”

The New York trial court held that the only legitimate reason for administering such a test during the course of athletic competition was to “prevent fraud, i.e., men masquerading as women, competing against women.” The court ruled that the USTA did in fact employ the test specifically to prevent Richards from competing, knowing that she would most certainly fail it. The court ultimately granted Richards’s request for a preliminary injunction precluding the sex verification test because the USTA discriminated against Richards to compete, thereby violating state human rights laws. In its ruling, the court did acknowledge that the test was an “acceptable tool for determining sex, [yet] it is not and should not be the sole criterion, where...the circumstances warrant consideration of other factors.”

III. On the sidelines: The parameters of sex and gender

Rather than attempting to express a bright-line definition for sex and gender, the Richards court insinuated that sex determination and gender recognition required a multifactored approach. In a sense, sex as indicated by genotype (i.e., chromosomal construct) is just one of several determinants to consider. Not all jurisdictions have applied such a liberal approach in determining working definitions for sex and gender, however.

A. Legally Prescribed Sex and Gender

When faced with matters concerning transgendered individuals-especially transsexuals-courts have struggled to develop consistency. The manner in which sex and gender are determined seems to differ with the circumstances. Following is a brief review of how courts have defined sex and gender in a variety of social and legal contexts.

1. Family Law

In Daly v. Daly, the Supreme Court of Nevada upheld a lower court ruling that terminated the parental rights of a child’s natural father, who also happened to be a post-operative male-to-female transsexual. The court did not attempt to determine the legal sex of the defendant, ruling instead on the gender-neutral jurisdictional and dispositional requisites for parental rights termination. It did, however, briefly address the defendant’s sex-reassigment surgery, stating that “[s]he[,] in a very real sense, has terminated her own parental rights as a father. It was strictly [her] choice to discard...fatherhood and assume the role of a female who could never be either a mother or sister to [her] daughter.” Although not explicit, the court’s dictum determined that the defendant assumed her post-operative sex and did not retain her Birth-Sex.

In Littleton v. Prange, the Texas Court of Appeals was faced with the mission of determining a post-operative transsexual’s legal sex with regard to marriage. This case arose out of a wrongful death action in which the plaintiff, Christie Littleton, a post-operative male-to-female transsexual at the time of marriage, sued the defendant for medical malpractice after the death of her husband. The defendant doctor challenged the action on a standing issue, asserting that plaintiff was a man and, therefore, under Texas Law, could not legally be the surviving spouse of another man. The court ruled that since the plaintiff was anatomically and genetically male at the time of birth, as a matter of law, she was still a male regardless of her subsequent operation and
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current appearance. For at least the purposes of marriage, the Littleton court defined one’s legal sex as the equivalent of one’s biological and anatomical sex at birth. Approximately twenty-five years prior to the Littleton decision, the New Jersey Supreme Court was presented with a similar situation and ruled quite differently. In M.T. v. J.T., the court held that a post-operative male-to-female transsexual was a woman for purposes of a legal marriage. Not unlike the Littleton court, the New Jersey court focused its analysis of sex determination on physical anatomy. The difference is that the New Jersey court acknowledged the current physical anatomy of a person as the proper sex, irrespective of the Birth-Sex: “[If] the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche[,] or psychological sex, then identity by sex must be governed by the congruence of these standards.” The court did note, however, that this combination of psychological and anatomical factors for sex determination is strictly limited to issues of marriage and that for other purposes, such as “public records, services in the branches of the armed forces, participation in certain regulated sports activities, eligibility for types of employment and the like, other tests in addition to genitalia may also be important.”

Although decided in the 1970s, M.T.’s liberal approach for arriving at a legal definition of sex did not set the trend for most courts. As evidenced by Littleton, the most recent contribution to this legal discussion, the prevailing standard is that one’s sex, for purposes of marriage, is the sex at the time of birth. Almost all jurisdictions faced with this decision have overlooked the transsexual’s psychosexual identity as the determining factor.

2. Civil Rights
a. Title VII of the Civil Rights Act
Title VII of the Civil Rights Act (hereinafter “Title VII”) makes it illegal for an employer to discriminate based upon sex. Neither the express language of the statute nor the legislative history defines the term “sex.” Thus, it has been left up to the courts to consider the legal boundaries of “sex” in the employment context. In 1998, the United States Supreme Court ruled, in Oncale v. Sundowner Offshore Services, that a same-sex harassment claim is within the scope of Title VII. Until then, it was unclear whether same-sex harassment was actionable under Title VII, thereby prompting a transsexual who wanted to initiate such a claim to first negotiate the hurdle of the court’s determination of male and female. A post-Oncale action turns on whether “discrimination based upon one’s status as [a] . . . transsexual constitutes discrimination based upon ‘sex’ or whether the term ‘sex’ must be limited to only males and females.”

Although decided before Oncale, Ulane v. Eastern Airlines remains the principal and “most illustrative” decision concerning transsexuals and Title VII discrimination. Ulane was born a male and had been hired as a pilot for defendant Eastern Airlines in 1968. In 1979, Ulane was diagnosed as a transsexual and shortly thereafter underwent sex reassignment surgery. Following the surgery, Ulane’s birth certificate was amended to indicate that she was a female and the FAA re-certified her flight status as female. When she returned to work as a female, however, Eastern Airlines fired her. Ulane filed a Title VII claim alleging that she was fired, and thereby discriminated against, because she was a transsexual. The district court agreed, holding that Ulane was discriminated against because she was a transsexual and that Title VII prohibits such discrimination. The Seventh Circuit reversed, and held that, for Title VII discrimination, the term “sex” was limited to “biological males” and “biological females.” Interestingly, the Seventh Circuit did state that “[i]f Eastern Airlines considered Ulane to be female and had discriminated against her because she was female..., then the argument might be made that Title VII applied.” However, the court found no evidence to support the argument that she was discriminated against because she was a woman. Rather, the discrimination stemmed from Ulane’s status as a transsexual.

Most state and local courts follow these federal when they face claims under state or local employment discrimination statutes, as the non-federal statutes are similar to Title VII. Both state and federal courts in New York, however, have held that employment discrimination against a transsexual person violates state and local discrimination and human rights laws.

Instead of determining whether the claimant is either male or female, irrespective of their transsexual status, it appears that courts faced with Title VII and civil rights cases have side-stepped the issue. They have relied exclusively on the plain meaning of the statutes, ignoring that a transsexual is indeed either a female or male irrespective of whether Birth-Sex or Gender-ID is the determining factor. Thus, the courts focus their analysis on the transsexual status of the victim, rather than on the subjective intent of the victimizer, who is likely reacting to gender stereotypes. It is entirely likely that the objectionable act was motivated by the
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victimizer’s belief that the victim’s behavior—either as a man or woman—did not conform to societal stereotypes. This is precisely the type of “prejudice” that civil rights laws were designed to prevent. A male cross-dresser

does not lose his “sex” even if he dons feminine attire. Thus, if the cross-dresser is discriminated against at work because of his lack of conformity to the male stereotype, he is suffering discrimination as a man.

Likewise, a transsexual whose Birth-Sex is male, but whose Gender-ID and appearance are feminine, is similarly victimized; the important question is whether he suffers discrimination because of his failure to conform to the male stereotype or as a female.161

b. Gender Motivated Violence Act of 1994

The Gender Motivated Violence Act of 1994 (hereinafter “GMVA” or “Act”)162 was enacted as a federal civil rights law to protect victims of “crimes of violence committed because of gender or on the basis of gender, and due, at least in part to an animus based on the victim’s gender.”163 In Schwenk v. Hartford,164 a pre-operative transsexual, who was anatomically male but dressed and viewed herself as female, filed a sexual assault claim under the GMVA.165 Schwenk, despite his feminine appearance, was a resident of the all-male Washington State Penitentiary in Walla Walla, Washington.166 After she was placed in the prison’s medium security Baker Unit, a prison guard allegedly sexually assaulted her. As a result, Schwenk brought a GMVA claim.167 The defendant guard argued that because Schwenk’s chromosomes and genitalia were both masculine, she was male and “that the GMVA does not protect men who are raped or sexually assaulted by other men.”168 Furthermore, the guard asserted that Schwenk’s status as a transsexual does not protect her because, as a general matter, the GMVA does not cover transsexuals.169 The defendant tried to convince the court his actions were not based on Schwenk’s gender, pursuant to the Act, but rather based on the plaintiff’s transsexuality.170 In other words, he argued that animus motivated by transsexuality is not the same the same as fueled by a person’s gender, and, therefore, is not proscribed by the Act.171 The Ninth Circuit rejected defendant’s claims and ruled that men are included under the protections of the GMVA.172 Further, the court found that for the purposes of both the GMVA and Title VII, the terms “sex”—biological and anatomical characteristics—and “gender”—an individual’s sexual identity—are interchangeable.173 Specifically, because the defendant’s actions were found to have been spurred by the plaintiff’s feminine appearance and mannerisms, his transsexuality was motivated the crime.

Contrary to the Ulane court, the Schwenk court takes a more realistic approach, attributing the victimizer’s actions to his perception of the transsexual’s sexual identity, irrespective of his or her Birth-Sex.174 The Schwenk court thus considered the transsexual victim’s Gender-ID, and society’s reaction thereto, to be the determining factor in a claim for discrimination. This is consistent with the approach taken by the Oncale court and flies in the face of civil rights decisions like Ulane and its progeny. With the liberal Schwenk decision, the Gender-ID standard replaces the Birth-Sex criterion as the appropriate method to determine legal sex. It remains to be seen whether future courts will embrace this approach.

3. Official Documents175

As indicated in the above discussion of Littlton, some jurisdictions allow transsexuals to obtain either a new or amended birth certificate changing both the name and sex.176 A person’s ability to receive a new or modified birth certificate differs among jurisdictions, however.177 Some states have adopted statutes that dictate the circumstances under which a new or amended birth certificate may be issued.178 One state, Tennessee, specifically prohibits the amending of a birth certificate to reflect the results of a sex modification surgery or to accommodate a pre-operative transsexual’s sexual identity.179 Other states do not have such statutory mandates, thus placing the decision to amend a birth certificate in the hands of the judiciary.180

In Anonymous v. Mellon,181 a New York trial court upheld the Board of Health’s decision to leave the sex indicator on a birth certificate blank rather than amend it to show both the original sex and the subsequent change.182 This decision was reached even though Richards held that a chromosomal test was not the foremost determinant of a person’s sex for purposes of a tennis tournament.183 The Mellon court acknowledged the Richards decision but decided that one’s legal sex should be determined on a case-by-case basis.184 Thus, the Board of Health’s decision to leave the sex indicator blank was rational.185

In K. v. Health Division, Department of Resources, the Oregon Supreme Court reversed the trial and appellate courts’ allowance of a post-operative transsexual modification of the sex indicator on her birth certificate.186 The Oregon Supreme Court held that birth certificates are historical records, documenting the facts at the time of birth, and thereby should not be altered to reflect current status.
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In Mellon and K., the courts circumvented the task of defining sex, deferring to the legislature or future courts. Interestingly, it is the earlier birth certificate cases that attempted to establish a standard with respect to sex determination. For example, in In re Anonymous, a New York court held that if both anatomical and psychological sex are in accord, then the indicated sex should so acknowledge. Thus, if transgendered individuals undergo surgery as a result of their transsexual identity, official documents should reflect the alteration.

In addition to birth certificates, other official documents that indicate a person’s sex are driver’s licenses and passports. In her article, Professor Greenberg reported that of the state motor vehicle bureaus responding to a survey, thirty-four would provide new licenses indicating a change of sex for post-operative transsexuals if presented with an affidavit from a physician stating that such an operation occurred. Further, six bureaus would authorize new licenses for pre-operative transsexuals if a physician’s affidavit indicated that the person was being treated for transsexualism. A United States passport may also be modified to accommodate changes in a person’s status. Specifically, changes may be made to reflect a person’s current sex status if proof of sex modification surgery is provided or, in the case of pre-operative transsexuals, proof is presented that an individual is about to undergo the operation.

These examples highlight that a more practical approach is being employed with respect to official documentation, with decision-making agencies and courts considering (1) Birth-Sex for historical purposes, (2) no indication in the instance of ambiguity, or (3) the applicant’s Gender-ID if a physician supports the application. The lack of uniformity among jurisdictions, however, could result in a bizarre situation. For example, a person born in Tennessee or Oregon who cannot amend his or her birth certificate could obtain a new driver’s license and passport indicating post-operative sex, creating confusion among these identifying documents. Further, if this individual (at age forty) chose to compete in a USA Track & Field Masters competition, for which a birth certificate provides proof of age, he or she may be denied entry to his or her post-operative gender classification. Herein lies the dilemma for transsexuals seeking to normalize their lives, achieve a healthy lifestyle, and participate in sports.

B. The Medical Community’s Treatment of Transsexualism

Thanks to the pioneering efforts of New York City endocrinologist Harry Benjamin, who worked closely with the transgendered population in the 1950s and 1960s and wrote the first book on the subject, a large body of medical information has developed over the years regarding the health care needs of this population. These needs can range from pre-surgical psychiatric counseling and hormonal treatment to urogenital and other plastic and reconstructive surgery with post-surgical follow-up and care by appropriate specialists. One comprehensive and authoritative source of information is The International Journal of Transgenderism (IJT), a peer-reviewed quarterly publication devoted entirely to transgender issues.

Furthermore, the Harry Benjamin International Gender Dysphoria Association (HIBIGDA) is a multi-purpose professional society that publishes regularly updated clinical guidelines. First published in 1979, the HIBIGDA standards provide a comprehensive consensus of current thinking and sound medical practice regarding optimal hormonal therapy regimens, genital surgery strategies, psychotherapy, and follow-up advice for all stages of progression through the process of sex reassignment. Its most current statistics indicate that 1 in 11,900 males and 1 in 30,400 females are transsexuals. The real number is probably higher because many transgendered individuals go unrecognized.

Comprehensive reviews have subsequently summarized the surgical and psychological outcomes of transsexual patients. Thousands of sex reassignment surgeries are performed around the world each year by trained experts who often specialize in this work full-time. Indeed, in some areas of the world, such as Thailand, such surgery is big business due to international clients taking advantage of the favorable combination of lower costs (than in North America and Europe) and high-quality medicine offered there. Sex reassignment surgery is available at selected hospitals and clinics in both North America and Europe at widely variable costs. Whereas costs for vaginoplasty in male-to-female surgery range from $10,000 to $28,000 or more, costs for phalloplasty in female-to-male surgery range from $20,000 to $60,000 or higher. One can find published clinical research can be achieved by examining the subject heading transsexualism in Cumulated Index Medicus. Transgendered people continue to experience varying forms of discrimination and stigmatization, even among health care professionals. Primary health care providers do not always have professional training in the
unique health care needs of post-operative transsexuals and may not even know if medical expense reimbursement for such care is available. Attempts are being made to address the issue of health care disparity among the lesbian, gay, bisexual, and transgendered (LGBT) patient group. In 2000, the Gay and Lesbian Medical Association (GLMA)—an organization of LGBT physicians, medical students, and their supporters—collaborated with Columbia University’s Center for LGBT Health to produce a ninety-page white paper representing the first ever federally funded document on LGBT health concerns. The GLMA has also produced a companion document for LGBT health to supplement the findings presented by the U.S. Department of Health and Human Services in Healthy People 2010, which serves as the federal blueprint for bettering the nation’s health over the next decade. While a sizable number of physicians may not have encountered members of the LGBT community in their practice, ample practical information is becoming available to assist the medical community with knowledge of improved standards of care and understanding for this population.

C. Toward a Definition of Transsexualism in a Sports Context

Upon examining the divergent results across various legal jurisdictions and the diverse medical positions that attempt to define a person’s sex and gender, two general camps emerge: (1) those who view Birth-Sex as determinative-sex is determined genetically at birth and cannot be changed, and (2) those who believe that the Gender-ID is determinative-gender, and not sex, is a reflection of the person’s outward manifestation of his/her identity.

Considering these different views, the question of “when is a man a man, and when is a woman a woman,” as recently posed by Professor Julie Greenberg, deserves repeating. As evidenced above, courts and legislatures have struggled to answer this question consistently. Rather than establishing a bright-line, finite definition of when a man is a man and a woman is a woman, the answer is context-dependant. In the sports context, this approach leads to inquiries into: (1) whether the athlete is a male-to-female or female-to-male transsexual, (2) whether the sport is a traditionally “male” or “female” sport, (3) what the physical characteristics of the individual transsexual athlete are, and (4) whether there is likely to be a real or perceived competitive advantage on the field of play. Failing to apply an objective criteria to these inquiries is likely to be perceived as offensive and biased by many in the transgendered community and unfair to many who hold civil libertarian views. Thus, the challenge for legal professionals advising sports organizations on how to integrate transsexuals into competition is to examine all the perspectives in light of prevailing American legal principles.

IV. Perspectives on transsexuals in athletic competitions: Men’s or women’s division?

In certain sports, e.g., equestrian sport, archery, shooting, and yachting, the sexes are not separated for purposes of competition, as sex differences among competitors are irrelevant to athletic performance. In most sports, however, where sex-related differences in physical strength, oxygen transport in the blood, or power-to-weight ratio can affect performance, separation of the sexes has traditionally been viewed as appropriate. The existence of separate men’s and women’s divisions in sport competitions poses a dilemma for post-operative male-to-female and female-to-male transsexuals who desire to participate, especially if they possess superior “natural talent.”

A. A Competitor’s Perspective: Fairness of Competition

Many female athletes who hesitate to compete against male-to-female transsexuals object to the perceived competitive advantages. The prevailing belief is that transsexuals retain the athleticism advantageous male physical characteristics. The critical question is whether there is in fact a competitive advantage in this instance. Male-to-Female Transsexuals: Males have a higher level of androgen hormones, which increase the protein component of the musculature, increasing strength. Androgens also increase the level of protein hormones, such as erythropoietin. This hormone in turn stimulates the bone marrow to produce more red blood cells, which contain hemoglobin. More than 98 percent of blood oxygen is transported via hemoglobin, explaining why males have a higher maximum oxygen uptake, which is so important to aerobic endurance. Females, due to higher levels of estrogen, exhibit an increased deposition of fat just below the skin. Elite level distance runners, both males and females, have minimal stored body fat, ranging from 5 to 9 percent in men, and from 9 to 14 percent in women. Examination of the world records in the commonly contested events in distance running shows the influences of these physiological differences. The men’s world records demonstrate a range of 6.7 percent (in the 100-meters) to 12.5 percent (in the 5,000-meters) faster than those for women. Thus, the fastest performance times for women do not overlap those of the top men, and are unlikely to ever do so; as one sex...
improves, so does the other. The differences for other sports vary, depending upon their popularity among the two sexes and upon environmental factors. For example, the difference among world records between men and women in swimming is considerably less than for running, because women are assisted in the water by their increased body fat, which contributes to buoyancy. But the difference continues to exist. Notwithstanding the above, transsexuals who become post-operative females are placed on estrogen therapy, which increases stored fat, decreases power-to-weight ratio, and slows athletic performance in sports where the body mass is supported by the limbs. Castration removes the gonadal source of testosterone, causing a reduction in skeletal muscle mass and circulating blood hemoglobin. The end result is a decrease in strength and in maximum oxygen uptake, which affects both strength-oriented and endurance-oriented activities. The physiological advantage male-to-female transsexuals had before the surgery disappears—their performance characteristics become similar to those of females. The larger male skeletal bone mass remains intact due to the males’ typically taller stature. Genotypic females seeing their post-operative female counterparts may question whether this larger person is a fair match for them in sport competition. This larger mass is being powered by a smaller skeletal muscle mass, however, which decreases its power-to-weight ratio, thereby resulting in a competitive disadvantage vis-à-vis unaltered males.

Female-to-Male Transsexuals: On the other side of the issue are post-operative female-to-male transsexual athletes who desire to participate in the men’s division. These athletes experience the opposite physiological changes from their male-to-female counterparts. Their testosterone therapy increases skeletal muscle mass, thereby increasing their power-to-weight ratio. It also increases their blood levels of erythropoietin and hemoglobin, increasing red blood cell mass and maximum oxygen uptake. Ovariectomy decreases their estrogen availability, which decreases stored body fat and further increases their power-to-weight ratio. These changes would appear to improve performance capabilities vis-à-vis biological males, at least to the extent that the female-to-male transsexual is not disadvantaged by his lower skeletal bone mass and shorter stature characteristic of most women. These differences are not so great as to make the female-to-male transsexual athletes stand out among their fellow competitors. Notwithstanding the physical issues, a female-to-male transsexual risks exclusion from competition at the elite level by the prevailing antidoping rules governing the use of certain prohibited substances. Thus, transsexuals undergoing testosterone therapy will fail the drug testing procedures of most sports. Some sports may permit the athlete to obtain a medical waiver or another form of exemption permitting competition despite post-operative testosterone therapy.

Male-to-female transsexuals appear to experience more athletic disadvantages, while female-to-male transsexuals could have a significant advantage, but this may not be enough to allow an average size woman to defeat an average size male. Let us consider once more the case of Dr. Renee Richards, who is a transsexual. In that case, the USTA was not the only entity that protested her participation in the women’s tennis draw; some of the female players on the tennis tour also expressed their dissatisfaction. Two British players, Lesley Charles and Glynis Coles, arrived at a tournament in Florida wearing shirts that read, “I Am A Real Woman.” Also, Australian Kerry Melville Reid once walked off the court and defaulted as she was trailing Richards 6-7, 1-4 during a tournament in Phoenix. Reid’s husband later said, “We don’t believe Renee is a woman. Kerry will never play her again.” Thus, there is no doubt that fellow competitors are likely to protest the participation of post-operative transsexuals.

Kathy Jager illustrates the risks of error, exposure, or discriminatory treatment that follow fellow competitors’ resistance to transsexual participation. Ms. Jager was a 56-year-old American sprinter who participated in the 1999 World Veterans Championship in England. After shattering the 100-meters world record for her age group, a fellow competitor questioned her accomplishments, as well as “her muscular build, slim hips[,] and explosive style,” accusing Jager of being a man. Jager was forced to undergo a sex test to prove her feminality even though she had given birth to two children. All of this and she was not even a transsexual; her Birth-Sex was indeed female. One should have no trouble appreciating why transsexuals may be reluctant to participate and excel in the sports arena.

B. A Spectator’s Perspective: Competitive Integrity
Opposing competitors are but one constituency motivated to dispute the inclusion of post-operative transsexual athletes in competition. Spectators wedded to a heightened ideal of competitive integrity might also denounce such integration, their argument being that inclusion would detract from competition and the “purity” of sport. Whether such views should prevail, thereby excluding transsexuals from athletic competition, would probably depend on who is asked-
sports leagues, sponsors, men, women, conservatives, or liberals. There is no spectator outcry when an injured football player leaves the field in pain only to return after receiving a cortisone shot. Thus, not all spectators view competitive integrity as essential, or perhaps there are differing expectations within divergent sports contexts. Whatever one’s perspective, America’s history of racial discrimination and the exclusion of women from sport should provide a frame of reference for this discussion, as should the historic Bobby Riggs and Billy Jean King tennis match in 1973. In each instance, widespread societal exclusiveness eventually gave way to tolerance and acceptance.

Renee Richards did state that the crowd response at tennis tournaments in which she participated as a woman had, for the most part, been “fair and neutral.” At the time of her inclusion, however, she was forty-three and one wonders what the reaction might have been if she were in her early 20s. Some sport commentators and spectators questioned the integrity of a particular event when some of the female athletes participating (and succeeding) possessed similar muscular development to their male colleagues. In the last ten years, female Chinese athletes were scrutinized after drastically improving in both track and field and swimming. This rapid improvement, coupled with the well-muscled appearance of some of the Chinese women, prompted one observer to report that “officials have confessed they will be keeping a close eye on female Chinese competitors” at the Sydney Olympic Games, because there will no longer be a mandatory sex test. At that time, the Chinese women, by significantly improving while the Chinese men remained static in their respective performances, were being compared to some of the eastern European and Soviet bloc female athletes of the 1970s and 1980s. Many of these women were later found to have been unknowingly fed male hormones, which in at least one instance may have accelerated latent transsexual tendencies of a female athlete. Television character Archie Bunker’s comment that a few of the Soviet women shot putters “got more his-mones than her-mones” was further evidence of spectator attentiveness to gender issues in the sport context.

Spectators have been known to question the “pureness” of female athletic competition even when the sex of the participants was not in dispute. For example, American fans of women’s tennis in the ‘70s and ‘80s never publicly accused Martina Navratilova of being a man, but they grumbled over her size, musculature, and aggressiveness as being too manly during the matches when she overpowered the more petite, all-American, girl-next-door, Chris Evert.

Among such people who emphasize athletic purity, one group that places perhaps the most scrutiny on competitive integrity is sports journalists. Recall, for example, the scrutiny placed on Major League Baseball slugger Mark McGwire when it was revealed that he was taking a performance supplement containing androstenedione during his quest for the single season homerun record. Similar media attention was given to Renee Richards. After the court’s ruling, long-time sports writer Dick Young argued that, by letting Dr. Richards compete as a female, “fair and equitable competition” in women’s tennis had been breached and the pureness of the sport had been subsequently spoiled. Specifically, Young posed the questions: “Is it fair that [Richards’ potential female competitors] be asked to compete against a 6-foot-2, 142-pound altered male? Is this what we recognize as the goal for balanced participation in sports?” Fellow journalist Dave Kindred challenged Young’s arguments by writing that the “very essence of sport is unfair advantage.” By this, Kindred implied that the nature of athletic competition is the exploiting of advantages, i.e., what propels one opponent past another, why there must be a winner and a loser. He added, “To reduce sport to a single level of competence is to rob it of life.”

C. A Transsexual’s Perspective: Athlete Dignity, Privacy, and Discrimination

Transsexuals, like most other individuals, seek athletic competition for physical activity, the excitement of competition, and social interaction, rather than fame and notoriety. An argument can be made that most transsexual athletes would prefer to retain anonymity with respect to their condition and any medical procedures thereby pursued. Thus, to exploit their transsexualism for purposes of sport would be counterproductive to the ultimate goal of being accepted as a member of their post-operative sex or Gender-ID. Nonetheless, the challenge for transsexual athletes remains how to compete without having their dignity undermined, privacy invaded, or being subjected to discrimination from other competitors and spectators.

This is precisely the dilemma that Michelle Dumaresq, a thirty-one year old Canadian downhill biker, raised when interviewed for this Article. Dumaresq’s problem arises, not only because she is a post-operative male-to-female transsexual, but also because she is a competitive athlete. She participated in snowboarding for six years and mountain biking for fourteen years prior
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to becoming involved in competitive downhill biking. The International Cycling Union (ICU), the world governing body for cycling, has refused to determine whether Kim can compete as a female, despite the submission of her hormone profile and medical history. 263

Dumaresq reports her first recognition of her female identity at age five. Nonetheless, family and peer pressure caused her to play the male role to the extreme. As a male youth, she played rugby and was the captain for the boy’s ice hockey team. She also chose a very masculine profession—she is a steel worker. Despite her height of six feet and weight of 200 pounds as a maturing male, even her father recognized that his developing son was “different,” remarking on one occasion that she would “someday make someone a good wife.” 264 As a female, Dumaresq is five-feet-eight-inches tall and weighs 180 pounds. It took her five years to complete the transition from male to female, a process she began at the age of eighteen. Although she reported a high degree of anxiety about revealing herself to co-workers and family, she reports that her co-workers were very supportive.

Dumaresq feels less accepted as an athlete, however. Although she calls her fellow competitors, who accept her as a woman, friends, she hesitates when asked how they feel about competing against her. She admits that her competitors believe that she has a competitive advantage and that they want proof that no such advantage exists. In her defense, she states that as a male-to-female transsexual track and field athlete taking the male hormone testosterone she has lost four inches and twenty pounds, and has a blood testosterone level of two nanomoles per liter, which is well within the range, with a maximum of 3.5 nanomoles per liter, for an average woman.

Similarly, Dr. Renee Richards said, while competing as a woman, “I want to play professional tennis, which brings me into the public eye, but I don’t want to be in the public eye. I’ve had my fill of being ogled and exploited and used.” 265 She added that she looked forward to putting the “zoolike atmosphere” surrounding her participation in women’s professional tennis behind her. 266 Richards, who five years previous to her operation, fathered a child, also had to consider the privacy of her family. 267 She and her former spouse sent their son to Ireland to protect him from adverse publicity. 268 Furthermore, Richards threatened to quit tennis if any more publicity was brought to her son. 269

Public scrutiny is but one hindrance transsexual athletes may face; further limitations are evident. For instance, in track and field, a male-to-female transsexual’s testosterone therapy would hinder advancement into the elite ranks of the sport. Unless the IAAF’s Anti-Doping Commission granted a prior exemption allowing a transgendered athlete to use testosterone—a substance normally prohibited under IAAF rules—the athlete would be suspended from the sport for violating doping rules. 270 Such an exemption is only granted in cases of “clear and compelling clinical need.” 271 Tracking this rule, the IAAF Procedural Guidelines for Doping Control (hereinafter “Guidelines”) provide that a medical exemption be granted to athletes “rarely . . . and in very special cases.” 272 The Guidelines caution that the exemption will not normally be granted in cases of acute disease and never when sporting activity may be hazardous to the athlete. 273

Faced with these rules and limitations, a female-to-male transsexual track and field athlete taking the male hormone testosterone must discuss with his doctor whether the likelihood of success in obtaining a medical exemption from the IAAF is sufficient to outweigh the necessity of disclosing personal, medical, and psychological information to an unknown group of sport administrators. Certainly, the transsexual community would argue that the transformation of one’s sex to match his or her Gender-ID is indeed a “rare and very special case” of a “clear and compelling” need to administer an otherwise prohibited drug. Whether the IAAF Anti-Doping Commission or any other sport governing body has ever made such a determination is not known; the availability of such a procedure, if truly confidential, however, should provide hope for those post-operative transsexuals (particularly female-to-male) seeking to participate in elite athletic competition. Interestingly, the Olympic drug-testing program in the United States does not provide permission to use certain drugs in advance. 274

There are a few transgendered athletes competing successfully at the top level in track and field. Karnah Soekarta, who competed for Indonesia as a female. In 1960, she was the official national record holder in several events, notably the 100-meters, 200-meters, and javelin throw. 275 She was third in the javelin throw at the 1958 Asian Games in Tokyo and competed in the 100-meters, although she did not advance beyond the semifinals. 276 Her javelin performance was listed in the first IAAF/ATFS statistics handbook produced for the 1983 Helsinki World Athletics Championships, 277 but her performance entry was deleted in the 1987 edition, 278 with an appended note stating “because she became a he.” 279
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Also, Syria’s Hala Atoura was listed in the 1987 IAAF/ATFS statistics handbook for her 5.55-meter long jump in the Pan Arab Games in Damascus in 1985. In the IAAF/ATFS statistics handbook produced for the 1988 Seoul Olympic Games, her name was deleted with the notation that she “has undergone an operation and is now a male.” What remains confusing about these two cases is that both Soekarta and Atoura apparently competed as genotypic females prior to the hormonal/surgical protocol that changed their phenotypic sex. That each woman chose to align her Gender-ID with her brain sex should not have caused sport administrators to dismiss their pre-surgical athletic achievements. Perhaps these women exhibited some of the abnormalities discussed earlier in this Article, which caused uncertainty regarding their female chromosomal or phenotypic expression.

V. Legal perspectives on transsexual sports participation

The societal and legal context in which a sports organization operates exerts a strong influence on its perspective about transsexual participation in sports competition. The viewpoint of a public school principal faced with a pre-operative sixteen-year-old transsexual participating in gym class may differ from that of the president of a state-chartered college or university considering the participation of a twenty-year-old transsexual in team sports like gymnastics, swimming, or volleyball. Likewise, the perspective of a professional or semi-professional sports league assessing the career prospects of a transsexual professional athlete will most certainly differ from an Olympic sports organization seeking to field a gold medal team. Whatever societal and organizational imperatives exist, they must be considered against the appropriate legal framework.

A. Government Actors
As state actors, government funded athletic organizations—sports programs within public universities, colleges, high schools, and grade schools—must adhere to both the U.S. Constitution and appropriate state constitutions. Such state actors are bound by the vast body of civil rights laws and equal protection decisions when they face alleged instances of discrimination.

Arguably, most instances of transsexual discrimination are likely to be classified as sex-based discrimination, and thus in violation of federal and state laws prohibiting sex discrimination from places of employment, public accommodations, the marketplace of goods and services, or federally assisted programs.

Transsexuals who feel excluded from collegiate or extracurricular, scholastic, or athletic competition are likely to challenge such exclusion on the grounds that it is sex discrimination in violation of Title IX of the Education Amendments of 1972. Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Included within Title IX’s purview are those private institutions that receive federal funding, even if the athletic department does not receive any of the federal apportionment.

A federally funded entity might argue, in response to a Title IX challenge, that the exclusion of the transsexual athlete was not based upon his or her sex, but rather to protect competitive integrity or preserve a “level” playing field. Irrespective of whether the alleged exclusion is sex-based or the result of some other administrative policy, a substantial equal protection issue arises. Constitutional jurisprudence related to sex-based distinctions provides that state actors must show “an exceedingly persuasive justification” when treading upon the protection afforded by the Fourteenth Amendment, i.e., equal protection of the laws. The persuasive justifications a federally funded institution might cite include the preservation of fairness between the male and female divisions or the maintenance of separate-sex locker rooms. Regardless of what the state’s interest might be, a government actor must also establish that excluding transsexual athletes from competitions is substantially related to the achievement of such an interest. Given these high constitutional hurdles, instances of transsexual discrimination within scholastic athletics would not survive the heightened scrutiny applied by a reviewing court.

In Doe v. Yunits, the plaintiff alleged transsexual discrimination within a state-funded educational institution, but not within the context of scholastic athletics. In Yunits, a high school student was excluded from her high school on the basis of her Gender-ID and expression. The student had been diagnosed with GID; although her Birth-Sex was male, she had a female Gender-ID. The student wore clothing consistent with the female gender, such as skirts, wigs, and dresses. The school found the student’s conduct disruptive to the education process and informed her that she would not be allowed to attend the high school if she wore such clothing. In her complaint, the student alleged that the school abridged her freedom of expression. In deciding a motion for summary judgment, the court applied a free speech analysis, invoking the
Massachusetts Declaration of Rights, Article XVI, which provides that, “The right of free speech shall not be abridged.” Under this analysis, the court had to first determine whether the student’s symbolic acts constituted expressive speech and, if so, whether the school meant to suppress that speech. The court reasoned that a male student dressing in clothing and accessories traditionally associated with the female gender was an expression of herself and her Gender-ID. The court found that the school understood this message. The court also reasoned that the school, by prohibiting the student from wearing women’s clothing, suppressed her speech. Based on these findings, the court held that the student had a viable claim and would likely prevail.

B. Professional Sports Leagues
One might assume that professional sports leagues, as private business enterprises, are not subject to the equal protection clauses of the U.S. Constitution or state constitutions, which would allow them to avoid the kind of claim that prevailed in Yunits. Professional leagues do not seek or accept federal or state funding for their business enterprise, supposedly removing them from the scope of federal civil rights laws such as Title IX.

Viewing the issue from another perspective, however, privately owned restaurants that solicit the business of the general public are subject to the anti-discrimination laws contained in the various civil rights statutes, most notably Title VII, which prohibits discrimination in public accommodations, public facilities, and federally assisted programs. Thus, Title VII and the various state acts modeled after it have extended the constitutional principle of equal protection to private businesses and individuals. Indeed, professional baseball has been successfully charged with discriminatory hiring and termination practices involving women. Title VII has been interpreted to exclude transsexuals from its coverage but recent court decisions suggest a possible shift in attitude and sensitivity to sex and gender issues.

Consistent with this trend, some states have chosen to extend gender-based civil rights protections to sexual orientation. Those states include California, Connecticut, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, and Vermont. The District of Columbia also has created a Human Rights Law implicating sex and sexual orientation. California, Nevada, and Rhode Island prohibit discrimination based on sex and sexual orientation in the area of employment. Vermont, Maine, and Minnesota prohibit discrimination based on sex and sexual orientation in the areas of employment, real property, education, public accommodations, and credit. The states of New Hampshire and New Jersey, along with the District of Columbia, do not denote areas where discrimination is prohibited, but generally prohibit discrimination based on sex or sexual orientation.

Despite the apparent opportunity for transsexuals to assert their rights in the states that include sexual orientation as a basis for discrimination claims, many of these states’ definitions of sexual orientation do not include transgendered persons. California, Connecticut, Massachusetts, New Hampshire, New Jersey, Vermont, Nevada, and the District of Columbia, define sexual orientation as having an orientation for heterosexuality, bisexuality, or homosexuality. Only a few states provide a broader definition of sexual orientation that includes transgendered persons. For instance, Minnesota defines sexual orientation as having or being perceived as having an emotional, physical[,] or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.

The state of Rhode Island has adopted legislation that will include the phrase “gender identity or expression” in both the Rhode Island Fair Housing Practices Act and Fair Employment Practices Act. Rhode Island defines gender identity or expression as: [A] person’s actual or perceived gender, as well as a person’s gender identity; gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person’s sex at birth. With these expansions of human and civil rights protections in place, transgendered persons seeking to participate in professional sports may be able to gain legal protection from these states, with others hopefully to follow. If this legislation is any indication, the trend towards recognizing transsexuals as a protected class for the purposes of discrimination has begun. Finally, no rules prohibit women from playing professional sports; if a transsexual athlete had the talent and skills to play, therefore, he or she would supposedly be welcome.
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C. Olympic Sports Organizations
All domestic Olympic sports organizations are governed by the Ted Stevens Olympic & Amateur Sports Act (OASA), which establishes the United States Olympic Committee (USOC) and outlines the criteria for recognition as a national governing body for an Olympic sport. The OASA provides that part of the purpose of the USOC is “to promote and encourage physical fitness and public participation in amateur athletic activities.”

According to the OASA, the USOC can only recognize and designate an organization a national governing body if it “[d]emonstrates that its membership is open to any individual who is an amateur athlete, “322 and “provides an equal opportunity to amateur athletes . . . to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, sex, age, or national origin.” Finally, the OASA provides that every national governing body must “provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis.”

In light of the recent court decisions and proposed state statutory amendments which recognize transsexuals and/or those with GID, there exists little breathing room for Olympic sports organizations with respect to their obligation to accommodate any individual or amateur athlete wishing to participate in amateur athletic competition. While OASA does not specifically mention transsexuals or GID in its anti-discrimination clause, its broad language includes transsexuals in its scope.

National governing bodies may question whether their obligation to provide an equal opportunity for any individual to participate requires them to make a determination of the appropriate sex category for a post-operative transsexual. The authors believe that it does. Thus, the question is whether to await the instance of a transsexual’s entry into competition or proactively establish a policy. For those Olympic sports organizations seeking to be proactive, the authors offer this Article as a source of information and guidance.

VI. Conclusion
The evolution of society, whether measured by technological advances, scientific advancement, or enlightened thinking, requires the recognition and accommodation of new realities. While the existence of GID is not new, its existence has reached beyond the lives of those families immediately affected. Ironically, one of the first public cases of transsexualism-Renee Richards-arose in a sports context. In light of the volumes of literature now available on this topic and the many transsexuals interviewed for this Article, there is no doubt that hundreds of thousands of transgendered and transsexual individuals are attempting to live safe, happy, and healthful lifestyles.

Athletic activity is part of the fabric of most societies around the world and has achieved a cult-like following in the United States. It is only natural and inevitable that the transgendered and transsexuals will walk onto the court, line up at the starting line, or skate onto the rink. Just as Americans have learned to accept “coloreds” and the “delicate sex,” isn’t it time that society welcomes individuals who, through an act of fate, seek to balance their biological and mental sexual identity?

Just as a thoughtful person would not encourage a schizophrenic to shun medication that helps him or her achieve balance and normalcy, sports administrators, athletic competitors, or spectators should not expect a transgendered person to forgo a treatment that will bring balance and normalcy to their lives.

As discussed above, it is clear that the U.S. judiciary and the various state legislatures are realizing that sex and gender are not always consistent, and are clearly not interchangeable terms. This fact has long been recognized by the medical profession, the IOC, the IAAF, and other Olympic sport governing bodies around the world, all of whom have sought solutions. Regrettably, the “so-called cures—castration, exclusion from competition, and public exposure—have often been worse than the malady.

In order to integrate the transgendered and transsexual community into athletic competition, the athletic community’s principles must include compassion, understanding, and enlightenment. For those who find it difficult to abandon the fiction that sports competition in its current form is “pure,” they need only decide whether to allow the transsexual into the men’s or women’s division. For those who accept and adhere to the Birth-Sex philosophy, the appropriate division is the gender into which the transsexual was born. For those who cling to the Gender-ID approach, the post-operative gender classification determines the appropriate gender.
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division. We can leave for another day, and further research, individuals with inter-sexed, abnormal, and/or ambiguous sexuality. The transgendered athlete has a sex. Let us acknowledge their sexuality and their desire to participate in healthful athletic activities. ▲

The authors would like to thank Kimberly Clark for her extensive research assistance and valuable feedback during the writing process.

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* General Counsel/Director of Business Affairs, USA Track & Field, Inc.; J.D., Columbia School of Law; B.A., Princeton University.

† Emeritus Regents’ Professor of Health Sciences, Georgia State University and Chair, Sport Science Subcommittee, USA Track & Field, Inc.

‡ B.S., B.A., 1998, Miami University in Oxford, Ohio; J.D., Tulane Law School 2002. The authors would like to thank Kimberly Clark for her extensive research assistance and valuable feedback during the writing process. We would also like to thank Michele Fuqua and Michelle Dumaresq for their valuable assistance.
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Far from the finish line: Transsexualism and athletic competition


See id.

See id.

See id.

See id.

See id.

Consider the case of Geri Lisa Fritz, however. Fritz was a pre-operative male-to-female transsexual who tried out with the all-women Colorado Silver Bullets semi-professional basketball team and was eventually cut from the final roster. During the tryouts and the decision making process, Silver Bullets officials claimed to not have suspected that Fritz’s Birth Sex was male. Fritz was not released because she was a transsexual, but prohibited substance is normally incapable of competing at that level. Bullets Hopful 8m Men. DENVER APR. 13, 1984, at 1. See Rosemund et al., supra note 236, at 13.

See id.

See id.

See id.

See, e.g., IRAA PROTOCOL GUIDELINES FOR APPLYING CONTROL (2002), available at http://www.iaaf.org/news/files/9630.pdf. Where a Prohibited Substance is capable of being produced in the body naturally, a sample will be deemed to be positive for that substance where the concentration of the substance or its metabolites and/or their ratios in the athlete’s body tissues or fluids so exceeds the range of values normally found in humans so as not to be consistent with normal endogenous production. Id. id., 1 at 20.

See id., id. 9.5.4, at 19 (“An application for an exception from an anti-doping rule is only admissible if a qualified physician setting out the reasons why the administration of a prohibited substance is necessary for the health of the athlete.”) These exemptions may not be readily granted. See notes 209-212 and accompanying text.


Greenberg, supra note 127.

See Bassos, supra note 11, at 366-97.

See id.

See Keul et al., supra note 10, at 118.

See RICHARDS & PÉLARD, supra note 36, at 291.

See id.

See id.

See id.

See id.

See id.

See id.

See id.

See id.

See id.


See id. (noting that “there seems to be a correlation between how well Richards does on the court and the degree of hostility exhibited by the other players.”)

See Duncan MacKay, Revealed the Secret of the Flying Grandmother from Phoenix, GUARDIAN (London), May 11, 2000, at 34, 30.

See id.

See id.

See id.

See id.

See id.

See id. (noting that “there seems to be a correlation between how well Richards does on the court and the degree of hostility exhibited by the other players.”)

See Duncan MacKay, Revealed the Secret of the Flying Grandmother from Phoenix, GUARDIAN (London), May 11, 2000, at 34, 30.

See id.

See id.

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See id.

See id.
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discriminatory practices in violation of New York's human rights law, and (4) violation of state common law restraint of trade. Id.

In addition to the cases discussed above, supra Part H.A.2, a further survey of the case law interpreting civil or human rights laws in the context of transgender discrimination in the professional setting reveals one particularly interesting application of the law.


Another similar case rejected certain professional baseball entities’ motion for summary judgment against a female plaintiff's claims for discriminatory firing and restraint of trade. Proteus v. Nat’l League of Prof’l Baseball Clubs, 320 N.Y.S.2d 788 (N.Y. App. Div. 1971). The court found that the defendants failed to establish that “being of the male sex” was a bona fide occupational qualification for an umpire, and that the height and weight standards were “inherently discriminatory against women.” Id. at 794.

The League of Prof’t Baseball Clubs, 799 F. Supp. 1475 (D.D.C. 1992), rev’d, 988 F.3d 60 (D.C. Cir. 1999). The underlying basis of the plaintiff’s complaint was the twelve years of sex discrimination and sexual harassment she experienced as a professional umpire, culminating in her firing by the A.A.A Minor League Baseball League in 1989. Id. at 1478. During her employment, the plaintiff was addressed by a derogatory name, was told her proper role was “cooking,” was kissed and spat upon, and was singled out for special technique training. Id.

The district court preserved the plaintiff’s claims of (1) third party interference with her employment leading to her termination, in violation of Title VII; (2) retroactive application of the trial by jury, compensatory, and punitive damages provisions of Title VII as they relate to intentional discrimination; (3) unlawful
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1. General

Conferences, meetings, lectures, courses, etc.

Belgian symposium on sports law
On 17/3/2006, the Department of Public Law at the Catholic University of Louvain organised a symposium entitled “Is sport being doped by the state – working towards a system of public sports law?” (Journal des Tribunaux 2006, p. 16). It was divided into two parts: (a) sport and the public authorities, and (b) sport and public policy. Among the topics dealt with were:
- Participation and intervention by the public authorities in sporting infrastructure
- Sport and security
- Sport and public health
- Sport and youth.

Obituaries

Kerry Packer
Late December 2005 witnessed the death of media tycoon Kerry Packer at his home in Sydney, Australia, having been wracked with health problems during the past two decades. He is generally credited with having changed the face of cricket in the late 1970s, with significant implications not only on the field of play but also in the courtroom. In mid-1977 – coincidentally or not within a few months of the memorable Centenary Test between Australia and England in Melbourne – the sport received the tidings that, in a bid to secure the television rights to the top games, Mr. Packer had declared war on the cricket establishment by organising a separate context for international cricket in the shape of World Series Cricket (WSC). In so doing, he had hired the services of the world’s top players and thus staged his own matches on the now-famous Channel Nine.

The establishment of WSC was not a goal in itself, but a means towards the end of securing the television rights then held by the state-owned Australian Broadcasting Corporation (ABC). The WSC one-day fixtures included matches under floodlights, with players wearing coloured clothing and using a white ball. Almost the entire Australian first and second teams joined up, as did the West Indies test side. (It also provided a welcome opportunity for many South African players, then banned from international sport as a result of their country’s apartheid policies.) The cricketing authorities of the players concerned took immediate action and banned them from further participation in any official fixtures organised under their authority. In response, Packer challenged the Test and County Cricket Board (TCCB) before the English High Court. The judge awarded the action to Mr. Packer, ruling that the bans in question constituted an unreasonable restraint of trade (The Independent of 28/12/2005).

Packer’s confrontational style also ultimately paid off in terms of his original objective, in that two years after starting WSC he was awarded long-term rights to broadcast cricket – the only sport, it should be remembered, to have a completely national profile in his home country. Opinions on his legacy are divided. It is pointed out that, as a result of his action, international players’ remuneration became more commensurate with the kind of earnings which their skills were capable of generating, and that cricket was indeed made a good deal more entertaining, particularly the one-day format (Daily Mail of 27/12/2005, p. 81). On the other hand, many people mourned the demise of the stylised leisure of pre-Packer days, on the basis that if noise and instant gratification were required, baseball already filled that need. It is still too early to tell which of these views carries more conviction. What is a historical certainty, however, is that cricket emerged from the Packer era a completely changed ballgame.

Sheik Maktoum al-Maktoum
 Barely a few days after the demise of Mr. Packer, the world of “flat” racing and bloodstock lost an influential figure with the sudden death of the Sheikh, who was the eldest of the three Dubai brothers and who – not unlike Mr. Packer – revolutionised the sport and the industry worldwide. He had suffered a heart attack whilst in Australia.

Sheik Maktoum was the Emirate’s ruler and played a central role in its emergence as a racing power. This he achieved mainly through the influential Godolphin operation. Some of his best mounts, such as Balanchine, Fantastic Light, Shamardal and Cape Verde, had their most notable triumphs for the Dubai-based team. In addition, the Sheikh’s enormous Gainsborough racing and breeding operation now straddles the globe and comprises over 200 racehorses with 10 trainers, the same number of bloodmares in Britain, Ireland, Kentucky and Australia, and several leading stallions in Europe and the US (The Independent of 5/1/2006, p. 64).
1. General

Bernard Lacoste
Mr. Lacoste, who died recently aged 74, was responsible for turning the family sportsware and polo shirt business founded by his father, the tennis player René Lacoste, into a major designer clothing brand. It all began in 1926, when father René appeared on court at the US Open Championship wearing a shirt of his own design, being a white short-sleeved chemise made from a light knitted jersey fabric called “jersey petit piquet” which assisted in the absorption of moisture. After retiring from top-level tennis, Lacoste Sr founded La Société Chemise Lacoste together with André Gillier, the proprietor of a large knitwear company. They produced a shirt with an appliqué green crocodile emblazoned on the chest – the first occasion on which a brand logo had appeared on the outside of sports clothing. Having succeeded his father as President in 1963, Bernard Lacoste oversaw the international expansion of the group and added several other product lines. Because of his recent illness, he handed over the reins to his younger brother Michel in September 2005 (The Daily Telegraph of 28/3/2006, p. 20).

Ibolya Csak
The main achievement in the sporting field of this Hungarian high jumper, who has died at the age of 91, was to carry off the gold medal for her country at the 1936 Olympics in Berlin – which was also the first ever Olympic gold to be won by a Hungarian woman. Although in a less spectacular way than US runner Jesse Owens, she was caught up in the racial politics of the Games. The German athlete who was generally reckoned to be her closest rival was Gretel Bergmann, who had been dropped from the team because of her Jewish origins. Watched by Nazi officials, Ms Csak, who herself was Jewish, succeeded in clearing 1.62m., which her rivals were unable to do. The supreme irony was that the excluded Bergmann had in fact cleared 1.64m at the Olympic trials. Ms. Csak was unwittingly drawn into further controversy at the 1938 European championships. German athlete Dora Ratjen had been primed to exact revenge on Germany’s behalf, and appeared to have done so by beating Csak into second place. However, Ratjen’s demeanour in the showers caused some disquiet among the competitors, and shortly after the medals ceremony it was announced that Ratjen was a hermaphrodite and was withdrawing from athletics. As a result, Ms Csak was once again awarded gold. Later, Ratjen admitted that he was actually a man christened Hermann, and claimed to have been pressurised into competing by the leaders of the Hitler Youth movement – although the truth of this assertion was never established (The Daily Telegraph of 13/2/2006, p. 23).

Truman K Gibson Jr
Mr. Gibson, who has died at the advanced age of 93, was an extremely versatile figure, whose field of interests included civil rights, entertainment, boxing promotion and the law. Born in Atlanta, a focus of racial strife at the time, Gibson studied law, and as a trainee successfully fought a case challenging a local housing covenant confining the sale of housing to white buyers. His civil rights work also found expression during World War 2, when he was appointed as civilian aide to the Secretary of War, in which capacity he spoke on behalf of black men in the army.

He left the War Department and became a boxing promoter, as well as managing the world champion heavyweight boxer Joe Louis. In fact, Mr. Gibson became the first black secretary of the International Boxing Club, and helped to launch the Friday night television fights. He then returned to the law in Chicago, where he was forced to fight a number of legal battles of his own. In 1961, he was convicted in a federal court of conspiracy and extortion for attempting to siphon off the earnings of a welterweight boxing champion. He was sentenced to five years’ probation and fined (The Times of 2/2/2006, p. 61).

Istvan Gyulai
The world of athletics lost a great ambassador in mid-March 2006 with the demise of this Hungarian ex-athlete who had risen to the rank of General Secretary to the International Association of Athletics Federations (IAAF). He was 62. Having been an athlete of some repute himself, representing Hungary at the 1964 Olympics, he was influential in effecting the rise of athletics from its amateur to its current professional status. He was described as a “tireless worker” who continued to operate as energetically as ever in the face of a cruel illness (The Guardian of 13/3/2006, p. S15).

Alain Danet
Mr. Danet, Member of Honour of the International Olympic Committee (IOC) and Honorary President of the International Hockey Federation, died in late March 2006 at the age of 74.
1. General

Digest of other sports law journals

Recent issue of Zeitschrift für Sport und Recht

The 2006/1 issue of our German sister journal (Neue Juristische Wochenschrift 9/2006, p. XX) opens with a contribution by Werner Schroeder called “Sport and European competition law”, in which he concerns himself with recent developments in the case law of the European Commission and the European Court of Justice (ECJ). More particularly he deals with the competition law aspects of (a) the central marketing of media rights, (b) access to sport-related professions, (c) the laying down of technical standards for sporting equipment, as well as the participation of investors in sporting associations. In “Early warning systems in the field of sporting bets from the point of view of data protection”, Christoph Giebel discusses the infamous German football betting scandal (of which more later – see below, p.67), and examines the extent to which such manipulation can be prevented by putting into place internal early warning systems. He first describes the various national data protection laws, then explains the applicability of the German Bundesdatenschutzgesetz, and finally analyses the possibilities of developing further the various existing early warning systems.

In “The liability of the German Football Association (DFB) for the refereeing errors”, the author Tillmann Eufe seeks to clarify the question whether – on the basis of the contractual relations between the DFB and the clubs, or in the light of the laws on tort liability – the affiliated clubs could have grounds for claiming compensation for refereeing errors caused not only by gross negligence or by intent, but also by ordinary negligence. In “The World Cup experience on the big screen”, Karl Hamacher and Anne Efing concern themselves with the legality of public viewing events. On the assumption that FIFA is marketing the broadcasting rights to the World Cup through its marketing company, and that German broadcasters such as ARD, ZDF, RTL and PREMIERE have acquired various rights, the question arises to what extent the public viewing of these events on the big screen is lawful. “Doping under Swiss criminal law” is a contribution by Juana Schmidt in which she proffers various definitions and explains the current legal position of doping in Switzerland.

Lawyers in sport

[None]

Sport and international relations

Zimbabwean cricketing issues refuse to die down

The various legal issues surrounding the problems currently experienced by Zimbabwean cricket are so variegated that they could fit into several of the other categories making up this feature. However, for the sake of consistency and convenience they will all be dealt with under this heading.

When this column last adumbrated with question, it was reported that the confused attitude by the international cricketing community towards sporting relations with Zimbabwe, on account of the well-documented human rights abuses by the regime of Robert Mugabe, was reflected in the troubled state of the game domestically. More particularly, there appeared to be a players’ revolt, with the latter either quitting the game altogether or withholding their services over the actions of Peter Chingoka, the Chairman of Zimbabwe Cricket (ZC), and the latter’s Managing Director, Oziias Bvute (2005] 3 Sport and the Law Journal p. 49). The most prominent of these desertions had been that of the captain Tatenda Taibu, who had called for the removal of these two administrators – not least because of certain financial irregularities of which they were accused.

The questionable manner in which the International Cricket Council (ICC) had thus far handled the Zimbabwe issue (Journals passim) has caused disquiet not only in official circles, but also among the players of the Test-playing countries – more particularly their representative bodies. Thus when the ICC issued a report criticising the standards of conduct displayed by some players of international repute, this received a frosty reception by the Federation of International Cricketers Associations (FICA). The Federation’s Chief Executive, former Australian Test spinner Tim May, endorsed the plea that the spirit of cricket should be observed more assiduously, but added:

“In an environment where players have been subject to threats of physical and other forms of intimidation, public criticism of their on-field behaviour will have a hollow ring. The game’s handling of the present Zimbabwe issue has disillusioned and disappointed the majority of players around the world” (The Daily Telegraph of 13/12/2005, p. S15).
1. General

This criticism of the international cricketing authorities’ handling of the issue, however, was only to increase in the light of subsequent developments – as will be seen below.

Domestically, Zimbabwean cricket seemed to lurch from crisis to crisis, each one a little worse than the last. Just before the old year 2005 ended, it was announced that the entire national squad had commenced an indefinite strike in protest at the manner in which the national governing body, ZC, was operating the sport. This decision followed a meeting of all 37 nationally contracted players (The Independent of 23/12/2005, p. 63). Their trade union, the Zimbabwe Professional Cricketers’ Association (ZPCA) urged the organisers of the Afro-Asian A-team tournament, scheduled to take place in Bangladesh the following month, to consider alternatives as it became unlikely that the country would be represented. Once again, it was the continued tenure of Messrs. Chingoka and Bvute which seemed to be the main issue. Earlier that month, the Government had been asked to order an audit into the affairs of ZC and to appoint an interim committee responsible for managing the organisation (Ibid.) The ZPCA also claimed that those players who took part in the series against New Zealand and India earlier that year had yet to be paid for their services (The Daily Telegraph of 23/12/2005, p. S13).

Worse was to follow. Not all members of the ZC Board were opposed to the players’ demands, and in fact 12 of them openly supported their action. This prompted the Sports and Recreation Commission of Zimbabwe to suspend these recalcitrant members, and to request Mr. Chingoka expressly to continue to manage the beleaguered organisation for six months. The Commission Chairman, Gibson Mashingaidze, stated that the Mugabe Government would not bow to the demands of the 37 strikers. The players for their part replied that they would not be deflected, even though this would almost certainly result in the cancellation of the impending Test series in the West Indies, which in turn could cause Zimbabwe to lose its Test-playing status (The Guardian of 7/1/2006, p. S11). In fact, such an outcome was expected within days, since the International Cricket Council (ICC) was due to meet in Karachi the following week (The Sunday Telegraph of 8/1/2006, p. S10).

However, barely 24 hours after the Government’s intervention, the players unexpectedly suspended their strike action, prompted by the likely consequences of losing Test status. Clive Field, the players’ representative, articulated the players’ realisation that Test status was “paramount, and that without it, there would be no jobs or financial security for the players”. It was easy to infer from Mr. Field’s comments that the players felt threatened by the Government’s intervention (The Independent on Sunday of 8/1/2006, p. 75). Their decision eased the pressure on the ICC, who urged the new Zimbabwe board to resolve the crisis (The Guardian of 11/1/2006, p. S9). However, such was the extent of the damage already wrought on the national team’s prospects of success that, barely a week afterwards, ZC decided unilaterally to withdraw from Test cricket because of the team’s poor record, adding that it would put into place a programme to “galvanise the development” of the national squads (The Independent of 19/1/2006, p. 75). Nevertheless, the side would continue to compete in one-day internationals, and as a result the West Indies tour was reduced to a one-day series (The Guardian of 19/1/2006, p. S10).

However, any hopes which the ICC may have entertained that this would bring its trials and tribulations over the Zimbabwean question to a provisional end were soon dashed. First of all, it emerged that it could face demands for financial compensation not only from the West Indies, but also from Pakistan, who were to have met Zimbabwe in a later series. This was prompted by the danger that television companies could demand restitution for the contracts which would be breached by Zimbabwe’s withdrawal from the Test arena (The Guardian of 20/1/2006, p. S9). In addition, the day after Zimbabwe announced its withdrawal, their former captain, Stuart Carlisle, became the latest figure to take the ICC to task for the manner in which it had managed the entire issue. Interviewed on BBC Radio 4, he claimed that the ICC deserved “95 per cent of the blame” for the current position, and that it needed to “grow a spine”. More particularly, Mr. Carlisle claimed that the entire situation could have been avoided by taking action 18 months previously (The Independent of 20/1/2006, p. 59). In April 2004, the ICC Chief Executive, Malcolm Speed, had travelled to Zimbabwe in order to discuss the boycott by the country’s top players. Mr. Speed was compelled to return home after Zimbabwean officials refused to meet him (see [2004] 2 Sport and the Law Journal p. 47 et seq.). Mr. Carlisle commented:

“Instead of sending Speed, they should have sent a committee. They should have sent a three-man research team and spoken to players and administrators. They always get one side of the story. They could have sorted this out a long time ago. One day the ICC is going to have to stand up and make a decision on something.... They’re going to have to grow a spine and make a decision” (The Daily Telegraph of 20/1/2006, p. 18).
1. General

Domestically also there seemed to be little sign of peace breaking out. The week after ZC announced its withdrawal from Test cricket, the country’s 35 remaining professionals informed its chairman that they would not enter into contract negotiations unless they were paid the earnings which they claimed were due to them (see above). More particularly they refused to discuss terms unless they were paid £140,000 by way of Test and one-day match fees owing since August, as well as four months’ back pay and expenses (The Guardian of 24/1/2006, p. S2). Nor were the team’s negotiations helped by the news that their national cricket manager, Mohammed Meman, had been dismissed after a period of tenure lasting 15 years. Mr. Meman, who had been in charge of almost all Zimbabwe’s international fixtures since 1991, immediately announced that he was consulting his lawyers with a view to a legal challenge (The Guardian of 1/2/2006, p. S6).

Barely a few days later, the Zimbabwean players announced that they were resuming their strike because the ZC had missed the deadline for payment of the outstanding amounts referred to above, the Zimbabwean government having informed the players that the issue would be resolved by 31 January – which was one of the factors which caused the players to suspend their strike action (The Daily Telegraph of 3/2/2006, p. S18).

However, the following week 16 players did sign up for the forthcoming one-day series against Kenya, contracts having been offered to 22 players (The Guardian of 9/2/2006, p. S2). This appeared to bring the issue of the outstanding financial claims to an end, even though some players still refused to sign contracts. Some of these players claimed that they were being subjected to police harassment, as witness raids on striking players Dion Ebrahim and Tatenda Taibu over their possession of ZC-sponsored cars (The Guardian of 16/2/2006, p. S2).

Incredibly, even worse news for Zimbabwean cricket was to come. With the one-day series against Kenya imminent, news transpired that the crisis affecting the domestic game had reached the point where nearly all “official” fixtures had collapsed. The only cricket to be played in the country at the time of current writing – apart from schools fixtures – seemed to be friendly games organised by an ever-dwindling number of die-hard cricket lovers. Ethan Dube, a respected former player, official and one of the selectors who fell victim to the Government-inspired “purge” described above, commented that he and others had made the mistake of “trying to keep things going these past two years”. Instead, he felt that all concerned should simply have walked away and let it collapse, so that a fresh start could be made with new administrators (The Daily Telegraph of 24/2/2006, p. S14).

Mr. Dube has assumed the temporary chairmanship of the second most important cricketing province, Metabeleland, because, as he put it, “there was no-one else to do it”. One of the many factors which, in addition to the troubles cited above, had caused such widespread demoralisation was the removal of the national coach, former West Indies batsman Phil Simmons, in August of last year (see [2005] 3 Sport and the Law Journal p. 48). Mr. Simmons also has claims for outstanding earnings against ZC, and at the time of writing was stranded in Zimbabwe as he is unable to join his family in London. Simmons was one of those who had backed the strike by the national squad. Another body blow to the domestic game was the decision by ZC Chairman Chingoka to expel all the clubs located in Mashonaland province, who have traditionally produced most of the country’s top players (Ibid). Fearing a revolt against their administration, Messrs. Chingoka and Bvute had created five new cricketing provinces – where the sport has never been practised and where there are neither cricket grounds nor players. The Mashona clubs have since been reduced to playing friendly fixtures between themselves (The Daily Telegraph, loc. cit.).

Nor does the financial position of the official governing body appear to have become any healthier or more transparent. According to its official balance sheet published last year, ZC should easily have had sufficient funds to cover all their obligations, both locally and internationally. However, they ran out of match balls for the series against Kenya, and were unable to fund the national squad for a match in South Africa some time previously (Ibid).

This column will naturally continue to monitor developments in this sorry saga in future editions of this Journal.

Iran friendless in international footballing community

As one of the countries branded as being part of the “axis of evil” according to the US President, Iran has been under increasing pressure from the international community in connection with its current nuclear programme. This seems to have had an impact on its sporting relations as well. As one of the countries which will contest the World Cup Finals in Germany later this year, it is keen to play a number of warm-up friendly fixtures, yet is experiencing considerable difficulty finding willing partners. Thus it was scheduled to play the Ukraine on 1 March, but the latter withdrew on the somewhat fanciful grounds that the flight to Tehran was “too long” (eventually, Costa Rica replaced them as
1. General

guest nation.) Two months previously,, Romania had also pulled out of a series of fixtures in Tehran. Mohammad Reza Pahlavan, the Secretary-General of the Iranian football federation, claims that there has been some “behind-the-scenes pressure” to prevent them from going ahead with their plans... *(The Sunday Telegraph of 12/2/2006, S12).*

Whatever the justification for such pressure may be, the Iranians scarcely helped their cause by their attitude towards the televising of the official draw for the World Cup. On the face of it, it seemed an innocuous enough event, featuring former Brazilian star Pele, several middle-aged FIFA officials and a bad Dutch magician. Nevertheless, the event was deemed “too immoral” to be shown live on Iranian television. In the subsequently censored version of the event, the supermodel who acted as co-presenter, Heidi Klum, was expunged after the Iranian censors decided that her low-cut dress was “too revealing”... *(The Guardian of 12/12/2005, p.14).”

“Ping-pong diplomacy” veterans return for anniversary (China/US)
One of the earliest examples of sport being used as a conscious medium for improving international relations occurred in 1971, when a series of table-tennis fixtures between China and the US was used in order to thaw relations between the two countries. To mark the 35th anniversary of this seminal event, US table tennis veterans were part of a delegation which visited China on a programme which included table tennis fixtures and discussions *(The Independent of 27/3/2006, p.27).*

Bush steps in to allow Cuban baseball team to play in US
Another country which has incurred the long-term displeasure of the US authorities is Cuba. This has not prevented baseball from being a popular sport in the Caribbean island, which in normal circumstances would make them natural participants in the 16-nation World Baseball Classic (WBC) tournament in the US. However, in a rare victory of sport over politics, the US authorities dropped their objections to Cuban participation, but only after a remarkable personal intervention by the leaders of the two countries, divided by economic sanctions imposed by Washington on the island for daring to depart from Western notions of democracy *(The Independent on Sunday of 22/1/2006, p. S43).*

In the first instance, Cuban leader Fidel Castro pledged to donate any profits made by Cuba from the event to the victims of Hurricane Katrina, thus complying with one of the conditions of the economic boycott, i.e. that Havana should not derive any financial benefits. For his part, President Bush, a lifelong fan of the sport and former managing partner of the Texas Rangers team, entered the fray and virtually ordered the US Treasury to reverse course. Officials in the US were keen to stress that this did not signify a change in sanctions policy (which, if anything, has tightened under the Bush regime). Nevertheless, Cuban-American politicians predictably condemned the lifting of the ban *(Ibid).*

Tillman affair may lead to criminal investigation
Previous issues of this Journal *(e.g. [2004] 2 Sport and the Law Journal p. 50)* have extensively documented the unedifying saga of Pat Tillman. To summarise the background to this affair, Mr. Tillman was a prominent American footballer for the Arizona Cardinals, who turned down a multi-million dollar contract to enrol in the US army, and was sent on active service to Afghanistan. For President Bush and his “war on terrorism”, this was a spectacular public relations coup. However, in April 2004 Tillman was killed whilst on patrol in the mountains of Eastern Afghanistan. The Pentagon immediately announced that he had perished whilst fighting the Taliban, Mr. Bush lauding his feat as “the ultimate sacrifice for the war on terror”. Mr. Tillman was also awarded a posthumous Silver Star. A few days later, the Army issued a press release describing how the former footballer was killed whilst storming enemy positions.

However, efforts by a number of brave journalists to establish the real circumstances in which he met his death revealed a totally different account. It now emerged that, far from dying in heroic anti-Taliban fighting, Mr. Tillman was killed by members of his own platoon who, in the nocturnal darkness, believed that he was attacking their positions. Having been informed of the true account of their son’s death, the soldier’s parents launched a crusade for an independent inquiry into the entire affair. Although initially the secrecy which is a hallmark of the Bush administration seemed to have doomed these demands to failure, a major breakthrough seemed to have been achieved in early March 2006, when it was announced that Mr. Tillman’s death was to become the subject-matter of a criminal investigation *(The Guardian of 9/3/2006, p. S7).* No further details are available at the time of writing.
1. General

Other issues

Major new Belgian work on the legal status of the sporting performer
In an important work on the subject, entitled Het statuut van de sportbeoefenaar naar international, Europese, Belgisch en Gemeenschapsrecht, (“The Status of the Sporting Performer under International, European, Belgian and Community Law”) the author, Professor R. Blanpain, exhaustively deals with the status of the professional and amateur sporting performer. In so doing, he assesses the compliance with various laws of existing rules applied by the sporting federations. In Part One, the author analyses the social and political background to sporting activity. The second part deals with the status of the professional sporting performer, in all its aspects – the legal capacity of the performer as an employee, the nature of the contract between players and clubs, the capacity of minor players to conclude a contract of employment, conditions of work, the disciplinary rules, the end of the contract of employment, training compensation, the competition clause, the status of the sporting agent, etc.

In Part Three, he examines the status of the amateur sporting performer. In so doing, he pays particular heed to the relations between the performer and the sporting federations, the degree of contractual freedom, including transfer fees, etc.

Irish sports law from a comparative perspective. Article in professional journal
A recent article entitled “Sport and the law in Ireland – a comparative analysis and review” ([2005] SLA&P April, p. 14-16) reviews the implications for Irish sport of prosecutions for assault committed on the sporting field, and the prospects of litigation against disciplinary or selection decisions made by sports governing bodies. It also compares the case law in various jurisdictions and describes the manner in which the Australian Football League uses its Disciplinary Tribunal in order to resolve conflicts rapidly and independently. It also suggests that legal exposure of sporting organisations can be minimised by the use of strict but impartial disciplinary and management procedures (European Current Law October 2005, p. 175).

Regulating professional sport (and more particularly football) in Poland. Articles in academic journal
In “Professional Sport in Poland – the role of legal regulations”, ([2005] 3/4 ISLJ 3/4., p. 31-33) the author, Marian Rudnik, discusses the regulatory framework governing professional sport in Poland, including rules on (a) professional sporting performers, (b) sporting companies, (c) sporting unions, (d) professional leagues, (e) professional groups, and (f) sporting events. He also considers the manner in which this legislation is likely to develop in the future (European Current Law February 2006, p. 144).

In “Current issues in Polish professional football”, ([2005] 3/4 ISLJ p. 34-37) the author, Andrzej Wach, discusses various aspects of the professionalisation of Polish football, including (a) developments in defining the employment status and contractual rights of professional footballers, (b) the football clubs’ increasing degree of participation in commercial activities, (c) the increasing significance of media contracts in the financing of the sport, (d) the increased use of arbitration in football-related disputes, and (e) the development of the disciplinary process (European Current Law February 2006, p. 140).
2. Criminal Law

Corruption in sport

German football match-fixing scandal – an update

It will be recalled from previous issues of this Journal (e.g. [2005] 3 Sport and the Law Journal p. 53-54) that, in one of the greatest scandals ever to besmirch German sport, a number of football referees had been found to be consistently fixing matches whilst in the pay of various sinister betting rings. Inevitably the matter aroused the interest of the German criminal authorities, particularly in relation to Robert Hoyzer, an officially-sanctioned referee driven to his deeds not only by a love of money, but also by the sense of power which he derived from them, who had defrauded various betting companies to the amount of €1,400,000. At the resulting trial, Mr. Hoyzer was issued with a two-year jail sentence after being found guilty of fraud.

However, no sooner had the dust settled on this tawdry affair than a new scandal threatened to engulf German soccer – and with it cast a murky shadow on the forthcoming World Cup tournament which the country hosts later this summer. In mid-March 2006, the news broke that four people had been arrested following an investigation into the activities of a group suspected of attempting to fix the results of German second division and regional league matches by offering thousands of euros to the players (Daily Mail of 11/3/2006, p. 113). Frankfurt state prosecutors announced that at least in one case, the payment was accepted (The Guardian of 11/3/2006, p. S4). A few days later, it was learned that Bavarian public prosecutors were also investigating reports of contacts between several Bundesliga players and a betting ring (The Guardian of 16/3/2006, p. S2).

Then the attention switched to the North of the country, more particularly the top Division One club Bayer Leverkusen, following reports that Cologne prosecutors were investigating claims that payments were made to fix three Bundesliga fixtures during the 2002-3 season. In the following season, it is claimed that £2.74 million had been written down to £1.78 million. At the time, of writing, it was as yet unclear whether any criminal charges would be brought. According to a spokesman for the Paris High Court:

“This is a preliminary enquiry that followed an accusation from the auditors charged with looking at the federation’s accounts. They thought some things in the accounts were not entirely regular. I cannot go into more detail” (The Guardian of 17/2/2006, p. S4).

Later, it also emerged that fourteen people had been committed for trial for alleged embezzlement at the top football club Olympique Marseille. The defendants, who include Club president Robert Louis-Dreyfus, face charges of embezzling £15.2 million in funds involving the transfer of 15 players between 1997 and 1999. The fourteen accused, who include former team manager Rolland Courbis, face a maximum of five years’ imprisonment and fines of up to €375,000 if convicted. Mr. Courbis’s lawyers were seeking testimony from two former players, ex-French star Christophe Dugarry and the former Middlesbrough player Fabrizio Ravanelli (The Guardian of 14/3/2006, p. 18).

This column will naturally continue to monitor developments in this affair with the keenest of interest.

Jack Warner cleared – but questions remain (Trinidad & Tobago)

In mid-February 2006, it was learned that FIFA vice-president Jack Warner risked being suspended from the world governing body in football after having been judged to have infringed the organisation’s code of ethics. More particularly it was being claimed that Mr. Warner was guilty of a conflict of interests after his family’s travel agency were awarded the rights to sell the entire World Cup ticket allocation given to Trinidad and Tobago (Daily Mail of 17/2/2006, p. 95).

However, the governing body once again displayed its reluctance to censure its senior members when its
2. Criminal Law

executive cleared Mr. Warner, who is also the President of Concacaf, of violating the FIFA code despite the circumstances described above. Earlier, the Ethics Committee had ruled that Warner was involved in a conflict of interests, but the Executive Committee disagreed on the grounds that, since then, he had sold his shares in the firm and removed his name, along with those of his wife and two sons, from the company register (The Guardian of 21/3/2006, p. S2).

Hann resigns before match-fixing hearing (Australia)
It will be recalled from a previous issue of this Journal (2005) 2 Sport and the Law Journal p. 55) that Australian snooker ace Quentin Hann had come under investigation by the sport’s governing body following allegations made in a newspaper that he fixed a match on the occasion of last year’s China Open. Journalists posing as front men for a gambling ring had covertly filmed Mr. Hann allegedly agreeing to fix the score in a particular fixture. Ultimately, no money changed hands, and the match was played normally, but the newspaper report resulted in disciplinary action being taken against him for bringing the game into disrepute (The Daily Telegraph of 15/2/2006, p. S17).

The hearing was originally fixed (!) for 29 November, but Hann successfully pleaded that he was too ill to attend. The hearing was postponed until mid-February, and a few days beforehand the Australian resigned his membership of the World Professional Billiards and Snooker Association (WPBSA), thus effectively ending his career. He also announced that he would be attending the hearing, and was found guilty in absentia. He was ordered to pay £10,000 costs and banned from attending the hearing, and was found guilty in absentia.

Belgian football match-fixing scandal
Belgium is the latest country in the sorry procession of nations where corruption is affecting the world’s most popular sport. In late March 2006, it was learned that the chairman and the legal advisor to La Louvière football club had been charged with financial misdemeanours as part of an investigation into what appears to be a major match-fixing scandal. Chairman Filippo Gaone and lawyer Laurent Denis were formally charged after police had raided 20 homes and offices, seizing documents, computers and mobile telephones. Five other people were also questioned. Thereupon the public prosecutor’s department (Procureur du Roi) brought charges of theft, fraud and forgery against Mr. Gaone, whilst Mr. Denis was accused of assisting the former in illegally channelling cash from La Louvière to Gaone-owned companies. Denis had been arrested after police spent more than four hours searching his office in Brussels, carrying away some 50 boxes and a laptop computer (www.news.findlaw.com of 29/3/2006).

For some months now, the Belgian media had made allegations of financial wrongdoings at La Louvière, which is a club having, officially, a budget of merely €2 million. In fact, the club’s earnings are much higher than this figure, but this is not reflected in the accounting records. The police raids in question were part of an investigation into claims that a Shanghai-based crime ring had paid considerable sums in order to fix important matches. Also questioned were the La Louvière manager, Chris Benoit, former La Louvière player Mario Espartero and players’ agent David Magri. Police have also questioned Chris De Nijn, the former chairman of Lierse SK, being yet another First division club caught up in an ever-widening scandal (ibid).

As a result of these raids and interviews, Belgian justice officials announced that Olivier Suray, a former La Louvière player, had admitted fixing a match which took place in Finland on 2 May 2005. This fixture generated unusually heavy betting at the request of Chinese businessman Zheyzuan Ye. Belgium accordingly issued an international arrest warrant for Mr. Ye as well as against an agent named Pietro Allata, alleging corruption, conspiracy, fraud, forgery and blackmail. The probe has by now spread to Luxembourg, where investigators were seeking to seize and block accounts held by both Allatta and Gaone (www.news.findlaw.com of 23/3/2006).

Thus far, the scandal has caused clubs to dismiss at least six players and coaches. As the news of these police operations broke just before this issue went to press, the full outcome of this affair is not yet known – nor is it likely to be for some considerable time. This column will naturally continue to monitor developments in this affair with the keenest of interest.

FIFA to demand that football clubs reveal details of their backers
Anyone who takes but a passing interest in the sport will have noticed a somewhat unhealthy trend in the manner in which it is currently being financed. It is true that wealthy business backers have been ploughing their cash into football clubs since the Edwardian novelist Arnold Bennett described this process in The Card. However, some of the figures who have been bankrolling major clubs in various countries – in many
2. Criminal Law

cases not the country of their birth or nationality – have given rise to some concern because of the controversial nature of some of their business dealings. More particularly, the activities of Chelsea owner Roman Abramovich and Portsmouth supreme Alexandre Gaydamak have aroused some disquiet (The Mail on Sunday of 19/2/2006, p. 127). (Mr. Gaydamak’s dealings will be examined in greater detail below, p.76.)

Naturally, this is not a development which has escaped the attention of the game’s official organs. More particularly FIFA, the world governing body in the sport, have been casting concerned glances at his trend, and in mid-February its Executive Committee was presented with a set of proposals following a report from a committee established in the wake of these growing concerns. This committee, which is headed by Mathieu Sprengers, President of the Netherlands FA and includes English Premier League chief executive Richard Scudamore, calls for increased financial transparency in the sport. English club Portsmouth are the likely to be affected in view of the reluctance by its chairman, Alexandre Gaydamak, to reveal details of the way in which he funded his £15 million takeover of the club (see below, p.76).

FIFA’s action was inspired in part by the £30 million investment in Brazilian club Corinthians by Iranian-born Kia Joorabchian, who is linked to Roman Abramovich’s former business partner, Boris Berezovsky. The latter is wanted for fraud in Russia, but was granted asylum in Britain. Concerns were also raised that CSKA Moscow are sponsored by the major oil giant Sibneft, which was, until last year, a company owned by Mr. Abramovich, although since then UEFA, the European governing body for football, has cleared the Russian magnate of any conflict of interest. Another factor behind Mr. Sprengers’s inquiry was a series of reports which had surfaced in the Netherlands that Chelsea FC were forging links with PSV Eindhoven, and were paying a proportion of the salary earned by PSV’s Brazilian defender, Alex. However, spokesmen for both Mr. Abramovich and Chelsea FC have denied that the former has any connections to Joorabchian or is attempting to make any serious investment in PSV (Ibid).

Canadian ice hockey supremo’s gambling connections questioned

Ice hockey is a major sport in Canada, and at the 2002 Olympic Games its national team won gold for the first time by beating the US 5-2 in Salt Lake City. This victory was attributed largely to the team’s executive director, Wayne Gretzky. However, as the side started to play the opening fixtures at this year’s Winter Olympics in Turin in order to defend their title, Mr. Gretzky became enmeshed in controversy when it was alleged that his actress wife, Janet Jones, had placed a $5,000 bet on which side would win the pre-match coin toss at the American Football Superbowl the previous month. This was one of several bets known to have been placed by her with a gambling syndicate which has been linked to organised crime (The Guardian of 16/2/2006, p. S9).

Mr. Gretzky himself was quite unfazed by this news, declaring that he himself was not involved and that therefore he considered the affair over and done with. However, the underworld links of the betting ring continue to cause concern. In addition, the news came as a particular embarrassment for the Canadian team because, during a speech held the previous week, the President of the International Olympic Committee (IOC), Jacques Rogge, had chosen to focus on the dangers and evils of gambling. However, there were also suggestions that the affair had been orchestrated by the US media to unsettle the Canadian team in their bid to retain gold in Turin (Ibid).

Korean IOC member suspended

South Korea is developing an unenviable reputation as far as its representatives on the International Olympic Committee (IOC) are concerned. In a previous issue of this Journal ([2004] 2 Sport and the Law Journal p. 54) it was reported that that Kim Un-Yong, the former IOC Vice-President, was found guilty of having embezzled the sum of £1.5 million which had been originally donated to the sporting organisations operated by him, as a result of which he resigned from the Committee. Now it has been revealed that his fellow-countryman, Park Yong-Sung, also an IOC member, has been suspended from the Committee pending the final outcome of corruption charges brought against him. In February 2006, Mr. Park was convicted of embezzling millions in a family feud over control of the Doosan Group, being South Korea’s oldest conglomerate (The Daily Telegraph of 16/3/2006, p. S18). No further details are available at the time of writing.
2. Criminal Law

Cricket corruption scandal – an update

Judge influenced by admiration for Wasim
It will be recalled from a previous issue of this Journal (I[2001] 2 Sport and the Law Journal p. 18) that, as it became clear that cricket corruption had also affected the game in Pakistan, Justice Malik Mohammad Qayyum had been appointed to investigate the conduct of several international players, including Saleem Malik, Ata-ur-Rahman and Wasim Akram. Whereas the former two were banned from the game for life, Wasim, the former pace bowler for Pakistan and Lancashire, merely received a fine. Five years on, Mr. Qayyum has admitted that his treatment of Wasim may have been affected by his admiration for the all-rounder, who retired from international cricket in 2003, in the following words:

“I had some soft corner (sic) for him [Wasim]. He was a very great player, a very great bowler and I was his fan, and therefore that thing did weigh with me. I didn’t want that cricket should be deprived of his participation and the other was that towards the end of his career, [I didn’t want him] banned or something like that” (The Guardian of 13/1/2006, p. S10).

At the time of the enquiry, Mr. Qayyum had stated that Wasim could not be “said to be above suspicion” but gave the latter the benefit of the doubt after Rahman had changed his testimony. Mr. Qayyum also criticised the popular perception that it was the Indian sub-continent which was the focal point for match-fixing, alleging that the region was becoming the scapegoat for this problem (Ibid).

Hansie Cronje biography published
One of the central figures in the corruption scandal which has engulfed cricket these past few years is the former South African captain Hansie Cronje, who received a life ban in 2001 for his dealings with various bookmakers of ill repute and his attempts to induce team-mates into underperforming in international fixtures (see e.g. [2001] 3 Sport and the Law Journal p. 24-25). In what some people rather apocalyptically described as an act of divine retribution, Mr. Cronje lost his life in a plane crash four years ago.

It was inevitable that a biography would follow, and this has arrived in the shape of The Hansie Cronje Story by Garth King, with a foreword by the cricket’s brother, Frans (reviewed in The Independent of 13/2/2006, p. 63). This assumes the form of a straightforward, if at times sentimentalised, account of the cricketer’s life – although it does not seek to gloss over the seriousness of the actions which led to his downfall. This is a biography which was obviously authorised by his family, who allowed this to be an objective study not only of Mr. Cronje but also of themselves. Nevertheless, it does little to shed further light on the actual scandal itself, and it is hard to escape the conclusion that the full truth of this tawdry affair will probably never be fathomed...

(For the story on the formal inquest into Mr. Cronje’s death, see below, p.79)

Hooliganism and related issues

Rangers fans cause trouble in Spain...
Glasgow Rangers have made but humble progress in the various European competitions in recent years, and there was little improvement in their record as a result of the 2005-6 campaign. However, they went out to Spanish side Villarreal on honourable terms, losing only as a result of the “double away goals” rule. Much less honourable was the performance of some of their supporters during the return leg in Spain. Before the kick-off, Spanish police had to arrest eight “fans” in nearby Benidorm as violence erupted in which it was reported that stones, bottles and glass were hurled at police. Visiting supporters were also blamed for attacking the Villarreal coach as it approached the stadium before the match. None of the players were injured, but a window was smashed as the coach wound its way through the narrow streets leading to the ground (The Guardian of 8/3/2006, p. S4).

At the time of writing, the European governing body in the sport, UEFA, was investigating the full circumstances in which the incidents occurred. However, in the best of British traditions, the Rangers' officials chose to criticise their hosts by questioning the security arrangements for the game. It is estimated that 15,000 Rangers fans travelling across to Spain, the official ticket allocation being restricted to 3,000. Thousands of Scottish fans gained admission at the home end, which Rangers safety chief attributed to “poor stewarding” and the police being taken by surprise (The Independent of 11/3/2006, p. 73). The thought that Rangers fans might have obtained these tickets on the black market obviously never occurred to Mr. McIntyre. The full outcome of the UEFA inquiry was not yet known at the time of writing.
2. Criminal Law

.... but Spanish football has hooligan problems of its own

The violent incidents reported above should not, however, blind the Spanish football authorities to the problems which hooliganism is continuing to cause domestically or to the criticism to which they expose themselves by the leniency of their penalties. Thus in a fixture between top sides Atletico Madrid and Seville, the game was halted after supporters pelted the players with missiles. These included a half-full beer can which struck the Seville goalkeeper Andres Palop on the head, and a whisky bottle which narrowly missed him. The missile-throwing had been prompted by the award of two penalties to the away side, and a sending-off and disallowed goal on the part of the home side. Nevertheless the host club not only escaped ground closure but were merely issued with a €3,000 fine (The Independent of 25/3/2006, p. 71).

This was in fact the second serious incident to occur in Spain this year. In January, a King’s Cup fixture between Valencia and Deportivo La Coruna was stopped after an assistant referee was struck by a coin. The referee immediately collected the match ball and ordered the players to the changing rooms. The remaining 46 minutes were played behind closed doors, which was the only penalty imposed by the authorities – once again displaying their lax attitude towards such incidents (The Daily Telegraph of 26/1/2006, p. S7).

Ajax fans riot in The Hague

Dutch football fans are normally not the most violent of creatures, but here again, an obnoxious minority have been known to cause mayhem both inside and outside the stadiums. Particularly the fans of top Amsterdam club Ajax have made themselves notorious in this respect, and they were at it again before an away fixture with ADO Den Haag (The Hague) in mid-February 2006. Around 70 hooligans went on the rampage through the Netherlands capital, and police reported that eight people were injured after Ajax supporters had forced their way into inside an ADO supporters’ clubhouse. The violence had erupted at 11 pm, and it took four hours for calm to be restored. Ten suspects were arrested, and Ajax fans were banned from the ADO ground for the match itself (The Sunday Telegraph of 12/2/2006, p. S6).

Russian fans “modelling themselves on English hooligans” – report

When, as was reported in these columns ([2002] 2 Sport and the Law Journal p. 28), a number of people rioted in Moscow in the wake of their national team’s humiliating exit from the World Cup finals in 2002, this was widely dismissed as a one-off aberration in an otherwise placid society. However, events since then have revealed a worrying trend among the more extreme followers of football in the former Communist country, with widespread evidence of the emergence of what are known as soker kezhuali – i.e. soccer casuals, modelled (if indeed this is the correct term to use) on the antics of the less respectable football spectators in this country.

Not only are teenagers saving for Lacoste T-shirts and Burberry caps (with internet chatrooms discussing what it means to be a “chav”). More worryingly, supporters’ “firms”, such as the Mad Butchers and the Gladiators, which echo the Chelsea Headhunters and West Ham’s ICF, are arising at every major football club, and pirate copies of Green Street, the Hollywood film about hooliganism, are selling like the proverbial incandescent confectionery at Moscow kiosks. Some of these firms even fly “hooligan consultants” over to Russia from places like Millwall. It appears that, in the early 1990s, many fans had toyed with the Italian “performance” style of supporting teams, using drums and flares. However, after seeing such seminal films as The Firm and Football Factory, many of them rejected this approach in favour of imitating hardcore English supporters. The result has been sheer mayhem (The Observer of 12/2/2006, p. 42).

As a consequence, the forces of law and order have struggled to contain the resulting growth in hooligan violence. In December 2005, police in St. Petersburg fired automatic weapons in the air after running battles with Zenit fans – known as the Nevsky Front – near St. Isaac’s cathedral. Over 50 supporters were detained and six police officers needed hospital treatment. An even more sinister side to the growth in Russian hooliganism is the racism inherent in its core beliefs, as witness the fact that many of them are skinheads known for attacking dark-skinned immigrants (Ibid). Clearly, the public authorities will in future have regular confrontations with this problem, which shows no sign of going away.
2. Criminal Law

Hooligans attack manager of defending Croatian league champions

In mid-March 2006, the manager of the defending Croatian league champions, Hajduk Split, was taken to hospital after a brutal assault by two unknown assailants. Luka Bonacic, the coach in question, incurred severe wounds to the head and other parts of the body after two people assaulted him with a baseball bat and a metal beam in the lobby of his flat in the southern city of Split. Television footage of the crime revealed numerous patches of blood spread across the entrance to the building. Mr. Bonacic had to remain in hospital with mild concussion and severe bruising (www.news.findlaw.com of 16/3/2006).

According to Marijana Kralevic Gudlej, a regional police spokesperson, the motive for the assault was unknown. However, there is strong media speculation that the manager was targeted by violent “supporters” after he had defended his players following an indifferent performance in a League fixture at the weekend. More particularly he stated that if anyone wished to attack the players, they would first have to turn on him (Ibid). No further details are available at the time of writing.

The EU and football hooliganism. Article in academic journal


Injuries and arrests in weekend of clashes between “fans” of Tunisian clubs

In late March, a band of stone-throwing and club-wielding followers of rival Tunisian football clubs clashed, wounding several people including a young girl, according to Tunisia’s official press agency. The clashes were between “fans” of Etoile Sportive du Sahel (ESS) and Espérance Sportive de Tunis (EST), who also damaged various vehicles. The two clubs are one point apart in the top division, and animosity between the two clubs has been growing of late (www.news.findlaw.com of 27/3/2006).

Two groups of supporters had crossed each other on the way home from matches involving the clubs, and clashed on a highway 70 miles south-east of the capital Tunis. Among the injured was a girl who was taken to hospital. In addition, a number of private and public vehicles were damaged, including a truck belonging to the Tunisian Radio and Television Service. Various arrests were made as police checked cars for stones, bottles, bats and other weapons (Ibid).

Trouble flares at AS Roma fixture (Italy)

In late January, violent altercations occurred before the game between AS Roma and Livorno in the Italian First Division (Serie A). Roma fans clashed with police as they attempted to attack coaches transporting Livorno fans. Three people were injured in the clashes, and police also seized six petrol bombs near Roma’s Olympic Stadium.

(This fixture was also notorious for the Fascist imagery on display – see below, p.74)

“On-field” crime

“L’affaire tennis” results in jail sentence for manslaughter (France)

The issue of “sporting parents from Hell” has already been adumbrated in these columns (see [2005] 2 Sport and the Law Journal p. 60). However, until recently such excesses have been restricted to relatively minor incidents, confined mainly to verbal abuse rather than physical injury. All this has been changed by an extraordinary and tragic case in France, which has recently seen the father of two talented young tennis players jailed for manslaughter.

For the ex-military officer Christophe Fauviau, tennis was more than just a sport, particularly whenever his children, Valentine and Maxime, were on court. He invariably sought to ensure that they won by fair means or foul, often going so far as to poison their opponents with sedatives. This tactic went fatally wrong in one case, when the opponent in question died after losing control over his car driving home from a fixture. Following a two-year investigation, Mr. Fauviau was charged with manslaughter. Police has started investigating when a young player noticed Fauviau allegedly tampering with his drink bottle shortly before he was to face Maxime in the semi-final of a local tournament. The player decided not to consume the water and, after having lost the match, handed over the bottle to police for analysis (The Guardian of 1/3/2006, p. 17).
2. Criminal Law

The following day, Maxime’s opponent in the final became ill after the match and was taken to hospital, where he had to remain for several days. Tests carried out on his water bottle revealed traces of Temesta, and antidepressant which induces extreme drowsiness. Before the police had completed their inquiries, Alexandre Lagardère, a primary school teacher, withdrew from a fixture with Maxime in July 2003 midway after complaining that he felt too exhausted to continue. Thus Maxime won the tournament by default, and whilst driving home, Mr. Lagardère’s vehicle left the road, as a result of which he was killed. The post mortem examination identified traces of Temesta. Thereupon Col. Fauviau was arrested as he returned from a tournament in Egypt with daughter Valentine. Under questioning, he confessed to having drugged not only Mr. Lagardère, but also two other players. As news of his arrest spread, many players came forward alleging that they too had suffered the same symptoms after matches, including abnormal tiredness and vision problems (Ibid).

Col. Fauviau later went on trial before the Cour d’assise at Mont-de-Marsan, The court heard from Col Fauviau’s wife, Catherine, that neither she nor the children had any notion that opponents were being drugged. She maintained that her husband was a good father but had “cracked” over the tennis talents of his children. Ultimately it was she who accompanied the children to tournaments because he could no longer bear to witness the matches. She also claimed that her husband’s problems were linked to conflicts with the tennis league over Valentine’s training. The latter – who since the arrest took place has continued to play exceptionally well – informed the Court that she did not need her father’s assistance to win matches, adding that he must have committed the indicted acts “out of love” (The Guardian of 10/3/2006, p. 14).

Ultimately, Col. Fauviau was jailed for eight years, although he had risked a maximum of 20 years’ imprisonment. The public prosecutor (Ministère public) had merely demanded a sentence of 8-10 years on the grounds that he had been a good soldier and had not intended to cause permanent harm to his victims. However, he denounced Col. Fauviau in the most savage terms, describing the pitiless way in which the latter saw an 11-year-old girl stretchered away and a young woman collapsing against the fence (The Independent of 10/3/2006, p. 22).

Another “tennis dad from Hell” threatens to “kidnap and kill” (Australia/Serbia)

Exactly what it is about the sport of tennis that drives some performers’ relatives into near-insanity is a matter best left to the psychiatric profession. However, as the case described above horrifically illustrates, the excesses in which they engage can descend into downright criminality. This would well be the case for Damir Dokić, the eccentric progenitor of tennis star Jelena Dokić. Born in Serbia, Ms. Dokić moved to Australia in 1994. As her career progressed, her father’s antics tested the patience of tournament organisers on the tennis circuit. He was expelled from Wimbledon in 2000 for stamping on a journalist’s mobile phone, and was banned from the tour for six months following a tantrum about the price of salmon at the US Open. In 19990, he was found in the middle of the road drunk after having been ejected from a tournament in Birmingham (The Independent of 20/1/2006, p. 65).

Seven years later, after losing the first-round tie in the Australian Open to Lindsay Davenport, Jelena Dokić switched her allegiance to the country of her birth, after Dokić Sr. had accused tournament organisers of rigging the draw. However, a few years after her return to Serbia, father and daughter fell out again, and Dokić Jr. returned to Australia. This news was not well received by her father, who, in an interview with the Serb newspaper Kurir, threatened to kidnap his daughter and kill an Australian. He also apparently informed the newspaper that he would wreak revenge by dropping a nuclear bomb on Sydney (Ibid). The latter claim may seem a little fanciful, but the criminal authorities may conceivably take an interest in the other threats. No further details are available at the time of writing.

Di Canio may face court action after being banned for Fascist salute (Italy)

Under the Italian constitution, making fascist salutes is illegal, which may lead to the prosecution of one of the country’s most senior professional footballers, Paolo Di Canio. It will be recalled from a previous issue of this Journal (2005) 1 Sport and the Law Journal p. 95) that, in January 2005, Mr. Di Canio, who now plays for Lazio Roma after several years in the English leagues, chose to engage in this activity when celebrating his side’s victory in a local derby with arch-rivals AS Roma. Inexplicably, no prosecution was brought against the player on that occasion (although he was fined £10,000 by the Italian Football Federation). However, Mr. Di Canio repeated the outrage nearly a year later in a fixture at Livorno, whose fans are well-known for their Left-wing sympathies.
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Having been substituted in the second half, Di Canio proceeded to the touchline and gave the infamous salute. Lazio fans responded by waving “white power” banners. By way of reaction, Livorno fans chanted left-wing slogans and clashed with the constabulary. A police officer taken to hospital during the match required eight stitches after having been struck on the head with a stone (The Independent of 13/12/2005, p. 77).

As was to be expected in Italy, it was not long before the matter assumed an explicitly political dimension, with prominent politicians weighing in on both sides. In the first instance, the Prime Minister, media magnate Silvio Berlusconi, defended Di Canio’s right to give the salute, and suggested that Fascism was not as reprehensible as Nazism or Communism. He dismissed the player’s gesture as having no significance, describing Di Canio as an exhibitionist and a bravo ragazzo (good lad) (The Times of 22/12/2005, p. 38). On the other hand, Amando Cossuta, the President of the Italian Communist Party, called for a prosecution against Mr. Di Canio (The Independent loc. cit). At the time of writing, it was not yet known whether the Italian public prosecutors will institute proceedings (although knowing the levels of defilement achieved by football in Italy the present author is not holding his breath).

However, the football authorities took the matter seriously. The Italian Football Federation issued the player with a one-match ban and fined him €10,000 (The Guardian of 24/12/2005, p. S4). In addition, world governing body FIFA ordered the Italian Federation to communicate various files relating to the incident, in an attempt to establish the extent to which the gestures in question infringed not only the FIFA code of ethics, which entered into force two years ago, but also various disciplinary provisions (The Daily Telegraph of 23/12/2005, p. S7). Thus far, however, no action seems to have been taken at the FIFA level.

Mr. Di Canio, for his part, announced his intention to appeal against the disciplinary measures imposed on him, justifying his actions in the following terms:

“I am a fascist, not a racist. I give the straight arm salute because it is a salute from a camarata to camarati [the Italian words for members of Mussolini’s movement]. The salute is aimed at my people. With the straight arm I don’t want to incite violence and certainly not racial hatred” (The Guardian of 24/12/2005, p. S4).

In spite of this, Mr. Di Canio pledged to desist from making the contentious gesture “for the moment”, having had time over the Christmas break to reflect and “put the interest of Lazio” before his own. Ominously, however, he added that he would continue his battle for “liberty, with the help of the lawyers who assist me” (The Guardian of 5/1/2006, p. S2). The following month, Di Canio received a request from the Mayor of Rome, Walter Veltroni, to meet a number of his compatriots who had survived the Nazi death camps. Mr. Veltroni had been particularly shocked to witness the presence of swastikas during the fixture with Livorno at which Di Canio gave the salute. He said he wanted to give the players and officials involved an opportunity to learn about the seriousness directly, in the words of those who suffered at the hands of right-wing extremists (The Guardian of 11/2/2006, p. 16). Whether this will suffice to prevent Mr. Di Canio from repeating his controversial gestures is another matter...

Other manifestations of Fascists and Nazi football connections...

It would be pleasant to report that the incident involving Di Canio described above was an isolated aberration. However, there have been several reports of other ways in which this disreputable practice has manifested itself in the guise of supporting a football team. AS Roma, the arch-rivals of the club which employs Mr. Di Canio’s services, often contrasted with Lazio on account of its more “liberal” credentials, yet during an Italian First Division game – once again, coincidentally or not, against Livorno! – Nazi swastikas were on display among Roma fans. Even more outrage was caused by a banner stating “Lazio-Livorno, same initial same oven”. Jewish groups hit out at the banners, which appeared only days after Holocaust Remembrance Day. It is not known whether any criminal charges resulted from this incident (The Daily Telegraph of 30/1/2006, p. S14).

Earlier that month, police in Austria were investigating allegations that photographs (now removed) on the Internet had displayed teenage supporters of a football club in Adolf Hitler’s home town of Braunau, raising their arms in a Nazi salute. The pictures, taken two years ago, were displayed on the fan club’s website until last year. Club officials have apologised in the meantime (The Independent of 10/1/2006, p. 20).

Finally, a Dutch company marketing orange-coloured helmets having the same shape as those worn by German soldiers in World War II, and aimed at Dutch football fans visiting Germany for the 2006 World Cup, has caused some upset among the football authorities
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(although it remains to be seen whether they will give rise to any criminal prosecutions). The website which advised fans to wear the helmets in “battalions” claimed to be aimed at “poking a bit of fun” at the country’s arch-rivals” (The Daily Telegraph of 11/1/2006, p. 14).

“Basketbrawl” offenders convicted (US)

It will be recalled from a previous issue of this Journal (2005) 1 Sport and the Law Journal p. 59] that, in mid-November 2004, there was a violent incident in an US basketball fixture between Detroit Pistons and Indiana Pacers. Players fought with spectators after visiting player Ron Artest was hit on the head by a cup of ice hurled by a spectator. The main accused of sparking off the riot, John Green, was convicted of assault for having punched Mr. Artest – although he was cleared of having thrown the cup at the Pacers player. Mr. Green subsequently stated that he would appeal against the conviction on the grounds that Mr. Artest did not attend the trial. The players involved in the brawl – Artest, Johnson, Harrison, O’Neal and Jackson – were all sentenced to probation and community service (www.news.findlaw.com of 27/3/2006).

Rally driver found guilty of involuntary wounding. French court decision

Whilst taking part in a car racing event, a pilot had lost control over his vehicle and injured five spectators. The route on which the event took place had been closed to traffic. Nevertheless, a number of spectators had ignored the risks which are inherent in car racing and had advanced to a point which was very close to the circuit. The road at that point was both wet and greasy, and the driver was riding at a speed of 140 kph. In a bend, he unexpectedly encountered a hump and lost control of his vehicle, which then struck the five victims of the accident. The Court of Appeal had held the driver guilty of criminal negligence, and the Supreme Court confirm ed the Court of Appeal in its decision. Neither of these two arguments were upheld by the Court, which held that rallying drivers were subject to the ordinary law of the land by express reference to one of the reasons give by the Court of Appeal of Besançon (in the decision appealed against), which was that the driver had left the road because of his excessive speed on a wet and greasy road. This rendered him unable to take a bend made dangerous by the hump, whose presence could have been detected by appropriate reconnaissance of the itinerary. As a result, the driver was guilty of criminal negligence, and the Supreme Court confirmed the Court of Appeal in its decision.

In an annotation to this decision, the author poses the question whether it should be concluded from this decision that rallying drivers are strictly subject to all the rules governing ordinary motorists. His reply is in the negative, citing Supreme Court case law which, although it does not require such drivers to observe the ordinary speed limits, the still imposes on the latter a duty to take account at all times of his possibilities and that of his vehicle (e.g. Decision of the Supreme Court dated2/10/1980, Bull. Civ II, 1980 p. 135).

Vets and pharmacist who drugged horse with Viagra arrested (Italy)

It is sometimes mischievously suggested that the stimulant Viagra makes stallions out of men. This dictum appears to have been taken a trifle too literally by a number of Italian citizens who sought to influence the outcome of various horse races by administering this drug to the mounts in question. In late February 2006, two veterinary surgeons and a pharmacist were arrested by police in Naples over such allegations, as part of a wider investigation into clandestine racing and betting in southern Italy. Police also stated that several horse owners and jockeys had also been arrested (The Guardian of 28/2/2006, p. 17).

The public prosecutor’s department (Ministero pubblico) of Naples has for some time now been attempting to stamp out illegal horse racing, which takes place on public racecourses after normal hours of business and attracts hundreds of gamblers. Often stolen horses are used, and some are fed various dubious substances, of which Viagra is just one. A police spokesman said that all those rounded up during the raids had been suspected of being part of an organisation which operates secret races all over the Campania region, and
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which had offshoots in such places as Sicily and Emilia Romagna. Police have thus far seized property worth over £3 million during the raids. Last year, police confiscated 80 horses and closed a racing track which had been constructed without planning permission (ibid).

“Off-field” crime

The Gaydamak affair (France/UK/Israel)
Attention has already been drawn earlier (above, p.69) to the concern expressed by football world governing body FIFA that as much transparency and probity as possible should exist in relation to some of the major financial backers of top football teams throughout the world. Some of these concerns have stemmed from the background of certain foreign backers of English football clubs, with Chelsea owner Roman Abramovich being an obvious case in point. However, concern has also arisen over the financial circumstances surrounding the backer of a less celebrated, but nevertheless top level- football club in the English Premier League, i.e. Portsmouth.

The New Year 2006 was hardly a few days old when “Pompey”’s chairman, Milan Mandaric, announced the sale of 50 per cent of his shares in the club to Alexandre Gaydamak, the businessman son of a Russian billionaire. Mr. Gaydamak jr himself is a French citizen who announced that he was relocating to the UK because of certain “problems” which his family were experiencing in France. These “problems” were surely not unrelated to the fact that, in course of 2000, Mr. Gaydamak Sr. was implicated in the alleged sale of almost £300 million worth of arms to the government of Angola, in violation of an embargo against that country. The French Government issued an international warrant for his arrest for alleged tax evasion and arms dealing. Although it was his son, a multi-millionaire businessman in his own right, who acquired the shareholding in the Hampshire club, the deal was certain to come under close scrutiny from the British Government. UK Sports Minister Richard Caborn has recently been in the vanguard of a Council of Europe group aimed at regulating football across the continent, and would obviously be keen to ensure that Mr. Gaydamak Jr met all the criteria of the English Premier League’s suitability test for club directors (The Guardian 3/1/2006, p. S2).

 Barely 24 hours after this announcement was made, it emerged that Arkady Gaydamak had been questioned by Israeli police investigating international money laundering deals. The interview, held in Tel Aviv, gave rise to speculation that Mr. Gaydamak Sr – who himself had several sporting ventures in Israel, including purchasing the Betar Jerusalem football club and financing the basketball club Hapoel Jerusalem – could himself stop supporting various sporting and charitable projects. After having been summoned by police, Mr. Gaydamak Sr issued a statement announcing that he was suspending all charitable contributions until a final decision was made by the Israeli authorities concerning the sources of his income (The Independent of 5/1/2006, p. 71).

Mr. Gaydamak Jr. ruled out any repercussions from this affair for his own position. On the subject of the sources of his income, the French/Russian passport holder has always maintained that he had made his own money through “brokerage and banking”, and insists that his father’s business interests and his were totally separate issues. However, it has since emerged that seven of the companies which he has in Britain have been dissolved, with one of them, Monarch Fiduciary, being alleged to owe HM Customs and Excise the sum of £250,000 (The Independent of 7/1/2006, p. 78). This cast doubts on whether Mr. Gaydamak Jr would ever become a Portsmouth director as well as investor, as had been announced the previous weekend, since in that case he would have to meet the “due diligence” test set by the English Premier League as to whether he is a fit and proper person to own a football club (The Daily Telegraph of 10/1/2006, p. B5).

The entire issue seemed to have died down somewhat, until the money-laundering accusations levelled at Arkady Gadaymack once more became newsworthy a few months later. In late March, Israeli police recommended bringing charges against Gaydamak Sr. after concluding their investigations into his business dealings, and advised Israel’s Attorney-General to bring him to trial. It appeared that hundreds of millions of dollars had been transferred through a Tel Aviv bank account from all over the globe. Once again, Mr. Gaydamak Jr stressed that his earnings were totally independent of any business dealings of his father’s. However, it did nothing to dispel the aura of controversy which surrounded the Franco-Russian dealer (The Guardian of 24/3/2006, p. S5).

Female wrestler faces trial over mystery killings (Mexico)

In late January, a female former professional wrestler was arrested on suspicion of being the mystery “little old lady killer” who has been stalking Mexico City lately, killing 10 victims. Investigators had said that they were seeking either a cross-dressing man or a robust woman who strangled elderly women with stockings or telephone cables. It emerged that the killer might very
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well belong to the former category when police announced that they had caught Juana Barraza fleeing a murder scene. They claim to have sufficient evidence to conclude that she is the killer in question who has terrified elderly residents in the Mexican capital over the past two years. She was arrested minutes after Ana Maria Reyes was found strangled in her home, and it is claimed that she confessed to the killing as she was led away by police (The Independent of 28/1/1006, p. 32).

Although she admitted to this murder, Ms. Barraza insisted that there were "several of us involved in extorting and killing people". Nevertheless, the Chief Prosecutor for Mexico City, Bernardo Batiz, claimed that Barraza's fingerprints matched those of 10 similar murders and one attempted murder. The killings commenced in 2003, although the police did not publicly admit to the presence of a serial killer until last year. They also claimed that Ms. Barraza was found with a list of names and addresses of elderly women who subscribed to a Government assistance programme, as well as a forged identification from that programme and an instrument to measure blood pressure. When valuable possessions were taken in certain cases, police detectives had paid greater attention to the trophy-like religious objects which disappeared from the scenes, such as images of saints, crucifixes and bibles (The Guardian of 27/1/2006, p. 20).

At the time of writing, the outcome of the inevitable trial was not yet known.

Maradona's brushes with the law continue... (Argentina/Brazil)

Diego Maradona, the former renowned Argentina striker, has, both during and after his footballing career, crossed swords with the forces of law and order. When playing in Italy he was involved in a drugs ring, and, as was reported in these columns at the time, four years ago he was jailed for two years for firing shots at a group of journalists in Buenos Aires (see [2001] 1 Sport and the Law Journal p. 18). It seems that Mr. Maradona is intent on continuing this sad record, if recent events are anything to go by.

Just before Christmas 2005, he took part in a charity match in Brazil. Having arrived late for his flight home and found the gate shut, he became agitated after being told by staff that he could not board the flight. He was arrested after it was alleged that he started to destroy part of the VIP area, which included breaking down a door (The Independent of 23/12/2006, p. 22). He was later released and allowed to fly home, but claimed that a Brazilian police officer pointed a gun at his head during the arrest. The offence of which he is accused is punishable by a maximum jail sentence of two years, and Maradona was only released after signing a legal document committing him to return for any subsequent legal proceedings (The Independent of 24/12/2005, p. 54). The outcome of this case is not yet known.

The following month, the former football star was in trouble again, having been accused of throwing a glass during a scuffle in a nightclub. The glass hit a French Polynesian beauty queen, who later filed a police complaint for assault. Maradona later paid the alleged victim the sum of £3,000, after which she dropped the charges (The Daily Telegraph of 27/1/2006, p. 20).

Criminal libel charges brought against Lance Armstrong (Italy)

Seven-times Tour de France winner Lance Armstrong is no stranger to these columns, but hitherto his involvement with the law has been confined to the civil. This is no longer the case as a result of recent developments in Italy. In an interview with Mr. Armstrong in the leading French newspaper Le Monde in 2003, he had branded fellow-cyclist Filippo Simeone a liar. Mr. Simeoni had given evidence in a trial of Armstrong's former coach Michele Ferrari, in which the former claimed that the latter had issued the Texan with doping substances (The Guardian of 15/12/2005, p. 52). This was deemed sufficiently serious for criminal proceedings to be instituted against Mr. Armstrong, starting with a preliminary hearing in Latina, near Rome. The US rider lost this hearing, and will therefore have to go on trial for criminal defamation later this year (The Daily Telegraph of 15/12/2005, p. S6). Mr. Armstrong will not be compelled to attend the trial, but could be issued with a jail sentence of 1-6 years if found guilty (The Guardian loc. cit.).

The outcome of this case was not yet known at the time of writing. The Armstrong/Simeoni affair has also had legal consequences in the French courts, at the civil level (see below under Unit 4, p. 91).

Kenyan runner leads campaign against cattle rustling

One of the plagues of life in the frontier country of Northern Kenya is represented by the nightly raids made by warring tribes in order to steal each other's cattle. This is one of the country's most impoverished areas with very few employment opportunities, as a result of which most young men become warriors who help their tribe in this rustling process. These raids have recently become increasingly deadly, and in July 2005 22 children were
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killed in clashes on the Ethiopian border, which naturally is of considerable concern to the Kenyan government. They will be assisted in their campaign to put an end to this strife by some of the country’s leading athletes, i.e. marathon runners who train in the thin air of the Northern highlands. Many of them have established training camps in some of the most inhospitable districts of the area and are seeking out talented athletes among the local inhabitants (The Independent of 28/12/2005, p. 24).

One of the most active members of this laudable campaign is Tegla Loroupe, twice winner of the New York marathon. Born in the troubled West Pokot area, she grew up among the cattle rustlers which made the district a no-go area for officials and police officers. She spent her formative years training barefoot on rocky trails before taking up running professionally. She has set up a foundation which provides training in athletics for teenagers who otherwise would turn to cattle-raiding. This foundation organises “peace races” in Kenya, Uganda, Sudan, Ethiopia and Somalia, with a view to bringing together warring communities. These races assist with the process of raising cash for the more talented athletes. Already they have become a national institution, attended by international scouts who take the winners away to professional training camps. It is estimated that poverty in this region will become more acute in the foreseeable future, which makes programmes such as these more indispensable than ever before (ibid).

Boxer pleads guilty in sportswriter death case (US)

James Butler, a US boxer who fought under the nickname “The Harlem Hammer”, is one of the many transatlantic sporting figures to have found himself at odds with the criminal authorities in recent times. In late March he pleaded guilty to voluntary manslaughter and arson charges, as a result of the death of freelance sports writer Sam Kellerman. The latter’s body was discovered in his Hollywood apartment on 17 October 2004, although the authorities believe that he was killed five days earlier. He had been bludgeoned around the head about 30 times whilst sitting at his desktop computer. A hammer was found near Mr. Kellerman’s body, his car was missing, and his apartment had been set on fire. He was a freelance writer who covered professional boxing, and who was thought to be on friendly terms with Butler. The latter had been staying at the journalist’s apartment since late September 2004 (http://news.findlaw.com of 27/3/2006).

Originally, Mr. Butler was due to face a murder trial, but this charge was eventually dropped and replaced by one of manslaughter. No motive for the killing has yet been revealed by the prosecutors, although this could be revealed at the time of Butler’s sentencing, according to Jane Robison, a spokeswoman for the relevant District Attorney’s office (ibid).

This column will monitor this case for future editions.

US university lacrosse team suspended amid rape allegations

In late March 2006, it was learned that Duke University’s top-ranked lacrosse team would not play again this season until the university’s authorities learned more about allegations that several members of the team raped an exotic dancer at an off-campus party. The case has shaken the campus to its foundations, raised racial tensions, and increased the existing antagonism between the affluent students at Duke and the city of Durham, which has a large population of less wealthy citizens and is about evenly divided between white and black (http://news.findlaw.com of 28/3/2006).

It appears that the alleged victim informed police that she and another dancer had been hired to perform at a private party in an off-campus house. The dancer in question, being a student at North Carolina Central University, informed the police that she had been pulled into the bathroom, beaten, choked and raped by three men. Armed with a judicial order, police took DNA samples, using a cheek swab, from 46 of the lacrosse team’s 47 players. The 47th member was not required to provide such a sample because he was the only black member of the team, and the dancer claimed that the attackers were white.

The alleged victim is black, which has turned out to be a source of tension within the university. Angered by the team members’ silence and the manner in which the University has dealt with the case, residents of Durham have demonstrated, both on and off campus. They met outside the house where the alleged attack took place, and gathered outside the home of the University provost, Peter Lange, where they banged on pots and pans until he emerged to answer questions. The University’s athletic director had already compelled the team to miss two matches because of under-age drinking practices and the hiring of dancers at the party (ibid).

No further details are available at the time of writing.
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“Routine” inquest into Cronje death (South Africa)

The role played by Hansie Cronje, the former South African captain, into the corruption scandal which rocked the world of cricket at the turn of the millennium has been extensively documented in this and other issues of this Journal. Mr. Cronje met his end in an aeroplane crash four years ago. This tragic event was naturally the subject of subsequent investigations. The initial enquiry by the Civil Aviation Authority (CAA) concluded that the crash had been caused by pilot error and instrumental failure. However, this has been followed by a judicial inquest which is being led by Cape High Court judge Siraj Desai. More particularly, the inquest will seek to determine whether the crash was “brought about by any act or omission prima facie involving or amounting to an offence on the part of any person” (The Daily Telegraph of 6/1/2006, p. 14).

Desai J’s decision could in theory lead to a criminal investigation or a civil action. It would appear that the findings of the CAA investigation referred to above makes any criminal proceedings highly unlikely. As to the possibility of civil proceedings, Ew ie Cronje, the cricketer’s father, confirmed that the family would not be a party to any such action, stating that the family had already reached “closure” on Mr. Cronje’s death. Nor did Willem Tarentaal, who will lead the evidence, suggest any possibility of foul play in the latter’s death, describing the inquest as a “purely routine” affair (Ibid).

Security issues

“Greek Watergate” scandal brewing over Olympic phone taps

The 2004 Olympics were the world’s biggest public event to be organised since the September 11 attacks took place, so naturally it was surrounded by various considerable precautions, as can be seen from previous issues of this Journal (see e.g. [2004] 2 Sport and the Law Journal p. 58). Particularly Washington was quite valuable in its demands that security be tightened in what it – rightly or wrongly – regarded as a terrorist-prone city. However, it now appears that some of these measures bordered on the illegal and may have constituted an infringement of human rights. Thus in early February 2006 it was revealed by the Government that the mobile phones of Greek Prime Minister, Costas Karamanlis, as well as those of top Government and security officials, were tapped by persons unknown during the Olympics and almost a year thereafter. All in all, this affected around 100 people, including the Ministers of foreign affairs, defence, public order and justice. Most of the country’s top military and police officers were also targeted, as were foreign ministry officials, a US embassy member, and even the Prime Minister’s wife, Natasha (The Guardian of 3/2/2006, p. 26).

In what he described as an “important issue related to national security”, Theodore Roussopoulos, a Government spokesman, announced that public prosecutors had brought charges of violating the privacy of telephone communications against unknown perpetrators. He added that a judicial investigation would also examine charges of espionage. Naturally, this affair has provoked a storm of protest at all levels of Greek public life, in particular opposition politicians. Socialist opposition leaders, including the former defence minister Yannis Papandoniou – whose telephone was among those tapped – called it “unacceptable” that he was not informed for 10 months about this so that his human and individual rights could be adequately protected (The Independent of 3/2/2006, p. 28).

It appears that the Greek head of mobile phone company Vodaphone, had informed the Government in March 2005 about the tapping operation. As soon as the Government discovered the tapping software, it removed the latter. However, the shutdown of the illegal software has wiped out all traces of its origins and the way in which it had been installed, said George Voulougarakis, the Minister for Public Order (Ibid). No further details are available at the time of writing.

Terrorist fears cast shadow on international events

Gwahali bomb blast causes security concerns for touring party (India)

In recent years, cricket tours to the Indian subcontinent have present greater health risks than the odd bout of malaria, in that the political instability of some of its regions has given rise to a number of terrorist attacks which some fear may in due course seek this most popular of South Asian sports as a target. This was seen as a particular risk when the international side involved is England, in view of this country’s involvement in the Iraq and Afghanistan wars, and when the party’s travels take the latter to particularly volatile areas of the country. Thus when a bomb blast killed two and injured several others in the town of Gwahati, where England were due to play the fourth one-day international of their Indian tour, this naturally aroused the concern of the English cricketing authorities. This part of India has endured terrorist
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activity for many years, and this particular outrage was attributed to the United Liberation Front of Assom. The England party travelled together with guards provided by Olive Security, who are specialists in this particular field (The Guardian of 21/3/2006, p. S12). The match eventually passed off without serious incident.

“Anti-Muslim” cartoons threat over Winter Olympics and football World Cup

Satirical drawings have, since time immemorial, been powerful weapons of political and social commentary. However, few such expressions of graphic lampooning can ever have stirred up so much controversy than a recent spate of cartoons aimed at the more extreme members of the Muslim community. The first came when the Danish newspaper Jyllands-Posten published a number of cartoons lampooning the prophet Mohammed in September 2005, which unleashed a number of violent demonstrations across the Muslim world and resulted in various death threats against the newspaper’s employees.

In the sporting arena, there were widespread fears that Danish teams might find themselves possible targets for terrorist attacks. More particularly fears were expressed for the Danish curling team, which represented the only delegation from their country to the Winter Games in Turin earlier this year. When the Games opened, the Danish team were given the same level of security as the US team at the opening ceremony (The Guardian of 13/2/2006, p. S16). In the event, the curling competition – as indeed the entire Games – did not give rise to any terrorist attack.

The second series of cartoons was published – coincidentally or not – whilst the Games were getting underway. A German newspaper published a cartoon depicting the Iranian football team dressed as suicide bombers at this summer’s football World Cup with various explosives attached to their chests. A caption read: “Why the German army should definitely be used during the football World Cup”. Naturally, this aroused strong feelings in Iran, with the General Secretary of the country’s Sports Press Association described it as a “black joke”, whereas the Iranian embassy in Berlin called for an apology, calling the cartoon “an immoral act”. In Tehran, hundreds of protestors threw petrol bombs and stones at the British and German embassies (The Guardian 15/2/2006, p. 23). Naturally, concern has also arisen about the implications which this affair may have for security at the World Cup in Germany later this summer.

Other issues (all months quoted refer to 2006 unless stated otherwise)

Imran Khan. The former Pakistan cricket all-rounder and captain, who in later life became a politician, was one of many people arrested during anti-US demonstrations held in Islamabad in March. The occasion of these protests was a 24-hour (!) visit to his ally President Musharraf, which was marked by intense security and a crackdown on anti-US protest. Mr. Khan was placed under house arrest after taking part in an illegal protest outside the Presidential Palace (The Observer of 5/3/2006, p. 35).

Brian Carney. The Great Britain and former Wigan rugby league international was recently transferred to top Australian side Newcastle Knights. However, following his first appearance for his new side, Mr. Carney was unceremoniously ejected from a pub in the seaside suburb of many, and was then fined by the local police force for attempting to return. A security officer claims to have been punched in the incident (The Independent of 14/3/2006). It is not as yet known whether further charges would be brought against the player.

Craig Gower. In mid-December 2005, the Australian rugby league scrum half was at the centre of allegations that he harassed the teenage daughter of former Test star Wayne Pearce at a charity golf event. He was also accused of having thrown a knife at guests, being drunk, damaging a golf course and running nude around the course (Daily Express of 22/12/2005, p. 63). No further details are available at the time of writing.

Nikolai Valuev. Known as the “Beast from the East”, this WBA boxing world champion is revered in his native Russia as a hero. Whether this reputation will last may well depend on the outcome of a current criminal investigation. He has been accused of assaulting a 61-year-old parking attendant. Previously, various reports had started to circulate about his dealings with various murky circles of the criminal underworld (The Independent on Sunday of 4/2/2006, p. 43). No further details are available at the time of writing.

Jeff Fenech. The former boxing world champion was charged with shoplifting just before after Christmas 2005. Police in Queensland, Australia, confirmed that a 41-year-old man and a 58-year-old man, both from Sydney NSW, had been charged with stealing three watches worth a total of A$400 from a shop on the Gold Coast. Mr Fenech was inducted in the International Boxing Hall of Fame in 2002 after holding world titles as bantamweight, super-bantamweight and featherweight.
in a 12-year professional career commenced in 1984 (The Guardian of 30/12/2005, p. S38). No further details are available at the time of writing.

**Elson Becerra.** In early January, the Colombian international striker was shot and killed, along with a friend, at a Cartagena discotheque. The 27-year-old footballer was dancing when his attackers shot him four times. He is, unfortunately, just the latest top footballer to be unlawfully killed in his homeland. Other have included Andrés Escobar, murdered after he had scored an own goal during the 1994 World Cup tournament (The Guardian of 10/1/2006, p. S2).

**Roscoe Tanner.** It will be recalled from a previous issue of this Journal ([2005] 3 Sport and the Law Journal that the former golden boy of US tennis had been sentenced to 10 years’ probation in the US for unlawfully failing to honour a £20,000 cheque which he had used to purchase a boat. Unfortunately, matters have gone from bad to worse for the former Wimbledon finalist. In mid-January, he was sentenced to two years’ imprisonment for violating probation by failing to make payments (The Daily Telegraph of 21/1/2006, p. S13).

**David Saelens.** In mid-January, it was learned that the Belgian Formula 3000 racing pilot was facing charges brought by the Belgian public prosecution service (Openbaar Ministerie) for having assaulted a 22-year-old woman in the Culture Club discotheque of Ghent in December 2004. It is claimed that, for no apparent reason, he had dragged her by the hair, and had subsequently hit her several times, making it necessary for her to be taken to hospital (La Dernière Heure of 14/1/2006, p. 15). The outcome of this prosecution is not yet known at the time of going to press.

**Eunice Barber.** In mid-March, the former heptathlon champion from France lodged a formal complaint, alleging police brutality, following her arrest in Paris. She was said to have been “very shocked and extremely traumatised” four days after she was accused of having bitten officers who had arrested her near the Stade de France. She accuses the police officers in question of having rained blows on her whilst she lay on the ground following her arrest – the reasons for which are not as yet clear. She was released the following day (The Daily Telegraph of 23/3/2006, p. S17). The outcome of this case was not yet known at the time of writing.

**ETA bombers.** In early March, two members of the Basque separatist movement ETA were sentenced to 253 years each for two attacks which occurred near real Madrid’s Santiago-Bernabeu stadium four years ago. The High Court of Madrid found Mikel San Argimiro and Imanol Miner guilty of having blown up two cars parked near the stadium, injuring 22 people, before a football fixture on 1/5/2002. It is expected that the pair will serve a maximum of 25 years (The Daily Telegraph of 9/3/2006, p. 18).

**Willie Manu.** In Sydney, Australia, the Rugby league international was sentenced to 200 hours of community service in early February on a charge of assault (The Independent of 8/2/2006, p. 63). No further details are available at the time of writing.

**Viola (Paulo Sergio Rosa).** The former Brazilian football international was arrested in early January on charges of illegal possession of firearms, following a domestic altercation. He was alleged to have been carrying a 12-gauge gun during an argument with his wife in Barueri, a city just outside the Brazilian city of Sao Paulo (The Guardian of 2/1/2006, p. S8). No further details were available at the time of current writing.
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Other issues

**Compliance with EU law of Netherlands gaming legislation. Article in academic journal**

In this contribution, the authors, J. Franssen and R. Budik (2005) discuss the decisions by the Netherlands courts in De Lotto v. Ladbrokes and De Lotto v Betfair, on the question whether UK online operators who accepted Dutch residents on their websites had contravened the Netherlands Gaming Act 1964. The authors also consider the question whether the discrimination against foreign operators, which is inherent in the Act, was justified under EU law on public policy grounds. Furthermore, they report on the administrative court proceedings being brought by gambling operators across the European Union which challenge their exclusion from Member States’ gambling licensing processes (European Current Law March 2006, p. 157).

**Manager jailed for 15 years for exploitation of Kenyan athletes**

In mid-March 2006, it was learned that a French court had imposed a three-month jail sentence on a former manager who housed 15 Kenyans in “degrading” conditions. Jean Conrath was also fined €8,000 after he had brought 11 men and four women from Kenya to France with the aim of entering them at local athletics events. The athletes were accommodated in an apartment measuring 55 square metres without sanitation in October and November 2005. There was no refrigerator and the heating system was unable to maintain room temperatures above 10C. Only five chairs were allowed for the athletes, who slept on mattresses placed on the floor. They were being charged €200 each monthly for accommodation and €80 for food (The Guardian of 16/3/2006, p. S2).
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Media rights agreements

Murdoch/Berlusconi media rights battle – latest

As is the case in this country, the media rights for top football games are “big money” in Italy, and therefore makes them a major target for the broadcasting companies. Until recently, this has not given rise to major battles between the big media battalions, because it was generally believed that the two weightiest players, Rupert Murdoch’s Sky Italia and Silvio Berlusconi’s Mediaset, had agreed a pact not to compete against each other. However, in recent years this relationship appears to have changed, and the two major broadcasters have been engaged in an increasingly fierce battle for the custom of Italy’s millions of football fanatics. This battle has been given a new twist by a recent European Commission competition ruling and by the battle for the right to screen the matches of one of the world’s best-known clubs.

The relations between Italy’s major clubs in the top division (Serie A) and the broadcasting companies is a complex one. Unlike their British counterparts, Italian clubs negotiate their own agreements with the media companies, as a result of which the biggest clubs earn large sums, whereas the minnows have to make do with as little as £3 million per season. Aware of the income that stood to be made from Italian football, Rupert Murdoch launched Sky Italia three years ago after purchasing its main rival in the country. For £265 million per year, the agreement covered all the major fixtures and attracted 3.4 million subscribers. At this point, however, the European Commission intervened. It had allowed Murdoch’s News Corp to merge Stream and Televu and thus form Sky Italia; however, at the same time it ruled that all the latter’s media rights deals should be restricted to two years and apply only to satellite television (The Guardian of 12/1/2006, p. S8).

This gave the Berlusconi group the space to start its own innovative pay-per-view operation early last year. It tied in with the decision by the Government – of which Berlusconi was the head – to move comprehensively towards all-digital viewing by 2006, and to subsidise the set-top boxes required. Taking maximum advantage of this, Mediaset made separate deals with the largest clubs to broadcast their games through digital terrestrial technology, and offered fans the opportunity to purchase them on a pay-per-view basis by purchasing viewing cards from tobacconists and corner shops. This has proved a great success – as has the sale of set-top boxes. Now, despite a continuing probe by the competition authorities, Mediaset is proceeding to extend its deals with Italy’s biggest teams beyond the two years permitted. The latest and most spectacular of these deals is that struck with Juventus, and is worth €218 million. This deal will guarantee live coverage until the 2009, with Mediaset paying an extra €30 million for an option on the 2009-10 season. More such deals are expected in the not too distant future (ibid).

This battle is being observed with keen interest, not only by the Murdoch empire, but also by the major clubs all over Europe, as they consider whether collective selling or individual deals serve their best interests. More particularly the focus will be on England, whose Premiership has steadfastly adhered to the principle of collective media rights deals. It also remains to be seen what will be the reaction of the European Commission, which on a number of occasions has already intervened in football broadcasting deals on the basis that they allegedly restrict free and fair competition.

Term “brief extracts” should be interpreted strictly when applied to football World Cup. French Supreme Court decision

In early May 2005, the French Supreme Court (Cour de cassation) issued an important decision on media rights law, more particularly on the extent to which exclusive broadcasting rights may be used by other companies for the purpose of public information (Decision of 3/5/2005, Gazette du Palais May/June 2005, p. 2213).

The official broadcasting company TF1 had acquired exclusive broadcasting rights in France for the 64 matches comprising the World Cup tournament in 2002 for a total of €168 million. During the World Cup, the L’Equipe TV company had broadcast over two hours of material taken from the TF1 coverage without mentioning its source. TF1 brought an action for damages against L’Equipe TV. In its defence, the latter relied on the provisions of Article 18-2 of the 1984 Law on Sporting Organisation. This enables audiovisual companies which are not holders of audiovisual media rights to a sporting event the right to broadcast brief extracts taken free of charge and chosen freely from the pictures broadcast by the company which held the rights – in order to safeguard the right of information for the benefit of the public. These transmissions must take place during information programmes and must be accompanied by adequate reference to the identity of the rights holder.

The Paris Court of Appeal sought to reach a definition of the term “brief extracts” on the basis of various documents, including the Code of Good Conduct signed in
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1992 between the main broadcasting companies, parliamentary debates, and various laws of EU member states on this subject. Its conclusion was that the duration of such extracts should be a maximum of 1.30 minutes for every day of the competition, in conjunction with another limit of 30 seconds per match. For continuous information channels, moreover, this use of brief extracts had to be confined to a frequency of once every four hours per period of 24 hours. It accordingly ordered L’Equipe TV to pay a total of €505 million by way of compensation.

The losing party applied for review to the Supreme Court, which dismissed the application. It held that the Court of Appeal had been called upon to interpret the relevant provision of the 1984 Law without the benefit of any indication by that Law on how to define this notion of “brief extracts”. The Court of Appeal was therefore not exceeding its jurisdiction, nor attempting to create a general rule (which the courts are prohibited from doing in France) where it held that, having regard to the circumstances of the case, it had to apply a strict interpretation of the term “brief extracts”, and accordingly defined the extent and frequency of such broadcasts in the manner described above. The Supreme Court therefore confirmed the Court of Appeal decision.

Football broadcasting rights – articles in academic journals

In “Football broadcasting rights – the situation in Bulgaria” (ISLJ 2005 3/4 55-57), the author, Boris Kolev, discusses whether the Bulgarian Football Federation has incorrectly implemented the regulations imposed by European governing body UEFA which govern the broadcasting of football, as a result of a mistranslation of the provision which concerns a certain period in which no football broadcasts should take place. He also considers some of the implications of this error, and how the situation could be remedied (European Current Law 2/06, p. 131).

In “Broadcasting rights in French football” (WSLR 2005, 3/9 12-12) the author, Paul Rawnsley, discusses the implications for the French broadcasting sector and for French football of the €1.8 billion, three-year domestic broadcasting rights agreement between the French Ligue 1 and the subscription service Canal Plus, under which the latter has acquired exclusive broadcasting rights to Ligue 1 fixtures. He identifies the reasons why there has been no regulatory investigation of the agreement by either the European Commission or the French Conseil de la Concurrence (competition committee). He suggests how the broadcasting income should be invested in such a way as to be to the long-term benefit of French football (European Current Law December 2005, p. 139).

Football media organisers have the right to charge for radio broadcasting rights for fixtures. German Supreme Court decision.

In this case, the claimant was a private radio broadcaster which had, until the 1999-2000 season, the right of access to the press boxes of the two prominent Hamburg football clubs (HSV and St Pauli), as well as to their various press conferences and the so-called “mixed areas” at the margins of the playing field where media representatives may conduct interviews with players and other personalities connected with the game. However, prior to the 2000-1 season, there arose a dispute on the existence and licensing of radio broadcasting rights between private broadcasters and the organisation which handled the two clubs’ media rights.

As a result, the latter started to charge the former for the right to broadcast from the two football grounds concerned. Ultimately the private broadcaster obtained extremely restricted broadcasting rights on a fee-paying basis. The broadcaster accordingly brought legal proceedings against the media rights organisation. In the main action, it sought a ruling that the clubs’ media organisers did not have the status of title holders to radio broadcasting rights relating to home games in the First and Second Divisions of the German football league which involved the clubs. In the alternative, it sought a ruling that the claimant had a right of access, against repayment of expenses, to the press boxes, press conferences and mixed areas of the clubs, as well as facilities enabling the broadcaster to operate from the stadiums in question. In the alternative to this plea, the claimant sought a ruling that it had the right to broadcasts of a maximum of five minutes for every home game involving the two clubs.

None of these actions were awarded by the Court of Appeal (Landesgericht) of Hamburg, and the Supreme Court (Bundesgerichtshof) upheld this decision (Decision of 9/11/2005, Neue Juristische Wochenschrift 6/2006, p. 377).

Disagreement arises over television rights to German Football League matches

Still on the subject of German football broadcasting rights, a dispute has arisen on television rights to the fixtures organised by the Bundesliga (German Football League). The television broadcaster Premiere has brought proceedings against Unity media, the company who were awarded the rights to show league games live. Premiere chief Georg Köfler commented that the legal action was aimed at overturning the approval given by the German Competition Authority (Bundeskartellamt) of the merger between the companies ISH and IESY, which led to the creation of Unity Media. The previous
week, the German League had abandoned its long-time partner Premiere in order to award the rights to Unity. The agreement is worth £287 million over three years (The Daily Telegraph of 27/12/2005, p. 39).

The broadcasting of sporting events and competition law. Article in Swedish academic journal
In this contribution ("Idrottsevenemang och konkurrens på den audiovisuella marknaden", Juridiska Föreningen Tidningar 3/2005, p. 352 et seq), the author, Alfred Streng, examines the way in which the audio-visual market for sporting events has changed over the past two decades, and examines the role of the public and private sectors from the point of view of competition law, both national and European. His general conclusion is that the two sectors have a different role to play, not only in the marketplace, but in society as a whole. If the object is to give airtime to the less popular spectator sports on the one hand, and to ensure as wide a level of access to the more popular sports on the other hand, the rules on restricting competition cannot be applied to them both on equal terms.

Legal issues arising from transfer deals
Transferee’s solidarity contribution must be calculated and paid by new club to club that trained him. CAS decision
The Court of Arbitration for Sport (CAS) recently issued an important decision interpreting the FIFA rules on "solidarity contributions". The world governing body in football has recently enacted rules which enable those clubs which have trained a transferred player, or have in any other way contributed towards increasing his market value by employing him, to receive a percentage of each subsequent transfer fee involving that player. This is called the "solidarity contribution". More specifically, the regulation issued by FIFA on 5/7/2001 provides that five per cent of the transfer fee must be distributed between the various clubs involved in the player’s training and education between the age of 12 and 23, in accordance with a formula laid down in Article 10 of the implementing regulation.

In the case under review (CAS decision of 14/5/2005, No. 2004/A/706, Reggina Calcio Spa v. Club Olimpia Asuncion), the CAS was required to interpret these provisions in order to decide whether it was the "purchasing" or the "selling" club which was required to pay this percentage to the club which was entitled to it. This issue arose in a case where a player of Paraguayan nationality had been transferred from FC Porto (Portugal) to Reggino Calcio (Italy). The Italian club had paid the entire transfer fee to FC Porto. The Paraguayan club, which had trained the player, informed FIFA that it had not received the solidarity contribution laid down by the said FIFA regulation. In response, the world governing body, through the Italian Football Federation, requested the Italian club to pay to the club which trained the player a sum equivalent to five per cent of the transfer fee, as well as interest in arrears. The Italian side refused to comply with this instruction, arguing that the amount in question should be paid by the Portuguese club which had received the fee. The matter was referred to the appropriate FIFA Commission, which ruled that the solidarity contribution should be paid by the Italian club. The latter thereupon appealed against this decision before the CAS.

The CAS panel in question dismissed the appeal, ruling that it was the appellant who was the debtor owing the solidarity contribution. In this, it referred to FIFA Circular Letter No 769, which confirms that it is the responsibility of the new club to calculate the amount of the contribution and to make the appropriate payments. The Italian club had argued that these provisions did not apply because the two parties involved in the transfer deal had concluded an arrangement which derogated from these rules. The CAS rejected this plea on the grounds that it was not possible to substitute the debtor without the consent of the creditor, in this case the Paraguayan club. This rule has almost certainly been derived from the Swiss law of obligations, which applies as being the alternative law designated by the FIFA articles. The panel also considered as an irrelevant consideration the fact that the transfer fee on which the solidarity contribution has been levied has been entirely paid by to the selling club. This was done, according to the CAS, at the purchasing club’s own risk, with the consequence that the Paraguayan club could still take action against the Italian club for the contribution in question.

However, the CAS decision does not settle the question whether the club owing the amount in question would be entitled to require restitution of this five per cent from “selling” club. This amounts to asking the question whether the five per cent contribution should be added to the transfer fee, or whether it should be taking out of this fee. The provision in question sheds little light on this issue, in that it states that “a proportion (5%) of any compensation paid to the previous club will be distributed to the club involved in the training of the player”. Should the term “proportion” be understood as meaning that the contribution is inherent in the transfer fee, or merely constitutes the method of calculating the amount due? The decision is unclear on this issue (see Revue trimestrielle LexisNexis Jurisclasseur 10-11-12/2005, p. 1327).

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Mikel affair still awaiting closure (Norway)
It will be recalled from a previous issue of this Journal ([2005] 3 Sport and the Law Journal p.64) that the transfer of the young Nigerian international footballer, John Obi Mikel, from Norwegian club Lyn Oslo to English premiership side Manchester United had become mired in controversy and legal disputes. The Nigerian player at first seemed destined for a move to Old Trafford, but then claimed that he had been falsely induced into signing the contract, which he sought to have annulled in order to be able to join Chelsea instead.

Mr. Mikel’s lawyers had taken the matter to Oslo’s District Court, claiming that the contract should be set aside under Norwegian industrial law. The court, however, disagreed, ruling that the matter was not a labour dispute and should instead be brought before a court of sporting arbitration (Daily Mail of 22/1/2006, p. 68). The matter had in the meantime also been taken to the dispute resolution chamber of world governing body FIFA, where Mr. Mikel also sought to have the contract annulled. In response, Manchester United sent a nine-page submission to FIFA, in which they not only responded to the accusations made by Mikel, but also called on the world governing body to impose various penalties on Chelsea – including a transfer ban – for their alleged illegal approach towards the former Lyn player. Details of this letter had apparently been leaked to BBC Radio Five Live. The relevant passage of the submission reads:

“If the involvement of Chelsea is established, then the complainants would seek the imposition of a sanction as set out in article 23.2(a) of the FIFA regulations, namely a ban on Chelsea ‘registering any new player, either nationally or internationally’ for the duration of two registration periods. In addition, given the welfare issues that this case raises, including the implications of the player from Lyn, it is submitted by the complainants that this is a case which warrants the imposition of severe sanctions under Article 23.2(d) including exclusion from competitions” (The Guardian of 31/1/2006, p. S2).

Chelsea, for their part, dismissed the claims made by both Manchester United and Lyn, insisting that they had only monitored the player with a view to acquiring his services if FIFA upheld his complaint, and claimed to have acted within FIFA guidelines. They also expressed their outrage that details of the submission cited above had been leaked in what they saw as an attempt to smear the South London club and to undermine the proceedings currently pending before FIFA – particularly as the submission dated from May 2005. Chelsea claimed that they had been asked by FIFA to respond to the contents of this submission after the submission had been sent to Chelsea in May 2005, and that they had informed the world governing body that these allegations were without foundation (Ibid).

Mr. Mikel’s lawyers have in the meantime requested both Chelsea and Manchester United to discontinue this dispute for the good of the Nigerian player’s career (The Guardian of 1/2/2006, p. S6). At the time of current writing, the FIFA disputes chamber had not yet arrived at a ruling on the underlying dispute.

Employment law

Spanish football league acts to prevent strike by referees
In late March 2006, it was learned that the Spanish professional football authority had intervened in order to avert a strike by the country’s first and second-division match officials, who are demanding two months’ unpaid salaries.

The Spanish League has issued emails to every referee requesting a breakdown of the amounts owed to them for February/March 2006, as well as their bank details. The previous week, the match officials in question had announced that they would withdraw their labour as from 1 April if no payment was forthcoming. More particularly, spokesman Eduardo Iturralde Gonzalez stated that he and his First Division colleagues were owed €12,000 each. This debt apparently resulted from a dispute between the Spanish League and the Spanish Football Federation on the question of which organisation was responsible for paying the match officials (http://news.findlaw.com of 28/3/2006).

New Italian collective bargaining deal. Article in academic journal
In a contribution entitled “The new Italian collective bargaining agreement” (WSLR 2005, 3(12) 8-11), the authors, Luca Ferrari and Vittorio Rigo, examine the provisions of the collective bargaining agreement which was negotiated in October 2005 between the Italian football federation, the nation’s professional league and the Italian players’ association. The new deal governs the contractual relations between the professional footballers and their clubs. The authors also highlight the differences between this agreement and its predecessor, and examine the uncertainty which prevails on those provisions which are to bring the agreement into effect (European Current Law 3/2006, p. 175).
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Dismissed Deakin obtains compensation (France)
In early January 2006, it was learned that Catalans Dragons, the new French team in Rugby League’s Super League, had arrived at a settlement with Steve Deakin, the English coach whom they dismissed with two months to go before the start of their first campaign. It emerges that Mr. Deakin only had a gentleman’s agreement, rather than a formal contract, with the Dragons. However, the club’s Chief Executive, Grant Mayer, confirmed that it had agreed a severance deal with Deakin. No further details were disclosed (The Guardian of 6/1/2006, p. S8).

Spanish court decision throws professional sports legislation into disarray
In March 2006, the San Sebastian Industrial Court (Juzgado de lo Social) gave its ruling in a case which is likely to have major repercussions for the employment law aspects of professional football. The Court ordered winger Ivan Zubiaurre and Atletico Bilbao to pay Real Sociedad the sum of €5 million by way of damages, for unilateral termination of the contract of employment between Ms. Zubiaurre and Real. The decision held that Zubiaurre and Atletico had entered into a verbal six-year agreement, and that the Basque club had entertained no intention of making any payment for the 22-year-old player’s acquisition, even though his contract with Real had yet another season to run (see www.iusport.es of 11/3/2006).

This decision may well throw into total disarray the so-called “Decreto 1006”, being a Government regulation laid down in 1985 in order to regulate the employment relations of professional sporting performers. This decree put an end to the “right of retention” which football clubs had enjoyed up to that point. It was replaced by the insertion in the relevant contracts of employment of the clausulas de rescission, i.e. contractual terms which fixed the conditions in which the contract would be terminated and which fixed the compensation payable by a player to the club if the former breached the contract. In his grounds of judgment, judge Francesc Xavier Gonzalez held that, although the termination clause applicable to Mr. Zubiaurre was fixed at €30 million – which was the amount claimed by Real in the action – the player’s contractual position made this clause an “abusive term”. He went on:

“At the present moment, no-one could seriously entertain the notion that a footballer aged 22, however good he may be, playing as an outside right, could be able to pay the contractual sum of €30 million, since it is well known that only the greatest stars have been able to pay such amounts” (translation by the author)

The judge fixed the amount payable at €5 million because the court was not informed of any sums agreed for the sale of players having characteristics similar to those of the footballer in question, since the intervening parties had failed to provide such information. Yet the decision appears to contradict itself, because the judge then proceeds to maintain that, in fixing this amount, account had to be taken of the realities of the football market and of the “amounts which tend to be paid for other sporting performers”.

This decision has failed to satisfy either of the parties. Mr. Zubiaurre’s lawyer maintained that making Atletico pay the amount in question was a fundamental error because there simply was no contract between the Basque club and the player. He announced his intention to appeal against this decision before the Basque Court of Appeal – something which could also be done by Atletico Bilbao. The Real Sociedad president, Miguel Fuentes, guardedly welcomed the decision – although not the amount awarded by way of damages. He described the reduction in the compensation payable as worrying, because it could oblige all professional clubs to revise the relevant clauses in their players’ contracts of employment. Real could also appeal against this decision. No further details are available at the time of writing.

Sporting agencies

UEFA tackles agents “acting as child traffickers”
In mid-December 2005, the European governing body in football, UEFA, called on its world governing counterpart FIFA enact tighter regulations for football agents, following complaints from the African and South American football confederations over alleged child trafficking. More particularly Lars-Christer Olsson, the UEFA Chief Executive, has been concerned at reports that agents and club scouts are transporting children as young as 10 from developing countries to the European Union and abandoning them if they fail to make the grade by winning trainee contracts. Mr. Olsson even quoted examples of clubs and agents having shipped entire families from South America (The Guardian of 14/12/2005, p. S3). Referring in particular to certain Southern European training camps, he elaborated in the following terms:

They (i.e. the children) are brought into the academies with promises by unscrupulous agents of a sell-on fee, but what happens when they are not good enough? Of course, they are kicked out. When it comes to trafficking of young
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players of different confederations, we have to look into [FIFA’s] transfer system” (Ibid)

The determination displayed by UEFA to tackle this particular issue has been part of a set of proposals aimed at considering the iniquities of the present-day European game. The European governing body considers that many of these have been exacerbated by the well-known (or notorious?) Bosman ruling, the tenth anniversary of which came in December of last year. Mr. Olsson regrets the fact that the true character of sport has lost out to the rules of business, and that the world of football was “ill-prepared” for the implications of the Bosman decision. Significantly, he added that UEFA considered that it had a “gentleman’s agreement” with the European Commission, which failed to stand the test. As a result – still according to Mr. Olsson – sport’s traditional values have been lost.

It is now hoped among the various authorities overseeing the game that more effective self-regulation will provide a special status for sport in EU law. UEFA is also aware of the fact that it will rely on assistance by the EU Member States’ governments in order to combat corruption in the sport, amid fears that the transfer market is being used for money-laundering purposes. UEFA is also a major signatory to the initiative currently being led by the UK sports minister, Richard Caborn, aimed at increasing financial transparency in Europe (Ibid).

Sponsorship agreements

German boot sponsorship dispute – article in academic journal

In an article entitled “Don’t mention the boot wars” (JLSS 2005, 50(6), 4), the author, Bruce Caldow, examines the controversy surrounding the exclusive contract entered into by the German Football Association with sportsware manufacturer Adidas to supply the kit and boots for the national football team. This has placed the players before the dilemma of breaching their personal sponsorship deals or not playing for the international side. He also considers the implications of the dispute for the future of such deals in other sports (European Current Law 10/2005, p. 175).

Other issues

Horseriding club not liable for accidental fall from horse. Danish court decision

In this case, a member of a riding club had fallen off a horse when his saddle slid round, and as a result sustained serious injuries. The saddle had been affixed by a 17-year-old employee of the club. The Appeal Court (Landsretten) did not consider it proven that the strap securing the saddle had not been properly fastened, and that therefore there was no evidence that the injury occurred as a result of the strap not being correctly fastened. The fact that the rider had not been advised that even a correctly fastened saddle is capable of sliding round where a rider of a certain weight loses his balance and falls off the horse could not in itself be regarded as engaging the club’s liability (Decision of 3/5/2005, (Ugeskrift for raetsvesen (2005) p. 2562).

Terms of repayment of loan contracted by athletics federation not unfair, rules French court decision

In this case, the French Athletics Federation (FFA) had contracted a loan for FF 14 million in 1995, repayable over a period of 15 years at a fixed rate of 10 per cent and at an effective overall rate of 10.17 per cent. Four years later, interest rates had fallen, and the FFA accordingly requested that the terms of the loan be renegotiated. Thereupon the lender proposed a fixed rate of 4.80 per cent, together with early repayment compensation amounting to approximately FF 4 million. The Federation refused to accept this proposal. Moreover, it took the lender to court arguing that the clause which fixed the early repayment compensation was unfair as being contrary to the provisions of the Consumer Code. Both the Court of First Instance and the Court of Appeal of Versailles having dismissed this action, the applicant applied for review of this decision before the Supreme Court (Cour de Cassation).

The Court dismissed the application, ruling that the Federation fell outside the scope of the Consumer Code (Decision of 27/9/2005). The loan in question had been contracted with a view to financing the acquisition of new headquarters. Therefore, the loan had been contracted within the scope of the Federation’s activity, and could therefore not be regarded as a consumer loan. Therefore the terms of the loan could not be regarded as unfair (Gazette du Palais (2005) 11/12, p. 4099).
4. Torts and Insurance

Sporting injuries

More French court decisions on vicarious liability – and the resulting controversy

The recent avalanche of cases in which organisations concerned with sport have found themselves caught up in cases involving their tort liability will not have eluded the attention of the attentive reader of this column. In the main, these have concerned sporting clubs and associations, as well as schools, which have found themselves on the wrong end of court actions in which it is claimed that their vicarious liability has been engaged for injuries incurred by those allegedly in their charge. The period under review has brought a fresh spate of decisions of this nature.

The first item involves a double set of cases which were decided together because of their – apparent – similarity. In the first (Decision dated 22/9/2005, JCP – La semaine juridique – édition générale of 11/1/2006, p. 33) concerned the pupil of a secondary school (lycée) who became injured as he took part in a judo competition organised by the National Schools Sports union (UNSS). The Court of Appeal had overturned the decision by the Court of First instance (Tribunal de Grande Instance) which had held the UNSS liable. The victim of the accident took the matter to the Supreme Court (Cour de Cassation), which dismissed the application. It recalled that, for a sporting association to be held vicariously liable for any sorting injury under Article 1384 of the French Civil Code (which regulates vicarious liability), it was necessary that the injury for which compensation was being claimed had been caused by a member of that association. In the case in question, it had not been proved – and not even alleged – that the person alleged to have caused the injury was a member of the UNSS. The latter had restricted itself to organising the event at which the injury occurred, and therefore could not have its vicarious liability engaged merely because of this fact.

The second joint decision was of a more complex nature. It concerned the case of a rugby player whose spine had become seriously injured in the course of a scrum, and who claimed compensation from the club whose colours the opposing team had defended. In this case, the Court of Appeal had awarded the action to the claimant, on the basis that the injury had resulted from an infringement of the rules in the course of the scrum. However, the Supreme Court did not accept this basis for liability. It ruled that the injury in question had not been sustained as a result of a direct hit by another player or because of a pile-up between various players.

It was linked to a series of pushes which occurred in the course of a scrum. The Court accepted that the victim had incurred his injuries as a result of a collapsed scrum, which itself had been caused by the collapse of an opposing prop forward. Although the collapsed scrum itself constituted an infringement of the rules, the Court was not convinced that it involved the deliberate collapsing of the scrum, and therefore ruled that the Court of Appeal had given inadequate reasons for engaging the opposing club’s vicarious liability.

The latter decision did not pass without comment, and already some commentators have passed unfavourable comment on it (see e.g. the annotation by the author David Bakouche which accompanied the published decision). It is also a fact that this is far from being the only decision involving the vicarious liability of a sporting association which has given rise to controversy. One author who has attempted to disentangle the various paradoxes inherent in this particular case law is Jean Mouly (“Les paradoxes du droit de la responsabilité civile dans le domaine des activités sportives” in JCP – La semaine juridique – Edition générale of 4/5/2005, p. 833). The author notes that, in order to prevent the rules on tort liability from excessively restricting the sporting world, the courts have developed a separate set of rules of tort which have limited the liability of sporting performers during competitions. However, the author is aware of the fact that this creates its own momentum, more particularly that of vicarious liability, to the point where this judge-made law could enter into conflict with the traditional rules of tort liability, or even with the rules of common sense. This has resulted in a number of paradoxes which the author attempts to highlight. More particularly he has identified a trend whereby amateur sporting performers are more likely to be held liable than professionals. He therefore pleads for a more generalised application of Article 1394 (on vicarious liability) which would discontinue this kind of discrimination.

As if to highlight the frequent paradoxes which occur in this area, the French Supreme Court issued a decision which also involved sporting injury, the sport in question being polo (Decision of 10/6/2004, Revue trimestrielle de droit civil 3/2005, p. 136). The victim had been seriously injured, having fallen from his horse as a result of violent contact with an opponent. Although the referees officiating in the match considered that the latter had not committed an infringement of the rules of the game, the Court of Appeal had nevertheless held the opponent in question liable. The latter applied to the Supreme Court for review of this decision, arguing that the courts could not challenge the referees’ decision, since the relevant rules of the sport decreed that a
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decision on whether an infringement of the rules had been committed was left entirely to the referees’ discretion. The Supreme Court dismissed this argument, on the basis that:

"the principle laid down by the rules which organise a particular sport, according to which an infringement of the rules of the game is left to the discretion of the referee responsible for ensuring their enforcement, does not have the effect of depriving the civil courts, when faced with an action in tort based on the alleged negligence of one of the performers in question, of its freedom to assess whether or not the behaviour of the opponent in question constituted an infringement of the rules of the game which was capable of engaging his liability" (translation by the author).

What this decision implied is that the courts have an autonomous discretion which is not bound by the referees’ interpretation of the rules – in other words, the referee’s decision cannot be raised to the status of res judicata. Whatever the merits of this view may be, it does little to contribute towards the clarity of the courts’ position on sporting tort liability, and indicates that something should be done to discontinue this situation of legal uncertainty.

One particular recent decision which has added yet another dimension to this already complex issue is that which was issued by the Aix-en-Provence Court of Appeal (Decision of 5/1/2005, Gazette du Palais (2005) 7/8, p. 2756). This concerned the case of an accident suffered by a pupil in the gymnasium of his school, where he and his class were due to have a gymnastics lesson. When the teacher in question did not arrive at the appointed hour, the pupils, including the victim, entered the gymnasium, where the latter fell from a plinth approximately 1 metre tall. The victim sued the State, as being liable for the schools alleged negligence. The Court pointed out that the defendant State representative (Préfet) conceded that the relevant teacher had arrived late for the lesson – regardless of what may have caused this lateness – and that the injury sustained by the victim was only made possible because this lateness had left the pupils without any supervision. Given the very young age of the pupil in question, i.e. 11 years, the fact that he entered the gymnasium in the absence of a teacher or supervisor should not be regarded as an error on his part which was such as to deprive him entirely of any right to compensation. Accordingly, the Court confirmed the decision appealed against, which had held the State liable for this accident.

The latest Supreme Court decision of this type is, however, less tainted with controversy (Decision of 14/6/2005, Gazette du Palais 5-6/2005, p. 2221). It concerned the case of a footballer who, whilst competing in a friendly fixture, was injured as a result of a ball hitting him on the head after having been kicked by the opposing goalkeeper. The injured player sued the goalkeeper in question in tort. The Supreme Court dismissed the action. It found that the accident had occurred at the beginning of the match when the victim’s team had kicked the ball towards the opponents’ goal, compelling the goalkeeper to leave the penalty area in order to clear. Without this being the goalkeeper’s intention, the ball hit the face of the victim who, vainly attempting to protect himself using his arm, received the ball on the temple and collapsed.

The victim acknowledged that the goalkeeper had not intended to cause him any injury, and that it is within the spirit of the game for the goalkeeper in such situations to act like any other player at other stages of the game – as does, for example, a forward when attempting to score a goal – i.e. to use all the physical force at his disposal to impart to the ball as much speed as possible. In the difficult position in which he found himself, the goalkeeper had to clear the ball by kicking it very forcefully before the opposing player could steal the ball or block the clearance. Moreover, the match referee, in his report, wrote that the incident was the result of “the run of play”, thus indicating that it had occurred without any negligence on anyone’s part – only an unfortunate combination of circumstances was to blame. From these facts, the Supreme Court concluded that the Court of Appeal of Angers was perfectly justified in ruling that the goalkeeper had committed no error whatsoever capable of engaging his tort liability.

Sporting club held liable for injury to children using unsafe chute. Belgian court decision

In this case, a child had been injured when using a water chute operated by a sporting club (Decision of 12/3/2003, Rechtskundig Weekblad of 11/6/2006, p. 1106). The Court of First Instance had held the club liable for this accident, and the latter appealed. Before the Court of Appeal (Hof van Beroep) of Antwerp, the appellants argued that the chute had not been opened to the public yet, because it was not yet operational, and that they had made public announcements that the chute should not be used. The Court of Appeal dismissed these contentions on the basis of statements made by eyewitnesses to the state police and to the relevant insurance company. It had to be concluded, therefore, that the chute had definitely been made available to children. The chute undoubtedly had a defect, in the shape of a pin sticking out. If the
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Appellants were of the opinion that the chute was unsafe, they should have taken adequate precautions to ensure that the chute was properly supervised, which they clearly had not done. They should therefore be held liable, and accordingly the Court of Appeal confirmed the decision of the first court.

Civil liability arising from breaches of sporting rules in Romania. Article in academic journal

In this contribution, entitled "Romania: civil liability arising from breaches of sports regulations", the author, Alexandru-Virgil Voicu, examines the extent to which Romanian law provides remedies for sporting performers who suffer personal injury whilst engaging in sport. More particularly he focuses on the question whether the participants consent to the risk of injury, and the consequences which ensue where injury is caused by breaches of the rules of the game (European Current Law 9/2005, p. 206).

Libel case against Lance Armstrong dismissed (France)

The imbroglio involving seven-times Tour de France winner Lance Armstrong and Italian cyclist Filippo Simeoni, which has led to criminal proceedings being take in Italy against the Texan rider, has already been dealt with in an earlier section of this Journal (see above, p. 77). In the meantime, this matter has also found its way to the French libel courts. It will be recalled that Mr. Simeoni was a key witness in the trial of Armstrong's former trainer Michele Ferrari, who two years ago was issued with a 12-month suspended sentence for malpractices which did not involve the US champion. Mr. Simeoni sued Mr. Armstrong after the latter had called him a "liar" in the French newspaper Le Monde. The French court, however, has dismissed the action (The Guardian of 17/1/2006, p. S2).

Insurance

Insurance for water skiing does not include ski biscuit gliding. French Supreme Court decision

This decision concerned an accident caused by someone engaging in ski-biscuit gliding. It revolved around an insurance agreement in respect of a pleasure boat which guaranteed liability for any loss caused to third parties, with an extended guarantee covering the use of the boat for waterskiing purposes. The Montpellier Court of Appeal had dismissed the claim that this guarantee could be extended to cover any loss caused by ski-biscuit gliding. A ski-biscuit is composed of an inflatable tube and a nylon cover equipped with a strap attached to a traction rope. Just by reading the details of this composition, any first-time practitioner of this pastime should have realised that here, we are dealing with a gliding sport, and that the method of operation and outward appearance of the object in question are far removed from waterskiing, in the sense that the person who finds himself ski biscuit has no control over its direction, which is definitely the case with waterskiing. Therefore, the Court of Appeal was right to rule that ski-biscuit gliding fell outside the scope of the guarantee, and the Supreme Court confirmed the latter's decision (Supreme Court Decision of 15/9/2005, Gazette du Palais (2005) 9/10, p. 3510).

Other issues

[None]
In the first place, the financial outcome of the Turin snow fest is hardly an irresistible incentive for any organising city and country. With a few months to go before the lighting of the Olympic Flame, the Italian government was compelled to put together a last-minute rescue deal to fill a massive gap in the budget. This had been caused in part by earlier adjustments to the national budget, which effectively reduced the governmental contribution (The Daily Telegraph of 23/12/2005, p. S18). However, the other reason for these financial difficulties was undoubtedly the sluggish sale of tickets for the various events. With barely a few weeks to go before the official start, just over half of all the tickets had been sold, even though they had been available since November 2004. This poor take-up was blamed on the lacklustre marketing campaign both in Italy and abroad, which was also hit by the government funding cuts referred to above. Final sales figures were not yet available at the time of writing, but it seems highly unlikely that the Turin Games will have achieved the 82 per cent target which it had set itself. Even that falls well short of the 2002 Games in Salt Lake City, which achieved a remarkable 95 per cent sales figure (The Sunday Telegraph of 8/1/2006, p. 23). The organisers of the Turin Games even gave away 42,000 tickets for the opening ceremony to local schools at a nominal €3 each, yet the event in question failed to reach full capacity (Daily Mail of 10/2/2006, p. 90). Another factor has undoubtedly been the very high prices charged for these tickets, which involved an average family paying a staggering €800 for entry to the events (The Guardian of 9/2/2006, p. 25). This has consequences beyond the Olympic organisations concerned, as there has been concern that the city of Turin’s flagging economy could be deprived of a major boost by such sluggish figures (The Sunday Telegraph loc. cit.).

Another factor which has detracted somewhat from the wisdom of holding this event has been the environmental damage allegedly caused by the Games. In the first place, the local environmental group Legambiente cited the hundreds of trees which have been cut down in order to site the bobsleigh track in Cesana, and claims that entire mountainsides have been “covered in cement” in order to provide accommodation for the athletes and their retinue (The Guardian, loc. cit). Environmental objections have also been raised against the high-speed link between Turin and Lyon, which was prompted by the Games and which will cut through the Susa Valley. Residents fear an environmental disaster in one of the most beautiful and unspoilt parts of the country. Although the building work was halted, residents fear that it will simply resume once the Games have finished and the media circus has moved on (The Guardian of 9/2/2006, p. 13). At least the protests mounted against these environmental degradations were sufficient to compel a change in the route taken by the final lap of the Olympic Torch (The Daily Telegraph of 10/2/2006, p. S9).

These protests, as well as other, more violent, dangers of disruption, naturally caused the organisers of the Games and the municipal and national authorities to focus their minds on the issue of security. To a considerable extent, this was grist to the mill of Silvio Berlusconi, Italy’s colourful Centre/Right prime minister, who, on the eve of the Games, pledged a policy of “zero tolerance” on protests aimed at disrupting the Winter Games. However, it appeared that Mr. Berlusconi’s bark was worse than his bite. Initially, he had issued a warning of “drastic measures” if the protesters continued their disruption. However, after a cabinet meeting at which he received a “reassuring” briefing from Giuseppe Pisanu, his Minister of the Interior, he adopted a more measured tone, confining himself to saying that the authorities would pay “vigilant and careful” attention to the events in and around Turin during the Winter Olympics (The Guardian of 11/2/2006, p. 21). As has been mentioned in an earlier section (see above, p.80), there was also concern that the Islamic outrage at the spate of anti-Muslim cartoons in the Danish press could also spill over into trouble at the Games – in the event, these fears proved groundless.

Inevitably, some people – not all of them with a political or business axe to grind – began to wonder exactly how Turin had won (or, as some might put it, been saddled with) the Games in the first place. Since it appears to have been the worst-kept secret in the “Olympic village” that Turin did not really want the Games, an investigative journalist of a British newspaper started to probe the history of the historic Italian city’s bid (Daily Mail of 10/2/2006, p. 90). This investigation revealed...
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that, right up to the point where the fateful decision had to be taken, the Swiss city of Sion was convinced that it had won the day. The Italians, apparently bidding only for the purpose of promoting tourism in their most celebrated mountainous area, seemed to be so certain of losing that they had appointed a local university professor of history to lead the bid.

The main reason why, contrary to all expectations (or fears, as the case may be), Turin obtained the Games appears to have been a backlash among his fellow members of the International Olympic Committee (IOC) against its Swiss member, Marc Hodler, who inevitably was a supporter of the Sion bid. It was he who had unleashed a blood-letting inquiry into some of the darker aspects of the IOC, including the allegations of corruption which had accompanied the bid by Salt Lake City (Journals passim!). The unexpected vote in their favour seems to have been the start of Turin’s embarrassment. Very few people in Italy appeared to display much interest in the project. The RAI (Italy’s state-operated television network) had to be “encouraged” to promote the event. Sponsors displayed a singular lack of interest, and Government interest was at best lukewarm, as witness the cut in funding which has been referred to earlier (above, p.92).

Inevitably, the results have been less than satisfactory. This has been particularly the case as regards the logistics of the Games. The twisting roads which link the city to its mountain resorts, where the main action took place, have proved a considerable handicap to those wanting unrestricted access to the various events. In an ironic twist to the environmental objections which have been raised against the event, private cars have been banned, with visitors being instructed to leave their vehicles near Turin and switch to trains and shuttle buses. However, checks inspired by bad weather and security concerns have caused many hours of traffic jams. Thus it was that a journey from the Olympic village to the competitive event often took five hours to complete.

Nothing would give the present writer greater pleasure than to be proved comprehensively wrong in his consistently negative assessment of these major events and bids. Yet until some irrefutable evidence to the contrary emerges that these are to the benefit of the communities concerned – both in the sort and in the long term – he will remained unconvinced that winning such events should be hailed as an unalloyed blessing.

Was the 2012 bid result a mistake? Israeli IOC member makes allegation, then has to apologise.

One year on, the celebrations in Trafalgar Square remain a vivid memory. The capital city of the United Kingdom had achieved a famous victory against the forces of evil and corruption – or Paris as it is known in the United Kingdom – and was set to make these the most memorable and well-organised games since – well, 2008 at least. At the time – and as was recorded in these columns ([2005] 2 Sport and the Law Journal p.68) this was attributed to the superior lobbying skills of such Olympic politicians as Lord Coe and – the man for whom the word “lobbying” seems to have been invented – the UK head of Government, Anthony Blair. Now, however, an IOC member has claimed that a voting mistake may have handed London the Games. Even though he later had to apologise to the person whom he accused of perpetrating the error, the entire matter still leaves a number of unanswered questions, as will be seen below.

Just before Christmas 2005, it was learned that London’s victory may have been assisted by a senior member of the International Olympic Committee (IOC) pressing the wrong button on his electronic voting pad. As a result, it was Madrid, instead of Paris, which was eliminated in the third round, thus leading to a London/Paris final. London had feared Madrid, and it was noticeable that, as new broke of Madrid’s elimination, the London delegation in Singapore, where the final stages took place, as they considered that, were Madrid to reach the final round, they could have beaten London. If this indeed was the explanation, it would solve a mystery. In the second round, Madrid had obtained 32 votes, but in the third round it lost a vote, giving Paris a one-vote advantage. Alex Gilady, a member of the IOC and of the London 2012 Co-ordinating Commission, explains:

“Let us say we think we know what happened, that one member made a mistake and voted for Paris rather than Madrid. If he had voted for Madrid it would be 32-32, and we would have to have a vote-off between Paris and Madrid. In the vote-off, all the votes supporting London would have gone to Madrid because the fear was that Paris had a big chance to win (sic). Madrid would have won against Paris, coming to the final against London. There, all the votes from Paris would have gone to support Madrid. Madrid would have won. That is now what we think happened” (The Daily Telegraph of 23/12/2005, p. S1).

The Madrid bidding team took the news philosophically, accepting that the issue was over and that they accepted the IOC’s decision (The Guardian 24/12/2005, p. S12). Not so Mr. Nikolou, however, who strongly denied the allegations, stating that all such “speculation” was totally unfounded, and claiming that he had not in fact voted at all in the third round. There is
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some evidence to back Mr. Nikolaou’s claim, in that he was definitely heard complaining that he had not had time to register his choice, and the relevant IOC records appear to support this assertion. But in that case, why did he add he had not voted “as I had announced during the election in question”? (The Guardian of 29/12/2005, S14). At any event, Mr. Gilady has issued an apology to Mr. Nikolaou, and it may be possible to ascribe this little episode to the bickering that often breaks out amongst IOC members after such important votes (The Daily Telegraph of 29/12/2005, p. S24). Nevertheless, the questions raised above remain short of a satisfactory answer...

Beijing 2008 “set to make profit”
The financial profligacy which often accompanies the organisation of the Olympics has been one of the factors which causes many to question the wisdom of these massive events. However, one city which has apparently has reason to be moderately optimistic about the financial outcome of organising the Olympics is Beijing, due to host the Games in 2008. According to the Chinese media agency Xinhu, the organisers had set a profit target of £9.2 million, but the final figure is likely to be higher because Beijing’s Olympic organisers have concluded deals with 10 domestic sponsors in addition to the 11 companies which had signed global sponsorship deals with the International Olympic Committee (IOC). Jiang Xiaoyu, the Vice-President of the organising committee, even talks about a $1 billion in sponsorship money, but concedes that there is much to do to reach this figure (The Guardian of 27/12/2005, p. G11).

Bear-wrestling to be made illegal in Ohio (US)?
This column refuses to treat any activity involving cruelty to animals, such as hunting and fishing, as a “sport” – except when reporting on official measures, or attempts, to make such activity unlawful. This may be about to happen to a particular fairground “attraction” in the US state of Ohio, which consists in the opportunity to enter a wrestling ring with a large black bear. For many years now, a paltry sum has earned the curious and the downright foolish the opportunity to get to grips with a 650 lb animal and try out its best moves. If you do not, however, try your chances of performing a half-Nelson on the bear, there is always the photo-opportunity of being snapped cheek by jowl with the animal in question.

However, this kind of event may soon be consigned to history, if a determined lobby group has its way. Says Ms. Amy Rhodes, a spokeswoman for the group People for the Ethical Treatment of Animals (PETA):

“It’s ridiculous. I cannot believe it still exists. It has been banned in 20 states. It used to be much more common. Most people realise it is dangerous and inherently cruel” (The Independent of 23/3/2006, p. 28).

The specific focus of PETA’s latest campaign has been Sam Mazzola, an Ohio-based exhibitor who operates the World Animal Studios touring exhibit. Campaigners allege that Mr. Mazzola has a long history of infringing rules issued by the US Department of Agriculture, and that many states which have laid down restrictions on bear wrestling have done so as a result of this exhibit. Accordingly, they have applied to the Department for the withdrawal of Mr. Mazzola’s licence. The latter, however, claims that he has tradition and a record of good animal husbandry on his side. He claims that he cares for a number of bears at his headquarters in the town of Columbia Station, and that the business of bear wrestling demands dedication and care on the part of the animal trainers. He added that he had no intention of discontinuing his activity (Ibid.)

The outcome of this case was not yet known at the time of writing.

Camel racing uses robots instead of children (Kuwait)
It will be recalled from a previous issue of this Journal (2005) 2 Sport and the Law Journal p. 73) that, following public concern and outcry over the use of child jockeys, this form of camel racing was banned in the United Arab Emirates (UAE). Now Kuwait has also moved to ban this scandalous practice, after criticism by human rights groups. Instead, races now feature camels driven by robots. The first such event was held in early February 2006, when teams from the six Gulf Arab states took part in a five-day championship held outside the capital Kuwait City. The remote-controlled robots are shaped like the small boys – some as young as four – who used to be employed as jockeys (The Independent of 6/2/2006, p. 25).

Articles on sports policy in European countries
In “organisation of professional sports in the Russian Federation” (ISLJ 2005, 1/2, 15-16) the author, Mikhail Loukine, examines the manner in which professional sport is organised and regulated in the country in question. He analyses the problem of defining professional sporting performers in a legal sense – both historically and with specific reference to Russia. He also focuses on the organisation and regulation, both in Soviet and in post-Soviet Russia, of professional ice hockey and football. He also considers the current and future role of players’ trade unions (European Current Law 9/05, p. 207).
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In “A wake-up call for Swedish football”, the author Owe Hjelmqvist (WSLR 2005 15-16) explains the background to the introduction by the Swedish football association of licences for football clubs to play in the top national league (Allsvenskan) on condition that the clubs in question are able to meet a number of financial requirements. He also describes the relegation of one club for having failed to meet these conditions in relation to a sponsorship agreement, as well as the method by which the club valued its players in its accounts (European Current Law 8/2005, p. 201).

In “Reform of Professional Sport – the Law of 15/12/2004”, the author Manuel Carius examines the background to, and likely implications of, the recent French legislation featured in the title. This measure was introduced in order to increase the competitive position of professional sporting clubs, more particularly in the context of EU competition law, and accordingly seeks to render more flexible certain provisions which apply to commercial sporting associations. This has served the change the legal position of paid sporting performers. At the same time, the Law in question liberalises certain conditions for the organisation of sporting companies, without, however, subjecting them to the ordinary legal rules on this subject (Carius, M., La réforme du sport professionnel – Loi du 15 décembre 2004 in JCP-La semaine juridique – Edition générale of 6/7/2005, p. 1273).

Proposed Dordogne motor racing circuit runs into flak from locals (France)

La Bagatelle is just one of the many delightful corners of the French Dordogne region which has attracted many foreign nationals, particularly British, to settle there. However, in recent months this idyllic setting seems to have come under threat by the proposed siting of a vintage racing circuit which seeks to attract around 20,000 people per year. The project has divided the local inhabitants. For some, it will provide just the boost which the area needs in order to breathe life into the local economy. However, to an energetic group of protesters, campaigning under the name of Court Circuit, this project would bring unwelcome noise, congestion and environmental degradation (The Daily Telegraph of 20/12/2005, p. 17).

At the time of current writing, the battle was about to enter a decisive stage. The promoters of this project, British businessman David Brooker-Carey and his wife, were due to submit formal plans in the town of Nontron, whilst its opponents will present a petition which thus far has attracted 2,000 names. The dispute seems to have pitted two types of British expatriate against each other – on the one hand, the “go-ahead” entrepreneur bursting with initiative and drive, on the other hand, those who sought refuge from the rat race in search of a quiet life. However, there is also opposition from many locals born and bred in the area (Ibid). The outcome of this case was not yet known at the time of writing.

Threat to Monza circuit lifted (Italy)

In late March 2006, it was learned that threats to the future of the Monza circuit, the home of the Italian Grand Prix located near Milan, had been lifted after the Mayor of the town and its residents had reached an agreement that would enable motor racing to continue to visit the historic circuit. The mayor in question, Michele Faglia, reported that a meeting between the local authorities and the families who had complained about the noise levels emanating from the track had produced a written agreement which is to be submitted to the local District Court (The Guardian of 27/3/2006, p. S18). No further details are available at the time of writing.

Something fishy – Russian Winter Olympic delegation alleged to have infringed caviar ban (Italy)

That the delegations which inevitably attach themselves to national teams participating in major events sometimes engage in a lack of moderation befitting their status is something that has been noted by most observers in recent years, but until now these excesses have remained outside the realm of law-breaking. It is possible that even this taboo was broken during the Turin Winter Olympics by the Russian delegation. The environmental group World Wildlife Fund (WWF), relying on media reports claiming that the Russian Olympic delegation took 55 lbs of black caviar to Turin for their entertainment banquets, has accused the said delegation of illegality. More particularly, the WWF claimed that such a large importation for personal use may well have infringed the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). It also claimed that sturgeon caviar could be exported from Russia only by special authorisation from the CITES agency, which in this case did not appear to have been issued (The Guardian of 20/2/2006, p. 19).

Not that the Russian delegation wished to make a secret of their lavish lifestyle. Its website, torino-2006.ru, boasted of banquet tables in the “Russian House” hospitality area virtually breaking under the weight of red and black caviar – among other Russian delicacies. The website added that such hospitality came courtesy of the delegation’s sponsor, being the Russian luxury goods company Bosco di Ciliegi. A
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spokeswoman for the company admitted that it had conveyed the caviar from Russia to Italy, but denied that any laws had been infringed. The allegations added to the controversy attending the Russian team at the Games, which detracted somewhat from the six gold and seven other medals which they acquired (Ibid).

Public health and safety issues

Great expectorations – Beijing “war on spitting for 2008 Games”

Tourists visiting the ancient capital city of China are often repelled by the phlegm on display – and they are not referring to the stoicism of the East, but to the volumes of spit encountered on the paths towards the Temple of Heaven (and just about everywhere else in China). However, with the 2008 Olympics on the horizon, a new anti-spitting campaign orchestrated by the Government has aimed to clear this expectoration from the city’s streets and manners. Public officials have identified spitting as Beijing’s worst habit, and have vowed to take forceful action against it. In fact, it would appear that opposition to this habit is confined to the tourists, with surveys showing that a growing number of locals are finding this habit extremely unpleasant and unhygienic (The Guardian 2/3/2006, p. 15).

Anti-spitting volunteers are already distributing small “spit bags” in which the citizenry may deposit their saliva. In addition, various dignitaries such as the Director of the Capital Ethics Development Office (CEDO) are also spreading the message through lectures and the distribution of over 2 million guidebooks on the subject. Although many in public authority expect satisfactory results from this campaign, others are more sceptical. They recall that, on the occasion of the SARS scare three years ago, similar noises were made by central government and were successful... until the scare ended, and people then expectorated as never before (Ibid).

Concerns about German stadium security

As the momentous football jamboree in Germany approaches, attention has understandably been focused on the safety of the venues for the various events. This issue seemed little more than an academic exercise until the alarm bells commenced their ominous peal in early January 2006, when the safety at four of these venues, including the Olympic Stadium in Berlin where the final is to be held, came in for some severe criticism from a leading consumer organisation. The nationally respected Stiftung Warentest organisation emphasised that their inspections did not seek to establish whether the stadiums met the relevant legal standards, but to measure them for what they described as “today’s standards in science and technology”.

Assessing the venues on the basis of these standards, the organisation gave a definite red card to the stadiums in Kaiserslautern, Gelsenkirchen, Leipzig and Berlin. Their criticism focused on missing escape routes, steps which were too steep, and considerable dangers in the event of fire or panic. The good news was that the improvements needed to make the grounds acceptably safe could be undertaken in good time for the commencement of the tournament on 9 June. This criticism has provoked a storm of controversy. The best-known public face of the 2006 World Cup, former German captain Franz Beckenbauer, took violent exception to these comments, describing the testers as “know-it-alls” who were only interested in publicity when they issued the report (The Daily Telegraph of 11/1/2006, p. S4).

However, some of the wiser World Cup organisers took a more dispassionate view. They accepted that in Berlin, Gelsenkirchen and Leipzig spectators were unable to flee a crush or panic on the pitch, but claimed this was never the plan and that modern thinking was to guide people to the area outside. As regards the Kaiserslautern stadium, the criticism was taken in a “constructive” (!) manner and that the situation was not irreversible, for the simple reason that the stadium was still being built. The Organising Committee’s Vice President, Wolfgang Niersbach, cautioned against “unnecessary panic-spreading” which could only make the fans feel insecure and damage the reputation of the FIFA World Cup (Ibid).

Another alarm about German stadium security was raised when security advisers warned governing bodies FIFA and UEFA about spectator safety at the ground of VfB Stuttgart following the UEFA Cup tie at which the German club had hosted English Premiership side Middlesbrough in mid-February 2006. The Gottlieb-Daimler stadium, which is another World Cup finals site, was evacuated after a fire alarm went off before the Middlesbrough match. Visiting fans, however, stayed put because emergency warnings were only read out in German (Daily Mail of 21/2/2006, p. 74).
Skiing resorts take measures to rein in the yobbish and reckless ... but still cannot prevent deaths from avalanches

The sport of skiing has hitherto been regarded as one of the more genteel physical occupations. However, it appears that this particular pastime also has its share of obnoxious elements who, often under extreme intoxication, take unwarranted liberties on the slopes to the detriment of other users and organizers alike. The problem appears to have become so acute that Swiss ski resort operators have announced that they are about to take severe action against offenders. They will employ mountain gamekeepers and forest wardens who will be given the power of issuing fines of up to SF 20,000.

Because of the scale of the problem, piste officials with the power to warn those who are skiing dangerously have been a feature of the Alpine resorts since 2004, when there was growing concern about yobbery on the slopes. However, it has soon appeared that even their powers to confiscate ski lift passes and ban persistent troublemakers have failed to resolve the problem of drunken or reckless skiers. Nevertheless, henceforth gamekeepers and wardens employed by the country’s Forestry Board will be used to come down heavily on the backs of offenders. (The Sunday Telegraph of 8/1/2006, p. 33).

The miscreants will be pursued wherever they go and have fines of up to SF 20,000 imposed on them. Unlike the regular piste patrols, who are restricted to the groomed ski runs, the new ski police will be entitled to follow skiers who endanger themselves and others by going off-piste. The move comes amid growing concern about the number of accidents involving skiers who have ignored safety rules. Fatalities have included an intoxicated Austrian skier who was crushed by a piste machine in the course of a blizzard, and a Briton who died after crashing into a log cabin during a ski run from a mountain bar at St. Anton in Austria’s Tyrol (Ibid).

Elsewhere, skiing authorities are taking other types of preventative action in order to stop the reckless from injuring themselves and others. Many accidents have been caused, not so much by acts of yobbery, but by simply hurtling down the slope at breakneck speed. Thus the Swiss resort of Grindelwald has set a precedent on the slopes by introducing a speed limit of 30 km/h on one of its pistes. The “Speed 30 Slope” – the two-kilometre intermediate blue run in the Oberjoch ski area – is designed to protect young, elderly or inexperienced skiers and snowboarders from the fast and furious bearing down on them at high speeds. This restriction is the first of its kind in Europe and, according to the resort’s authorities, it has been favourably received by the general public. They defend themselves against the charge of being “killjoys” by pointing out that 45,000 people per year are hurt on Switzerland’s slopes, mainly owing to collisions (The Observer of 8/1/2006, p. 39).

One particular hazard which causes a regular spate of fatalities, however, is entirely down to the hazards of nature and has thus far defied such safety measures as have been put into place, to wit, avalanches. This has been a particular problem this year’s winter season in the French Alps, during which fierce winds and heavy snowfall have caused a rash of avalanches. Some of these have swept away skiers and made it the costliest season yet in terms of lives lost. According to the National Association for the Study of Snow and Avalanches, avalanches have killed 53 people in ski resorts this past season. Snowslides have swept away climbers, a ski patroller and a mountain rescuer, but the majority of victims have been skiers who strayed off-piste (The Guardian of 18/3/2006, p. 25). Clearly, more work will need to be done to protect the skiing public from this hazard.

Safety at rallying events questioned as participants are killed

Rallying is a sport which is not for the faint-hearted, and those taking part in them must expect to take a certain amount of risks. However, this is not to say that greater efforts should not be undertaken to make the sport safer, particularly in the light of certain fatalities incurred in recent events.

One such event is the Dakar Rally, an annual motorcycling and car-racing event which takes place on a route going through several African countries. Safety concerns had been raised after the previous year’s race, which, as was reported in the previous issue of this Journal [(2005) 1 Sport and the Law Journal] saw the deaths of riders Fabrizio Meoni and Jose Manuel Perez and led to speeds being restricted to 93 mph in the motorcycling event. However, renewed question marks over the safety of the event were raised when Australian rider Andy Caldecott died instantly after a crash on the rally’s longest stage, which is between Mougachott and Kiffa in Mauritania. Mr. Caldecott’s team, KTM-Repso, made the following statement:

“Today we were brutally pulled out of our dream to make this rally safe. Our thoughts are with Andy and his family” (The Daily Telegraph of 10/1/2006, p. S14).
5. Public Law

Mr. Caldecott was one of the most experienced riders in the rally. Another KTM rider, Isidre Steve, from Spain, also crashed during that stage and had to be taken to hospital, but his injuries were not life-threatening (Ibid). It is not yet known whether further safety measures will be introduced as a result of this tragic affair.

The Catalunya Rally in Spain has also witnessed a recent fatality raising safety concerns, involving the German co-driver Jörg Bastuck. On the opening day of the event, Mr. Bastuck was hit by the car driven by another competitor, Britain’s Barry Clark, after climbing out of the Citroën C2 which he shared with Aaron Burkart. Their car had slid off the slippery asphalt into a ditch on a corner, and whilst Bastuck was attempting to repair the damage, Clark’s Fiesta left the course at the same spot. Mr. Bastuck was pinned between the two vehicles and suffered serious injuries. He was airlifted to hospital, but was pronounced dead an hour later (The Guardian of 25/3/2006, p. S5). To a certain extent this can be described as a freak accident. However, coming only six months after the death of British co-driver Michael Park in Rally Great Britain, this incident has imparted added urgency to the debate on ways to make the sport safer.

Fifteen die as roof of German ice rink collapses
Tragedy struck in the Bavarian Alpine town of Bad Reichenhall in early January 2006, when the roof collapsed on an ice rink as it was closing, engulfing many children. The rescuers battled bravely to rescue those buried in the wreckage, but their efforts were hampered by the danger of further collapses, and in the event 15 people were found to have met their end. Inevitably, the question as to whom was responsible arose. The town’s Mayor shrugged off criticism that the disaster could have been forestalled. He insisted that snow levels on the roof had been measured at midday on the day of the disaster and had been found to be safe. However, locals have suspected that the ice rink, built in the 1970s, was in poor shape and leaking. Police and public prosecutors immediately confirmed that they would investigate the case for possible negligence (The Guardian of 4/1/2006, p. 16). The outcome of this case was not yet known at the time of writing.

Could bird flu endanger 2006 World Cup?
Recent months have seen a good deal of concern over a disease, Far Eastern in origin, which has taken root among certain avian species, and of which it is yet uncertain whether it could communicate itself to humans. The possibility of this bird flu jumping species seemed to have increased when, in early March 2006, it was found that a German cat had died as a result of being contaminated with the disease. This caused a minor panic in the country, with householders in that area being ordered to keep their cats indoors and only walk their dogs on leads. These measures, which include provisions to shoot cats which stray outside, were drawn up by Germany’s animal disease crisis team in response to a bird flu epidemic that has already affected five of Germany’s federal states (The Independent of 2/3/2006, p. 22).

Some people have dismissed these panic measures as an over-reaction – and the same might be said of the warning issued by Sepp Blatter, the President of football’s world governing body FIFA, that the World Cup to be staged later this year in Germany could be cancelled if the bird flu were indeed found to be transmitted between humans. Asked by a German newspaper whether the disease could be a threat to the tournament, he replied:

“\textquoteleft At the moment, no, but if bird flu developed into something like the plague or cholera (sic), if it’s a case of people infecting people, then the Government would have to take a decision. We would have to respect that. That is clear\textquoteright” (Ibid).

It remains to be seen whether Mr. Blatter’s somewhat apocalyptic words will need to be translated into action.

Safety rules for Volvo Ocean sailing race questioned as competitors suffer damage
As the second day of the Volvo Ocean Race was due to commence in the Victoria & Albert dock in Cape Town, the 70 competitors were gripped with considerable apprehensions, the first leg having seen three of the seven boats damaged, two of them during the first 24 hours, and forced to retire for rapid repairs. Both “Pirates of the Caribbean”, captained by Paul Cayard, and “Movistar”, skippered by Bouwe Bekking, were compelled to head for Portuguese ports during the first leg and for reconstruction following their early withdrawal. Many of the sailors blamed the organizers, who only produced regulations for the building of the 70ft boats one year before the start. This was felt to be an insufficient length of time for teams to be able to raise funding and commission appropriate designs (The Guardian of 2/1/2006, p. S15).

Their apprehension was only natural given that the second leg, from Cape Town to Melbourne, a 6,100 trek which normally takes 15-16 days. However, the race organizers have taken a number of safety measures in recognition of the danger presented by sending boats deep into the Southern Ocean, and have introduced two artificial waypoints which the boats must pass to the North. They have also named Kerguelen island, located between Africa, Antarctica and Australia, as well as...
5. Public Law

eclipse Island, off the South-West tip of Australia, as marks of the course (Ibid).

Nationality, visas, immigration and related issues

Police apprehend Sierra Leone athletes are visas expire (Australia)
The problem of athletes who take advantage of their attendance at major sporting events in order to migrate illegally to that country is one which has been frequently adumbrated in these columns (see e.g. [2002] 2 Sport and the Law Journal p. 76). Such episodes have naturally caused the relevant public authorities to be extremely vigilant in this regard, and to monitor carefully the movements of competitors both during and after the event.

Thus it was that, on the occasion of the 2006 Commonwealth Games, which took place in Melbourne in the course of March, attention focused on a group of six Sierra Leone athletes who were reported missing after the Games. Police in Sydney later found these athletes in a house at a beachside suburb, hours after their official visas expired. The athletes were reported to have indicated to the police that they wished to apply for continued residence in Australia, and were granted bridging visas which enabled them to make further visa applications. The athletes were released back into the community, but must check regularly with immigration officials whilst their applications are being considered (The Guardian of 28/3/2006, p. S2).

Athlete O’Sullivan last person to dart through “dual nationality” loophole (Australia/Ireland)
In the midst of the 2006 Commonwealth Games, held in Melbourne, it was learned that the loophole which has enabled Sonia O’Sullivan to compete for Australia during this event will be closed by a change to the eligibility rules. The veteran athlete became a dual Australian/Irish national in February 2006, and represented the host country in the 5,000 metres event before returning to Europe in order to compete for Ireland in the European Championships later that year. Under existing international regulations, athletes normally have to wait for three years before they can represent another country; however, this clause does not apply to the Commonwealth Games.

The organizers of the event had to accept Ms. O’Sullivan’s registration, but announced their intention to close this particular loophole after the Melbourne event. Mike Hooper, the Chief Executive of the Commonwealth Games Federation, commented:

“Being candid, we did not know there was this anomaly on eligibility until it came up recently concerning several athletes who have dual nationality. The anomaly had to be tidied up and we have done that; we have refined the rules. So, in the case of Sonia O’Sullivan, we wish her well in Melbourne but that loophole is now closed” (The Guardian of 13/3/2006, p. S7).

Nevertheless, Ms. O’Sullivan’s choice has been criticized on moral, if not on legal, grounds. Several athletes, such as Australia’s Cathy Freeman, voiced the opinion that one’s allegiance should be to one country only (Ibid).

Blatter advocates limit on foreign football signings
A combination of the Bosman ruling and the enormous increase in the game’s revenue through television coverage have meant that virtually every top football team in Europe – if not the world – has a fair quota of foreign players on its books. Some clubs even field teams containing not a single player having the citizenship of the country which accommodates it, as witness the series of games Arsenal FC have played without a single Briton (let alone Englishman) in their ranks. Some see this as an inevitable and welcome consequence of the game’s global reach; others condemn this trend as transforming leading clubs into havens for footballing mercenaries. The latter view appears to be the dominant thinking among the game’s top hierarchy, judging by the recent pronouncements of Sepp Blatter, the often controversial president of the game’s world governing body, FIFA.

In a recent statement, Mr. Blatter indicated his preference for a system whereby clubs should impose a limit on foreign players, ten years after the famous Bosman ruling (see countless Sport and the Law Journals passim!). Warming to his theme, Mr. Blatter singled out English Premier League side Chelsea as an example of the extent to which foreign signings can stifle competition. He opined that, if sides such as Chelsea were confined to five foreign signings, the club’s main financial backer. Roman Abramovich, would not be able to buy the best players across the world for excessive fees. He added:

“FIFA’s idea is that we should have at least six players eligible for the national team of the country in which they play. The national identity of clubs is very important. But the organization of club competitions is not made by FIFA but by national associations” (The Daily Telegraph of 20/12/2005, p. S3).
5. Public Law

To a considerable extent, Mr. Blatter’s thoughts chime in with the plans forged by the European governing body UEFA to ensure the presence of a minimal percentage of home-grown talent among the continent’s teams (see [2005] 1 Sport and the Law Journal p. 73). However, it would appear that the FIFA and UEFA proposals will encounter a formidable opponent in the shape of the European Union (EU). Questioned on Mr. Blatter’s proposals, an EU official stressed that the freedom of movement ruling (referring to the Bosman decision) was a sacred principle, and that such restrictions were not on the EU agenda (Ibid). The FIFA and UEFA plans therefore seem to have many obstacles to overcome before they can become reality.

Sporting figures in politics

Weah accepts defeat after Liberian election controversy

It will be recalled from a previous issue of this Journal ([2005] 3 Sport and the Law Journal p. 72) that the former Chelsea and A.C. Milan footballer, George Weah, had been involved in an extremely controversial campaign for election to the presidency of his native Liberia. When this column last reported on this imbroglio, the former Footballer of the Year had threatened to take legal action to block the inauguration of his victor, Mrs. Johnson-Sirleaf, blaming his defeat on widespread malpractice and downright fraud. It soon became apparent that Mr. Weah’s protestations were having a serious effect on the political order in Liberia. Indeed, a number of riots flared in the capital, Monrovia, which threatened to undermine essential order and stability in the country.

It emerged that, during these disturbances, Mr. Weah’s supporters clashed with police for several days, with hundreds of youths chanting his name and hurling stones at the police, who responded by using batons and teargas. Twenty people were reported to have been seriously injured, including five police officers. The concern at this unrest was not confined to reactions to the election result, raising as it did concerns that Liberia may remain trapped in what have already been 14 years of political violence. Indeed, at a crisis meeting held by the Government, the forces behind these disturbances were accused of attempting a coup d’état. Accounts of the demonstrations varied considerably, with some people accusing the police of using batons to break up an essentially peaceful demonstration, others claiming that the youths had started the trouble by smashing car windscreens (The Guardian of 13/12/2005, p. 14).

In the meantime, the nation’s elections commission undertook to investigate a complaint lodged by Mr. Weah. However, a few days later he announced that he would abandon the legal challenge to his opponent. He stopped well short of expressly acknowledging Ms. Johnson-Sirleaf’s victory, but stated that he was discontinuing the action in the interests of peace and stability (The Guardian of 22/12/2005, p. 17).

Other issues

Figure-skating coach revealed as former Stasi spy – but allowed to continue in post (Germany)

The former Communist state of the German Democratic Republic (GDR), commonly known as East Germany, was notorious for seeking international renown and recognition through the exploits of its citizens on the sporting field, by fair means or foul. One of the more controversial elements of this development was the role played by the notorious state police force, the Stasi, which represented a network so pervasive as to involve virtually all areas of public life, including – as will be recalled from previous issues of this Journal (see e.g. [2005] 1 Sport and the Law Journal p. 75) – the world of sport. Therefore the news that the figure-skating coach of the current German Olympic team, Ingo Steuer, was unmasked as a former Stasi spy was greeted by the general public as a regrettable, if unsurprising, news item.

However, not all the German sporting authorities seem to have taken this relaxed view. The National Olympic Committee has argued that Mr. Steuer cannot represent Germany, whilst the German Skaters’ Federation have stated that the coach’s former relationship with the Stasi should not be an issue. The matter came to light when documents were discovered indicating that Mr. Steuer, who himself represented the united Germany in two Olympic Games and became the pairs world champion in 1997, was an active and enthusiastic informer between 1985 and 1989. He apparently reported on conversations and tipped off the Stasi that a prominent ice skater was considering defection to France. He was also used in order to inform on Katarina Witt, the GDR’s star skater, who was also in contact with the secret police and received a number of privileges from the Stasi. In fact, the latter infiltrated all sports in East Germany, which was a leading sporting nation. In the immediate aftermath of reunification in 1990, Germany was eager to tap into the former GDR’s athletic potential, so Stasi files were frequently overlooked (The Times of 2/2/2006, p. 40).
Because of its opposition to Steuer, the national Olympic Committee had announced that it would remove him from the official delegation, and named Monika Schweibe as his replacement. However, it later came to light that Ms. Schweibe also had been a Stasi informer. It was clear that the Committee’s move could have serious implications for its medal-winning chances as well, since one of their main hopes, Aliona Savchenko, declared publicly that she would not go to Turin without him. In the event, Mr. Steuer challenged the Committee before a Berlin court and won the right to accompany the German delegation. However, two other sporting officials with Stasi connections, the ski-jump trainer Henry Glass and sports analyst Hans Hartleb, were banned from the Turin team (The Independent of 7/2/2006, p. 17).

Korean premier quits after playing golf is deemed “dereliction of duty”
In mid-March 2006, it was learned that president Roh Moo-hyun of South Korea had accepted the resignation of his Prime Minister, Lee Hae-chan, for dereliction of duty after he engaged in something that many of his compatriots would prefer to working – i.e. playing golf. The hapless minister had faced pressure ever since he took part in a game of golf on 1 March, which was not only a national holiday, but also marked the commencement of a walkout by railwaymen which paralysed the country. His fall was delayed whilst the President was out of the country on a trip to Africa, but Mr. Lee offered to resign as soon as Mr. Roh returned.

This was not the first occasion on which Mr. Lee had caught up in similar embarrassment through his appetite for the game. He was golfing in April last year when a wildfire spread across parts of the country and destroyed a 1,300-year-old Buddhist temple. He was also on the greens later that year when heavy rains struck southern areas. However, adding to his woes on this occasion were his golfing partners, who included a businessman having a criminal record for stock-price fixing. The individual in question, who operates a flour mill in the Southern port of Busan, was reportedly ordered to pay a fine of 3.5 billion won (£2 million) for fixing flour prices. Some opposition critics voiced their suspicions that the businessman had attempted to convince Mr. Lee between holes to extricate him from his predicament (The Independent of 15/3/2006, p. 27).

The main opposition Grand National Party has in the meantime lodged a complaint with prosecutors alleging that Mr. Lee could have received requests for favours from the businessmen in question, and claimed that, following the resignation, the investigation should be continued into what has been – predictably – labelled “golfgate” (ibid). No further details are available at the time of writing.

Chinese tennis star “wants to break away from Communist state control”
China’s aspirations to occupy a prominent position in the world of sport have by now embraced the majority of major disciplines, including tennis, which has been in receipt of massive state funding over the past few years. However, it looked as though one of the products of this programme may prove something of an embarrassment to the country’s authorities when it was learned that their second-ranked player, Peng Shuai, wishes to break away from Communist state control. Ms. Peng, who is ranked No. 61 in the world, has already defeated such top players as Anastasia Myskina and Elena Dementieva, and is becoming increasingly frustrated at having to yield a considerable proportion of her earnings to the state. It is reported that players have been required to remit as much as 65 per cent of their prize money (The Daily Telegraph of 16/2/2006, p. S15).

Accordingly, Ms. Peng has announced that she will no longer follow what have appeared to be restrictive training regimes, and will decide her own coaching team, preparations and tournaments. China’s tennis authorities are reported to be highly embarrassed that Ms. Peng’s dissatisfaction has been made so public. This is particularly the case as this imbroglio comes at a crucial time of the nation’s tennis investment programme. Thus at the Australian Open in January 2006, China won its first Grand Slam title, with Yi Jan and Jie Zheng winning the doubles title at Melbourne Park (ibid).

Muhammad Ali receives award for civil rights work
In December 2005, it was learned that the former heavyweight boxing champion, Mohammad Ali, was to receive the Otto Hahn peace medal for his efforts with the US civil rights movement and the United Nations. This German award is presented every two years, and has already honoured such famous figures as Mikhail Gorbachev and the late Nazi-hunter, Simon Wiesenthal. It was named after the 1944 Nobel Prize winner, a German chemist and nuclear physicist who fled the Nazi regime in 1938 (The Guardian of 17/12/2005, p. G8).

Banned promoter King honoured for charity work
Even though the boxing promoter Don King is not permitted to promote fights in the local casinos, Atlantic City has named a square after him. Local government officials unveiled the sign on Don King Plaza in recognition of the promoter’s work for charity, which
have included educational outreach in local schools, turkey giveaways to the poor, and donations to a fund for injured construction workers. Previously, the promotor had been refused a licence to promote in the casinos because he refused to answer regulators’ questions about his dealings with the former International Boxing Federation chairman Bob Lee, who was convicted of money laundering, tax evasion and racketeering in the course of 2001 (The Guardian of 15/3/2006, p. S2).

Ve heff vays of making you vinn – Klinsmann called before Parliamentary committee to explain training methods (Germany)

The excessively elevated status accorded to football has rarely caused more than a ripple of irritation amongst those who consider that such matters as world peace and the eradication of poverty should enjoy considerably more attention. However, the obsession with this sport displayed by elected politicians appeared to have plumbed further depths in early March 2006, when a group of German MPs demanded that Jürgen Klinsmann, the German national coach, be summoned to a Parliamentary Committee to explain his training methods and tactics before the World Cup tournament commenced in June.

Following Germany’s 4-1 defeat by Italy a few days previously, MPs from the ruling Christian Democrats and Social Democrats informed a leading German daily newspaper that Mr. Klinsmann should answer questions on the subject. Presumably contriving to keep a straight face, Norbert Barthle, a member of the CDU party, explained that this issue was worthy of Parliamentary attention because

“the World Cup is of national importance. It would be good if Herr Klinsmann would come before the sport committee and explain what his concept is and how Germany can win the World Cup. The Italy match was gruesome and we wonder that it can be fixed by the summer. The Federal Government is the biggest sponsor of the World Cup. In the light of that, I’d like to get a few answers from him” (The Observer of 5/3/2006, p. S9).

In the absence of any relevant media reports, it must be assumed that Mr. Klinsmann wisely declined this particular honour.

5. Public Law
Planning law

Judicial review (other than planning decisions)

Recent decisions by the French administrative courts in sporting matters

French cycling champion wins review of doping decision

Having been crowned national champion of France in time trialing, and having emerged victorious from the Paris-Bourges race in 2001, the cyclist Florent Brard was embarking on the most critical period of his career when, in August 2002, he was subjected to a drugs test after a stage in the Tour de l'Ian race. As a result of this check, he tested positive for betamethadone, being a substance classified under glucocorticosteroids and therefore prohibited by the rules of the International Cycling Union (UCI). However, the disciplinary authorities of the French cycling federation failed to take a decision within the stipulated time limits, which caused the Council for the Prevention and Countering of Doping (CLPD) to intervene. The CLPD is an independent administrative authority created in 1999, which is in charge of formulating policy on the protection of sporting performers' health, as well as organizing the campaign against doping. It may exercise disciplinary functions in several instances, one of these being the circumstance whereby the appropriate disciplinary authorities of a sporting federation have failed to take a decision within the stipulated time limits.

The CLPD heard that Mr. Brard had ingested the substance in order to treat a wound sustained as a result of a fall. It ruled that the cyclist in question should have mentioned, in the official doping control report, that his body contained, even in residual form, elements of a prohibited substance caused by a medical prescription. In the absence of such details, the disciplinary body considered it necessary to impose on the cyclist a six-month suspension, as well as an obligation to undergo a doping check once this suspension had ended. Mr. Brard decided to appeal for judicial review to the Supreme Administrative Court (Conseil d'Etat), even though no CLPD decision had previously been annulled by the Court.

The Court awarded the action to the applicant. It ruled that the CLPD had committed an error of law in imposing the penalties appealed against by misinterpreting the legislation in question. The latter allows the injection of the substances in question in the event of medical necessity, but merely allows the medical practitioner administering the injection to inform the patient both of the nature of the substance and of the obligation to present the prescription document at the time of the doping control. Under these circumstances, the mere fact of Mr. Brard having failed to inform the doping authorities in question of the injection could not justify the penalty imposed by the CLPD (Decision of 18/5/2005, Gazette du Palais 7/8 2005, p. 2697).

The fall-out from this decision has not been as momentous as might have been suspected – if only because the CLPD is, at the time of writing, scheduled to be replaced by a new national anti-doping body. It has, however, highlighted the need to harmonise the interpretation of current anti-doping legislation by the various bodies concerned.

Paintball is a leisure activity rather than a recognized sport. Decision of the French Supreme Administrative Court

The provisions of the French Law on Sporting Organisation of 16/7/1984 lay down that, for a sporting licence to be issued by the Minister for Sport to a federation, the latter must have a public service objective, which must consist in promoting and organizing sporting and physical activity. When the French Sporting Paintball Federation applied for such a licence, the Minister for Sport refused to issue it. Pressed by the Federation to give reasons for his decision, the Minister replied that his decision was based on the circumstance that paintball was essentially a leisure activity which did not have the essential characteristic of involving physical endeavour or exercise. The federation accordingly applied to the Supreme Administrative Court (Conseil d'Etat) for review of this decision.

The Court essentially followed the same reasoning as the Minister. It considered that, on the basis of the case file documents, paintball was normally practised as a leisure activity and did not necessarily involve sporting performers who engage in physical endeavour in the course of competitions regularly organised on the basis of well-defined rules. Thus ruling that, in making his decision, the Minister had neither committed an error of law nor made an incorrect assessment of the circumstances of the case, the Court confirmed the latter's decision (Decision of 13/4/2005, Gazette du Palais [2005] 7/8, p. 2770).

6. Administrative Law
6. Administrative Law

Decision endorsing French motor racing circuit annulled by Supreme Court

Under a decree of 1958 on the organisation of events or competitions in areas not open to the general traffic, and involving the participation of motorised vehicles, the Minister of the Interior must issue the necessary measures not only to secure the safety of the participants and of the general public, but also to ensure that the general public enjoy adequate levels of peace and quiet, taking into account the location of the circuit, the nature of the events, and the number of vehicles which it is capable of accommodating.

The French Supreme Administrative Court (Decision of 1/7/2005, Gazette du Palais [2005] 11/12, p. 4340) the ministerial decision of 2002 licensing the Pôle Mécanique d’Alès racing circuit, which had been based purely on the safety guarantees presented by the latter, was unlawful in that it had failed to take into account the need to safeguard adequate levels of peace and quiet. It therefore annulled the decision.

Procedure imposing administrative football disorder penalties must observe rights of the defence established under the criminal law. Belgian Supreme Court decision

Belgium is a country which, although its citizenry is largely regarded as peaceable and law-abiding, has nevertheless also had to grapple with problems of hooliganism at sporting contests, particularly football. Under legislation adopted in 1998, football clubs organising both domestic and international football fixtures must take certain measures aimed at preventing trouble, failing which they may be subjected to a range of administrative fines. In the case under review, the officials of a leading First Division club had failed to observe the necessary safeguards, more particularly in relation to the distribution of entrance tickets, supervision of such distribution and admission to the stadium.

Under the said 1998 legislation, police officials designated by the King may draw up an official report of the alleged infringement and submit it to a high-ranking official of the national police service (Algemene Rijkswacht), who may impose a fine. The legislation also provides that the organisation or individual who is subject to such a fine may, within 30 days, present written submissions to the relevant official and at the same time request a hearing before him. Such a hearing was held on application by the club in question. In spite of this hearing, a fine was imposed on the club, albeit by a different official from the one before whom the hearing had been held. The club applied to have this decision overturned.

The District Criminal Court (Politierechtbank) of Bruges, to whom the club had appealed, ruled that the rights of the defence had been infringed in this case, because the decision had been issued by a different official from the one who had attended the hearings involved in the case, also applies to criminal cases, and that this is a principle which is imposed by public policy (openbare orde). It accordingly set aside the decision imposing the fine. The Interior Ministry applied for a review of this decision before the Supreme Court (Hof van Cassatie).

In his submissions to the Court, the Advocate-General, D. Thijs centred his argumentation on the manner in which the said Article 779 should be interpreted in the light of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). He held that the requirement that judges taking the relevant decision must have attended all the hearings had a different outcome according to whether the proceedings in question were civil or criminal. In civil actions, this rule, although mandatory, was not one which affected public policy. This was, however, the case in criminal proceedings. In such cases, there can be no question of dispensing with the relevant formalities. Although the fine imposed was labelled as an “administrative penalty”, it should be regarded as a criminal penalty within the meaning of Article 6 of the ECHR and Article 14 of the ICCPR. However, neither of these provisions made it obligatory that the judge taking the decision should also be the judge who conducted the hearing.

The Court disagreed with these submissions (Decision of 19/11/2004, Rechtspersdag Weekblad [2005-6] p. 101 et seq.). Basing its findings entirely on the various provisions of the 1998 Law referred to above, it decided that the official who imposes the fines laid down should be the same as the one who had heard the defence submitted by the indicted party, or by the latter’s legal counsel. The District Court decision was therefore confirmed.
6. Administrative Law

Other issues

**What is the best type of administrative contract for the management of sporting installations? Article in French academic journal**

In France, virtually all sporting installations used by professional sporting clubs belong to the local authorities. The contractual relations between the club and the local authority in question accordingly acquire a particular significance. The author of the contribution in question (“Les modes de gestion des équipements sportifs utilisés par les clubs professionnels”, in AJDA 2005, p. 1438 et seq) the author, Patrick Bayeux, examines the array of contractual solutions which present themselves, and concludes that in their present form they display considerable shortcomings. One of the most prominent of this defects is that most of them require that the management of these installations be opened for competitive tendering, which in the case of sporting clubs is very difficult to enforce from a political viewpoint. He accordingly suggests that an exceptional contract be devised for sporting installations in the same way as these already exist for the military and for the world of the arts.
7. Property Law

Land law

Members of horseriding club denied right of access to private property by prescription. Danish Supreme Court decision

In the case under review, the members of the Horsholm riding club had, ever since the club was established in 1930, used a path which was part of a privately-owned property on their journey from the Folehave forest to the Rude forest, which was located approximately 3 km from that path. In 2000, the owner of the property, who had acquired ownership in 1992, fenced off the path in question. Later, the fencing was adjusted in such a way as to enable pedestrians and cyclists to pass, but not horse riders. The riding club applied to the courts for recognition that its members should be allowed to use the path, as they had acquired a right to do so. Both the District Court (Byretten) and the Court of Appeal (Landsretten) awarded the claim. The owner applied to the Supreme Court (Højesteret) for review of this decision.

Before the Supreme Court, the riding club claimed that it has acquired the right of passage over the land concerned as an easement acquired by prescription. The Court found that the club’s premises extended to the Folehave forest, which itself was at a distance of 1 km from the disputed path. Therefore, the latter could not constitute a way of access to the riding club. The Court also held that many types of horse rider who had been riding in the forests located in that vicinity had been suffered to use the path in question. In fact, riding on the path in general had been tolerated for many years by the temporary owners, and therefore anyone who had wished to use the path for this purpose had been allowed to do so. The Supreme Court therefore held that, being merely part of an indeterminate group of horse riders who had used the path, the riding club had no rightful claim to have access to that path, and that their use of the path did not have such specific characteristics as to allow them to claim easement by prescription (Decision of 20/5/2005, Ugeskrift for Rettsvaesen [2005] p. 2464).

Intellectual property law

Design of muscle trainer does not meet novelty requirement. German court decision

The applicants in the case under review were, respectively, the German manufacturer of an abdominal muscle trainer marketed under the AB SWING trade mark, and the holder of that trade mark. The opponents, who had originally bought the applicant’s products and sold them through their catalogue, subsequently marketed a product known as Aktiv Swing, which was similar to the item produced by the applicants. The operating instructions supplied with the Aktiv Swing product stated, inter alia, “Please follow the training instructions given in this manual carefully when training with AB SWING”.

The applicants alleged that the opponents’ Aktiv Swing product breached their unregistered Community design right. At the request of the applicants, the opponents were prevented by a court ruling (a) from advertising, offering for sale, importing or exporting, selling, tendering for sale or otherwise putting into circulation the abdominal muscle training device in Germany (b) from advertising, offering for sale, importing or exporting, selling, tendering for sale or otherwise putting into circulation the abdominal muscle training device sold by the opponents under the trade name AB SWING, and (c) from advertising a price decrease in such a way that the lower price was contrasted with a crossed-out price at which AB SWING had previously been marketed.

The opponents appealed against this decision, claiming that the design lacked protection under the unregistered Community design right, since it had been retailed to the public in the United States before it had been made available in the European Union (EU). The Frankfurt Court of Appeal (Landesgericht) allowed the appeal in respect of the first and third grounds of the order (case 3/12 O 5/04, decision of 17/3/2004 [2006] European Copyright and Design Reports p. 71). There could be no novelty in respect of the alleged unregistered Community design on account of it having been published in the US, where it had been put on sale by the company which had originally designed it before it was made available to the public in the EU. Such prior disclosure did not impart to the unregistered Community design an earlier date of protection, but had the effect of acting as prior art against which the design, not being novel, was deprived of legal protection as an unregistered Community design. In any event, the applicants’ design was not novel since it was anticipated by the placing on the market of a product of the same design by a third party.

Canadian patent decisions

Stedman/Stedmans opposition refused

In this case, the applicant had applied to register the trade mark STEDMAN on the basis of its use in Canada in connection with T-shirts and sports shirts. Opposition was lodged against this registration on the grounds that, inter
7. Property Law

alia, (a) the trade mark was not capable of registration under Section 12(1)(d) of the Trademarks Act 1985, by reason of confusion with the registered trademark STEDMANS, and variation, registered for the operation of a department store, with retail services associated with the sale of clothing; (b) the applicant was not the person entitled to register because of the prior use by the opponent of the trademarks referred to under (a), and (c) the trade mark was not distinctive of the applicant.

The Trade-marks Opposition Board held that the opposition should be refused (Truserv Corporation v. Sara Lee Corporation, Decision of 23/11/2004, Canadian Patent Reporter [2005] p. 51). It found that the trademarks of both parties possessed little inherent distinctiveness. Although STEDMAN was not, essentially, merely a surname, the word did have surname significance. The length of time for which the trademarks had been in use favoured the opponent, although the latter did not establish any significant reputation for its mark. There was some overlap between the opponent’s services and the applicant’s wares, since the opponent sold T-shirts and sports shirts in its retail outlets. However, the applicant did not sell its wares under the trademark STEDMANS or under any house brands or private labels. The Registrar had agreed that the fact that a party may use a trademark in association with retail activities does not operate to extend the ambit of protection for such trademark to cover all wares sold incidentally with the scope of its retail activities. The marks were not confusing, and all grounds adduced to this end were unsuccessful.

Mere registration of a company name does not constitute evidence of use of name

In the case under review, the applicant had sought registration of the trademark ODYSSEY & design on the basis of its proposed use in Canada in connection with clothing, golf shoes and headgear. The opponent claimed, inter alia, that (a) the applicant was not entitled to registration of the trademark because of prior use by the opponent of the trade name Sports Odysseé Inc. in connection with the distribution of sportswear, and (b) the trademark was not distinctive of the applicant.

The Trade-marks Opposition Board ruled that the opposition should be dismissed (Sports Odysseé Inc. v. Odysseé Sports, Inc. decision of 15/6/2004, [2005] Canadian Patent Reporter p. 418). As regards ground (a), the opponent had filed corporate documentation indicating that it had changed its corporate name to Sports Odysseé inc. in November 1994, as well as a copy of its registration for a CA number (i.e. a Canadian textile product identification number). The opponent also filed copies of catalogues dated 1995 and 2000, as well as price lists for various years in the 1990s, on which its trade name appeared. No information regarding the circulation of the catalogues was provided. Nor was there any evidence that the opponent had made a single sale in Canada before any of the relevant dates.

The mere registration of a company name did not constitute evidence of the use of such a name. The same conclusion applied to the documentation relating to the opponent’s CA number. The display of a trademark on catalogues did not constitute use of the trademark within the meaning stipulated in s.4 of the Trade-marks Act 1985 in connection with wares. In terms of establishing use of the opponent’s trade name in connection with services, there was no evidence that the catalogues had been circulated in Canada. The price lists and order forms were blank. The materials supplied were inadequate for the purpose of establishing use by the opponent of its trade name in the normal course of trade. All grounds for opposition were therefore unsuccessful.

Nike sues Adidas in US court battle

In mid-February 2006, it was learned that sportswear giant Nike had brought legal proceedings against arch-rival Adidas, alleging that the German sports company had infringed its patents when marketing its latest brand of footwear. More particularly Nike are seeking several millions of dollars by way of compensation, claiming that the technology used to produce the Adidas shoe had been stolen. The claimant company asserted that the Shox cushioning technology had taken 16 years and significant financial investment to develop, as well as being covered by 19 separate patents. Shox are the stubby rubber columns, usually in groups of four, which make up part of the sole of the shoe. They are designed to absorb impact on the heel whilst its wearer is running, as well as adding more power to a runner’s stride. This new shoe named Kevin Garnett after the famous US basketball player, is among those said to infringe Nike’s patents. Nike brought the action in a Texas court following the World Shoe Association show in Las Vegas (The Daily Telegraph of 18/2/2006, p. 31).

The Shox technology was introduced in 2000 after the original Nike Air shoe made its debut in 1979. Since then, Nike produced a large range of shoes based on the Shox design. The latest version removes foam from the mid sole of a shoe, with the objective of creating a lighter and more durable product. It was based on a design first proposed by aerospace engineer Frank Rudy. The battle between the two giant sports brands was raised a notch after Adidas had completed its $3.8 billion takeover of Reebok the previous month (ibid).
8. Competition Law

National competition law

Water sport passenger fee held to infringe Bulgarian competition law

In the case under review, the applicants sought judicial review of a decision made by the Competition Protection Council (CPC) of Bulgaria which imposed certain penalties for infringement of the Competition Protection Act (CPA) provisions on concerted practices and abuse of dominant position by imposing unfair prices.

As to the facts, the Court found that one of the applicants, G, was a joint-stock company which owned a marina which had been entered in the Register of Ports in of Bulgaria and located in the seaside resort of “Golden Sands”. The marina was the only port of its kind on the territory of the resort. In February 1999, G entered into a management contract for the marina. Under this contract, M was required to provide 24-hour surveillance over the marina, traffic control and supervision of compliance with the relevant safety regulations, parking spaces for tourist buses, maintenance of the pier, development of tourist services, including water sports and entertainment, and advertisement of the services provided. In addition, M provided repair services to the vessels located in the marina. M concluded a series of agreements with the vessel owners, under which M was required to safeguard undisturbed use of the marina, while the vessel owners had to make available the vessels for water sports and other types of entertainment.

Included in the agreement was the list of rates charged for the services. This list contained a clause according to which the vessel owners had to pay a fixed fee of $2.00 per tourist for providing the tourist with appropriate conditions for water sports and entertainment programmes. The Court held that the imposition of this fixed tourist fee was not based on any economic criteria (Decision of 3/1/2006 Marina Commerce Eood v. Competition Protection Commission, Case 2433/2005). Therefore, the decision by the CPC to penalise the two companies for infringement of Bulgarian competition law was upheld (European Current Law [2005] 2, p. 91).

EU competition law

EU formally ends Sky Premier League monopoly

The stranglehold exercised by the Sky television empire on the live broadcasting of English Premiership fixtures is a matter which, as has been extensively documented in these pages, has engaged the attention of the EU’s competition authorities for some time. It will be recalled from the previous issue of this Journal ([2005] 3 Sport and the Law Journal p. 76) that, in November 2005, a final deal had been reached with the EU Commission. Under the new arrangement, matches were to be divided into six tranches of 23 games, with no single broadcaster being able to acquire all the packages. However, there was another aspect to the matter which had exercised the concerns of the European Commission, to wit the fact that the Premier League sells all the media rights collectively, i.e. on behalf of all the clubs of which it is composed. This dispute ended in mid-March 2006, as an almost inevitable corollary to the deal reached last November in that, as a quid-pro-quo for its commitment towards ensuring that no single broadcaster would be allowed to buy all the live packages, the Premier League would be allowed to continue to sell the rights for its 20 clubs together (The Daily Telegraph of 23/3/2006, p. 14). The Premier League welcomed and end to the legal dispute, its chief executive Richard Scudamore commenting:

“...This decision creates legal certainty for the FA Premier League and our clubs as to how we well our rights from the 2007-8 season onwards. It is also a good outcome for supporters, whether in the stadium or watching our broadcasts. The FAPL believe that the conditions are now in place to create maximum interest for our audiovisual rights and to take the world’s most popular domestic football competition from strength to strength” (Ibid).

The agreement described above will cover arrangements for the sale of broadcasts for a period lasting until 2013. The bidding process will be supervised by an independent trustee (The Guardian of 23/3/2006, p. S2).
8. Competition Law

“Bosman II” cases kick off in Belgium, France and Denmark – with potentially ominous implications for football

It has been frequently recorded in these pages (e.g. [2004] 2 Sport and the Law Journal p. 66) that one of the long-running disputes between the leading football clubs and their national federations has been the question whether, and to what extent, the former should be compensated by the latter for the absence of top players called up for international duty. This issue has now – as was almost inevitable – found its way to the courts. It will be recalled from the previous issue of this Journal ([2005] 3 Sport and the Law Journal p. 66) that, in the course of the 2004-5 season, Charleroi, who play in the Belgian Premier Division, withdrew their best player, midfielder Abdelmajid Oulmers, from the Morocco team scheduled to play a friendly fixture against Burkina Faso in order to protect him from injury. However, the world governing body in football, FIFA, ruled that Mr. Oulmers should play in the international fixture. During the resulting match, the Moroccan international tore several ankle ligaments and was out of action for seven months. Charleroi missed out on a place in the lucrative European Champions’ League, and blamed their failure to do so on the absence of Mr. Oulmers.

As a result, the Belgian club have now brought court proceedings against the world governing body before a local commercial court. Aware of the potentially wider implications of this case, the G14 Group, which consists of Europe’s wealthier clubs, have thrown their support behind Charleroi, maintaining that this case emphasises the basic discrepancy which prevails between international and club football – and which essentially poses the question as to why national teams should benefit from the use of players whose not inconsiderable salaries are paid by the clubs. Although related to a different aspect of EU law, this case could transform the manner in which the sport is run as fundamentally as the renowned Bosman decision did just over a decade ago. FIFA have thus far refused to engage with the G14 Group, but have, on the other hand, sought the support of football federations such as European governing body UEFA and 48 national federations (The Daily Telegraph of 17/3/2006, p. S6).

With the start of the court proceedings imminent, the G14 Group issued a 10-point document outlining what they consider to be the key principles at stake. These include the need for insurance and compensation to be covered by the national federations; however, they also stray into areas such as the need for greater club representation on national federations, as well as questioning the right of governing bodies such as FIFA to set the rules which the rest of football must observe (ibid). Whatever the outcome, a speedy resolution of this case does not seem very likely. Given that it revolves around complex issues of EU competition law, it is likely to find its way to the European Court of Justice via the preliminary rulings procedure, under which the ECJ may be called upon to interpret EU law in cases brought before the national courts of the member states. In fact, in an academic article on the subject, the authors M. Goldberg and S. Pentol ("Club v country: Bosman 2" [2005] WSLR 3(12) 3-4) examine these EU law aspects involved in the case, reviewing the arguments likely to be advanced in the case (European Current law [2006] 3, p. 116).

However, this is far from the only case being currently hailed as a successor to Bosman. In Lyon, France, a similar dispute to that involving Charleroi is also in its early stages. The current French football champions are suing FIFA over an injury sustained by their defender Eric Abidal whilst playing for France in November 2005 (The Daily Telegraph loc. cit). The outcome of this case is not yet known at the time of writing.

Meanwhile, in Denmark, a case is taken shape which could with justification be regarded as the “true” Bosman Mark II. It will be recalled that, as part of the post-Bosman settlement, the various international football authorities agreed that, although the out-of-contract transfer system was no longer lawful, some form of post-contract compensation would be allowed for players aged under 23, taking into account the amount of time a club has spent on training the transferred player ([2001] 1 Sport and the Law Journal p. 55). Even this concession is regarded as being contrary to EU rules on freedom of movement by some, and in fact this thesis is currently being tested before the Danish Supreme Court (Hojesteret). Also at issue is the question whether the rules set by governing bodies FIFA and UEFA may transcend a member state’s own labour laws and codes of practice which have been achieved – as is the case in Denmark – through the process known as “social dialogue” (The Observer of 18/12/2005, p. 21). Once again, this matter is likely to find its way to the ECJ by means of a request for a preliminary ruling.

The wider issue at stake in this case is the challenge being made to the assumption that football should be exempt from agreements which cover employee-employer relations in most European countries. The players’ representatives want football to be run by agreement rather than by diktat – and may in future continue to use the courts to enforce this point (ibid).
8. Competition Law

Various articles on sport and EU competition law

Access to data
In “Access to data: the competition law perspective” ([2005] WSLR 3(2) 12-13), the author, Neil Baylis, examines the extent to which Article 82 of the EC treaty, which penalises abuse of dominant position, prevents sporting organisations from supplying their own information for profit, following the ruling by the European Court of Justice (ECJ) in British Horseracing Board Ltd. v. William Hill Organisation Ltd (Case C-203/02, see [2005] 1 Sport and the Law Journal p. 83) which related to database rights. He considers whether commercial users of sporting data may rely on Article 82 in order to seek licences on their terms. He also discusses whether refusal to supply data is an abuse of dominant position and whether copyright owners can be forced to license (European Current Law [2005] 7, p. 53).

Anti-doping rules and EC law
In “Anti-doping rules and EC law”, the author, Stephen Weatherill, discusses the ruling by the Court of First Instance (CFI) in Meca-Medina (Case T-313/02) and its approach to the question whether the International Olympic Committee’s anti-doping rules related exclusively to non-economic aspects of sport, and were thus excluded from the scope of the EC rules on competition policy in Articles 81 and 82 of the EC Treaty. He also reviews the background to the case and criticises the reluctance on the part of the CFI to apply the principles developed by the European Court of Justice (ECJ) in Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten (C-309/99). He furthermore considers how the Court could have used the Wouters decision in order to clarify the scope of the autonomy left to sporting federations (European Current Law [2006] 1, p. 59).

Mobility of sporting rights
In a contribution entitled “Sporting rights – how mobile are they? A consideration of the competition issues arising from the European Commission’s investigation in the sector inquiry into the new media (3G)” the author, Louisa Penny ([2005] EntLR 16(8) 201-3) examines the findings, published in may 2005, of the Commission’s investigation into the competition law implications of the sale of sporting rights to internet and third generation mobile telephone companies, as well as the new categories of anti-competitive practice which are beginning to be identified. She also reviews the Commission’s findings as to the nature of the market, as well as various concerns regarding (a) access to content, (b) exclusive access, (c) bundling of rights across technology platforms, (d) pricing practices and (e) restriction on media coverage (European Current Law [2006] 1, p. 6).

Pyramid structure of sport
In an article entitled “Is the pyramid compatible with EC law”, the author Stephen Weatherill ([2005] 3/4 ISLJ p. 3-7) considers whether the pyramid structure of the organisation of sport, which gives monopoly power to sporting federations, is inconsistent with the principles of EC competition law. He examines, with reference to the relevant case law, the extent to which the EC has the power to intervene in the governance of sport. Furthermore, he advances arguments in favour of the larger football clubs exercising greater control over their commercial affairs (European Current Law [2006] 2, p. 41).
9. EU Law

EU Law

**EC regulation facilitates issuing of visas for 2006 Winter Games**

In December 2005, the EU issued Regulation 2046/2005, which was aimed at facilitating the issuing of visas of members of the “Olympic family”, i.e. Olympic Games participants accredited as such by the Organising Committee of the Olympic Games, in order to assist Italy with the organisation of the Winter Games in 2006 (see also above, p.80). To this end, the Regulation provided for a temporary derogation, for the duration of the Games, for the benefit of non-EU citizens who are members of the Olympic family.

This derogation simplified the procedures for submitting applications and the form in which visas are issued. Individuals applying for a visa were not required to present themselves at the relevant consular departments, neither in order to make the application, nor for the purpose of receiving the visa; furthermore, the requirements as regards documents to be produced in support of the visa application were relaxed. The visa was not issued in the form of a sticker, as envisaged in previous EC legislation, but was formalised by the entry of a specific number in the Olympic Games accreditation card (European Current Law 2/06, p. 18).

**Commission organises “Equal Opportunities in Sport” workshop**

By way of follow-up to the European Year of Education through Sport, the European Commission organised an Expert meeting entitled “Equal Opportunities through and in Sport” in late October 2005. The object of the exercise was to present and disseminate examples of good practice of participation in sports with regard to gender and people with disabilities, in order to establish a basis for future co-operation between member states and, more importantly, to present recommendations for action at the EU level as and when appropriate. It was recognised that actions aimed at integrating equal opportunities into sporting activity are best carried out at the national level. The Commission’s main function in this field could be to encourage informal contacts as well as the exchange of comparative documents. In the absence of any legal powers to deal with sport, the Commission could still support national actions for the improvement of gender equality through sport and for the integration of people with disabilities, taking into account the social function of sport (see http://europa.eu.int).

In order to prepare the Expert meeting, a questionnaire was circulated among senior officials in the member states responsible for sport. The replies received constitute the main part of the resulting working document, which was intended to lead the discussion and facilitate more detailed explanations and exchanges in identifying current activities in the member states.

**Commission requests France to amend its company legislation as regards football clubs**

In mid-December 2005, the European Commission decided to invite France formally to amend its legislation preventing football and other sporting clubs from being listed on the stock market, which it regards as an unjustified barrier to the free movement of capital, thus constituting an infringement of Article 56 of the EC Treaty. More particularly, the reasoned opinion concerns the Law of 16/7/1984 on the organisation of sport, Article 13 of which stipulates that limited companies operating in the field of sport are not allowed to raise capital from the general public. One effect of this ban is to prevent professional sporting clubs, particularly football clubs, from being listed on the stock market (Press release IP/05/1592 of 14/12/2005).

The Commission considers that these provisions are inconsistent with the rules of the EC Treaty on the free movement of capital. Admission to stock exchange listing, as well as the issuing and placement of shares or bonds on capital markets, are movements of capital for the purposes of EU law. The European Court of Justice has consistently ruled that any restrictions on the free movement of capital must (a) be applied in a non-discriminatory manner, (b) be required for overriding reasons of general interest, (c) be such as to guarantee the achievement of the objective pursued, and (d) not go beyond that which is necessary to achieve that objective.

The Commission conceded that the protection of savers and the promotion of a certain degree of equality in sporting competitions were relevant objectives of general interest. However, it also believes that a total ban on raising capital from the public is disproportionate to the objectives pursued and that other measures are possible which are not as restrictive to the free movement of capital (ibid).
9. EU Law

Validity of food supplements directive confirmed by ECJ

Food supplements have assumed an increasing relevance to the world of sport in recent years, in view of the increasingly extensive and complex rules regarding unlawful substances and doping which have come to play a prominent part in the life of every leading sporting performer. Any EU measure regulating this issue is therefore of direct concern to all those involved in sport at all levels. In June 2002, the European Parliament and the Council enacted a directive relating to these supplements (Directive 2002/46/EC, OJ 2002 L183, p. 51), which seeks to harmonise the various national rules on such products in order to ensure their free movement and, at the same time, guarantee a high level of consumer protection. For this purpose, the directive lays down a “positive list” system under which only such products as contain the substances included in the lists attached to the directive by way of appendix are capable of being marketed within the EU. Member states are barred from prohibiting or impeding trade in such substances. If it is safe for human health, a substance may be included in the list by a Commission decision. The directive requires member states to permit, by 1/8/2003, trade in products containing these substances and prohibit, as from 1/8/2005, trade in products which fail to comply with the directive.

At the suit of a broad alliance of food supplement traders, this measure was challenged before the European Court of Justice – albeit indirectly, via the preliminary rulings procedure – on the grounds that it had been adopted on the wrong legal basis. The Court found that, prior to directive being adopted, food supplements were regulated by different national rules capable of impeding the free movement of goods. Therefore, the directive was fully justified by Article 95 of the EC Treaty, which requires the EU authorities to adopt harmonising measures of this type. The applicants had in fact argued that the directive was itself inconsistent with the free movement of goods because of the restrictions which it contained – they argued that a negative list system would have been more in keeping with the free movement principle. The ECJ rejected this view, pointing out that certain restrictions could be justified on the basis of protecting public health, and held that the measures in question were necessary and appropriate for this purpose. It added that a negative list system might not be sufficient to achieve this objective. This type of system could result in a substance being freely used in the production of food supplements, even though – for example because of its novelty – it has not been subject to any scientific assessment proving that it posed no risk to human health (Press Release No. 66/05 of 12/7/2005).

Validity of “Intertops” trade mark for general betting services confirmed by ECJ

German legislation on sports betting has frequently come under scrutiny in these columns, not least because of its criminal law aspects (see e.g. [2001] 3 Sport and the Law Journal p. 21). Judging by recent developments, it has now opened up issues related to EU law as well.

Under current EU law, it is possible to obtain from the Office for Harmonisation of the Internal Market (OHIM) a Community trade mark, i.e. one which will be recognised throughout the territory of the EU. However, this trade mark may be ruled invalid if it has been registered contrary to the requirements of public policy or accepted principles of morality – even if this is only the case in part of the EU. Seven years ago, Intertops Sportwetten GmbH, a German firm, successfully applied to OHIM for registration of a sign which included the word INTERTOPS, in respect of bookmakers’ services and betting services of a more general kind. However, some time later another German firm, Sportwetten GmbH Gera sought a declaration that this trade mark was invalid as being contrary to accepted principles of morality. Gera was at the time holder of the German word mark INTERTOPS SPORTWETTEN.

In early 2002, the OHIM Board of Appeal dismissed this application. Gera then applied to the European Court of First Instance (CFI), on the basis that, since Intertops Sportwetten GmbH did not hold the licence required to offer such services in Germany, it would not be authorised to offer those services or advertise them in that country. The CFI, however, ruled that the fact that Intertops Sportwetten GmbH was not the holder of such a licence does not make the Community trade mark contrary to public policy or to accepted principles of morality within the meaning of the applicable EU legislation, which is Regulation 40/94 (OJ 1994 L11, p. 1). It was the trade mark itself which had to be assessed – more particularly the sign which related to the goods or services as they appear at the time of registration – in order to determine whether it was invalid by these criteria.

In this connection, the CFI pointed out that the absolute grounds for refusal of registration, laid down in Article 7(1) of the Regulation, referred to the intrinsic qualities of the trade mark applied for, rather than to circumstances surrounding the trade mark applicant. The fact that the trade mark holder was prohibited from offering or advertising the relevant services in Germany did not relate to these intrinsic qualities, and therefore did not render the trade mark contrary to public policy or to accepted principles of morality.
9. EU Law

It also followed from the EU case law that the Community trade mark system is an autonomous one, which applies independently of any national system. Therefore, the question whether a sign can be registered as a Community trade mark should be assessed only on the basis of EU legislation. Finally, although Regulation 40/94 did not preclude the possibility that the use of a Community trade mark could be prohibited on the basis of national rules relating to public policy and morality, that power was irrelevant as regards the question whether that trade mark had been registered in accordance with those provisions of the regulation which deal with public policy and accepted principles of morality. The CFI accordingly dismissed the action brought by Gera (Press Release No. 76/2005, 13/9/2005, Decision made in case T-140/02).

Commission decision approving UK television coverage measures annulled

It will be recalled from a previous issue ([2001] 3 Sport and the Law Journal p. 39) that the German-based Kirch Media group had obtained from football’s world governing body FIFA exclusive broadcasting rights for the World Cup finals in 2002 and 2006. EU legislation governing television broadcasting lays down that each member state is entitled to adopt measures aimed at ensuring that television broadcasters within its territory do not have broadcasting rights over events of major importance, such as the Olympics or the World Cup, which are such as to deprive a substantial proportion of the general public of the opportunity to follow them on free-to-air television. Any member state seeking to enjoy such rights was required at least one of the four non-Swiss players permitted in every team to be an EU citizen in accordance with the 1999 Agreement between the European Union and the Member States and Switzerland on the Free Movement of Persons (European Current Law 10/2005, p. 175).

In order for such an action to succeed, the applicant must clear two hurdles: one which relates to admissibility and one which concerns substance. As regards admissibility, the applicants were found by the CFI to be directly and individually concerned by the measure, and therefore be capable of challenging such a measure. In substantive terms, the Court held that the Commission had breached essential procedural requirements where it adopted the measure in question, in that it had failed to consult the College of Commissioners on the subject, and that the Director-General who had signed that decision had received no specific power to that effect from the College. The Court accordingly set aside the decision (Press release No. 110/05 of 15/12/2005, Decision in Case T-33/01).

Articles on EU law aspects of sports law

Comments on Swiss ice hockey arbitration ruling

In a contribution entitled “Switzerland: ice hockey: arbitration in view of the agreement between Switzerland and the European Union on the free movement of persons” (ISLR 2005, (3) 76-77), the authors, Christoph Gasser and Eva Schweizer, comment on the ruling issued by an arbitrator of the Swiss Ice Hockey Federation on the question whether a team which fielded three Canadians and one Latvian had infringed the rules of the federation. These rules required at least one of the four non-Swiss players permitted in every team to be an EU citizen in accordance with the 1999 Agreement between the European Union and the Member States and Switzerland on the Free Movement of Persons (European Current Law 10/2005, p. 175).

Harmonising Romanian and EU sports law

In “The legal dimension of ethics in sport” (ISLJ 2005 3/4, p. 38-42) the author, Alexandru Virgil Voicu, examines the way in which Romania’s efforts to harmonise its sports legislation with that of the EU requires the lawmakers to take account of ethical standards and principles. He applies a deontological analysis to the practice of professional sport (European Current Law 2/06, p. 89).

Is UEFA home talent plan consistent with Bosman?

In “UEFA’s plans for developing home grown talent” (WSLR 2005, 3(8) 15-16) the author, Adrian Rubinstein, examines the difficulties facing local young players attempting to break into first-team football on account of the renowned Bosman decision by the European Court of Justice (ECJ), which removed restrictions on the movement of foreign players. He considers whether proposals by the European governing body UEFA to
9. EU Law

introduce minimum quotas for home-grown talent are consistent with this ruling and with Article 39 EC Treaty (European Current Law 12/05, p. 17).

Effects of EU law on sporting contracts of employment
In “Employment law and the professional sportsperson – a contractual analysis” (SLA&P 4/2005, 1-7) the authors, R.C. McKenzie and B.A. Caldow, discuss the application of employment law to the relations between professional footballers and their employers, and reviews the changes in the registration and transfer processes which resulted from the rules on restraint of trade and from EC law, as well as from the Bosman decision (European Current Law 10/2005, p. 34).

Jurisdiction of EC courts to rule on sporting issues
In a contribution entitled “Fair play on and off the pitch” (European Law 2005, 12-13), the author Ian Blackshaw reviews the EC case law concerning the jurisdiction of the EC courts to rule on sporting issues such as football league restrictions on their intake of foreign players. He examines the implications of the decision by the ECJ in Smutenkov v. Ministerio de Educacion y Cultura (C-265/03) which deals with the question whether the rules applied by the Spanish football league on foreign player quotas, which in this case prevented a Russian player from joining a Spanish club, contravened the EC-Russian Federation Partnership Agreement, which prohibits discrimination against Russian workers (European Current Law 10/2005, p. 34).
11. Procedural Law and Evidence

Proposal to establish Irish Court of Arbitration. Article in academic journal

In a contribution entitled “An Irish Court of Arbitration for Sport?” (ISLJ 2005 3/4, p. 28-30), the author, M. De Bruin, discusses the proposal to establish an Irish Court of Arbitration for Sport in the wake of a number of Irish actions for judicial review brought by various sporting performers. She considers the ways in which such a court could operate, including: (a) the forum, (b) its jurisdiction, (c) the choice of arbitrators, (d) the arbitration procedure, (e) the right to appeal, and (f) arrangements as regards costs (European Current Law 2/06, p. 240).

Plea of inadmissibility in Canadian sports synthetic lawn patent case dismissed

In an action brought before the Montreal Federal Court under s. 60(2) of the Patent Act 1985, for a declaration that synthetic sports lawns sold and installed by the claimant did not violate the defendant’s patents, the defendant brought a motion to strike out the claimant’s statement of claim, or in the alternative for a stay of proceedings. The defendant pleaded that the statement of claim requested the court to decide in a vacuum without a comprehensive set of facts, that any judgment rendered would serve no practical usefulness, and that infringement actions relating to the claimant’s products were already pending before the Federal Court and the Quebec Supreme Court.

The Court held that the motion should be dismissed. The claimant had established that it laid, and would possibly lay, synthetic lawns in accordance with very specific characteristics. Although it was true that such lawns were custom-made on site, and that there would always remain an argument as to the specific characteristics of the carpet and the infill at a given location, the claimant’s products were sufficiently specific to allow the relief sought in s. 60(2) of the Act. Whether a given case had to do with past or future installations, the parties simply had to establish evidence on the spot with regard to the specific characteristics of the site. In the event of disagreement between the parties, resort could be had to the summary judgment procedure to compare an actual situation with the outcome of the decision on the merits of the claimant’s statement in the case at bar. If the action contained aspects similar to other cases, resort to Rule 105 of the Federal Court Rules 1998 could be considered (Les Installations Sportives Defargo Inc. v. Fieldturf Inc., Court File T-491-04, 30/9/2004, [2004] Canadian Patent Reporter p. 512).

Ad hoc division of CAS and the Olympics at Athens 2004. Academic journal article

In this piece, entitled “The ad hoc division of the Court of Arbitration for Sport and the Athens 2004 Olympic Games – an overview” (ISLJ 2005, 3/4 23-27), the author, Domenico Di Pietro, reviews cases adjudicated by the ad hoc division of the Court of Arbitration for Sport (CAS) at the 2004 Olympics in Athens, including disputes over alleged doping offences, rule infringements in competitions, and the eligibility of certain athletes to compete (European Current Law 6/06, p. 34).
12. International Private Law

[None]

13. Fiscal Law

Charitable exemption applies to yachting association. Australian court decision

In this case (Re Yachting Australia Incorporated and Chief Commissioner of State Revenue [2005] NSW ADT 208), the taxpayer involved was an incorporated association not only concerned with the sport of yachting but also fulfilling a significant educational or training function by operating a number of training programmes. The Commissioner of State revenue claimed that the salaries paid by the yachting association to its employees were subject to pay-roll tax, whereas the association contended that it was exempt from such taxation because it was a charitable, benevolent or patriotic non-profit organisation. The Commissioner conceded the non-profit status of the association, but queried whether the association could successfully claim to be a charitable or patriotic non-profit organisation.

The Administrative Decisions Tribunal of New South Wales held that:
(a) provided that the relevant activity was education, and that it also contributed towards the welfare of the public, the objective was charitable;
(b) the purpose of such an exemption provision was not to raise revenue, but rather to grant relief from taxation, and should therefore not be construed narrowly but rather benevolently. In considering the objectives of the association, as is required by statute, the activities of the association should be considered as a matter of course, and not merely as a “tie-breaker” where the objectives of the taxpayer in its constituent documents are unclear.
(c) The patriotic head of exemption was also available.

Although this concept was one which was vague and uncertain, and probably by no means fixed in time.

Cruyff Foundation causes change in gift and succession – but not without reservations and criticism (Netherlands)

The Cruyff Foundation is a benevolent organisation established by the world-famous Netherlands former international footballer Johan Cruyff with the object of laying out playing fields – called “Cruyff Courts” – in deprived areas. In recent months, Mr. Cruyff has used the Press to fulminate against the alleged iniquities of Netherlands legislation on gift and succession duties, from which benevolent organisations are not exempt – in fact they are subject to such taxation at the rate of 8 per cent. The imposition of this tax had prevented the Foundation from constructing three additional “Courts”, hence Mr. Cruyff’s invective. His strong words seemed to have produced the desired effect, since in mid-October 2005 the Minister of Financial Affairs, Mr. Wijn, suddenly announced that charitable institutions (algemeen nut beogende instellingen) would become entirely exempt from these duties (De Telegraaf of 17/10/2005, p. 4).

It might have been expected that this decision would attract nothing but praise. Yet a number of reservations and criticisms have been expressed in certain quarters. These have recently been articulated in a leading article in a Netherlands legal journal, Inge Vijfeijken, Professor of Fiscal Law at the University of Tilburg (“Cruyff en het goede doel: snel scoren en toch verliezen” [2006] 1 Nederlands Juristenblad p. 19).

In the first place, the author asks the question where the funds are to be found in order to cover the deficit caused by this exemption. Earlier, the Minister had reduced the relevant tax from 11 to 8 per cent, claiming that any further reduction was a budgetary impossibility. Pressed on this issue when he had announced the total exemption, the Minister replied that the relevant money would be found by increasing gambling duties, which would raise the sum of €40 million. However, the explanatory memorandum which accompanied the regulation instituting the exemption estimates the cost of implementing the exemption at €55 million – leaving a gap of €15 million. It is not clear where this sum will be found.

Another major reservation expressed by Prof. Vijfeijken is the unseemly haste with which this measure seems to have been pushed through, holding that the Minister would have done better to delay its introduction for a year in order to surround it by “flanking legislation”. This would have avoided a number of weak areas inherent in the new measure, and which could cause some taxpayers to obtain exemptions on the basis of motives which are a good deal less philanthropic than those displayed by the distinguished former international. One of these weak spots has resulted
13. Fiscal Law

from a recent decision by the Netherlands Supreme Court (Hoge Raad) which held that an organisation should be considered as having charitable status where 50 per cent or more of its activities have a charitable purpose. This, according to the author, is capable of abuse, and she proposes a threshold of at least 90 per cent. The author also considers that the present system presents inadequate safeguards which ensure that the system is properly monitored.

14. Human Rights/Civil Liberties

Racism in sport

FIFA takes action against racism – will UEFA follow suit?
The problem of racism in football has been so persistent in recent years that its governing bodies have come under increasingly intense pressure to remedy this state of affairs. This has naturally also enough been the case with the sport’s world governing body FIFA, and to date, the majority of commentators appear to have been distinctly underwhelmed both by the actions taken at this level and by their results. This has been all the more regrettable because, as has frequently been documented in these columns, there is every indication that racism is on the march in the sport, particularly in certain East European countries and Spain (see, e.g., [2005] 2 Sport and the Law Journal p. 80 – see also below!). However, in recent months there have been some signs that the supreme governing body of the sport is now prepared to take stronger action against this evil than has hitherto been the case.

In late December 2005, FIFA President Sepp Blatter announced an energetic new initiative against racism, threatening offenders with penalties which would be much more biting than the comparatively modest fines which have hitherto been imposed. He elaborated:

“A financial sanction is not an adequate measure because you can always find someone with enough money to pay the fine. We need to start to deduct points from the teams involved. It could also mean suspension. It could also mean exclusion” (The Daily Telegraph of 21/12/2005, p. S7).

However, these severe-sounding measures are hedged with a number of conditions and reservations. First of all, they could not be applied during the World Cup or the European Championships, in view of the short time-span of the tournaments in question. It has also been questioned whether such measures could in fact be lawfully taken, and at the time of writing the world governing body’s lawyers are examining these proposals in time for a decision to be made at the FIFA Congress in June (Daily Mail of 21/12/2005, p. 56).

However, in the meantime the FIFA Executive, at its March 2006 meeting, decided to proceed with these measures on a provisional basis.

The punitive measures in question will range from match suspensions and a deduction of points (three points for a first offence, six points for a second, and relegation in the event of further infringements) to disqualification of the team in question from a competition, depending on the seriousness of the case. Footballing confederations and member associations will be compelled to incorporate these provisions into their national regulations. Any national association which infringes these measures could be excluded from international football for a period of two years (The Daily Telegraph of 17/3/2006, p. S5).

The supreme governing body appears to have been galvanized into action by the comments and pleas made by a number of distinguished black players in recent months, such as Patrick Vieira and Lilian Thuram of Juventus (The Independent of 17/3/2006, p. 64). Particularly the latter has been extremely voluble on this subject, and in an interview with a prominent French newspaper he engaged in a passionate attack on what he described as the retrograde turn which Italian football
14. Human Rights/Civil Liberties

seems to have taken on this issue in recent seasons (The Guardian of 29/3/2006, p. S2). Earlier, Mr. Thuram had testified to the FIFA Executive Committee at the relevant Executive Committee meeting, at which he provided first-hand evidence of his campaign against racism in football, stating that “some people will never learn”, and that this was the reason why FIFA had to intervene so as to return sanity to the game and keep these people away from the stadiums (The Daily Telegraph, loc. cit.). Having heard Mr. Thuram’s testimony, the Executive approved an amendment to Article 55 of the FIFA Disciplinary Code as proposed by Mr. Blatter, allowing for stricter penalties to be imposed following acts of racism or discrimination in football (Ibid). The national member associations were informed of these new measures shortly afterwards (Daily Mail of 30/3/2006, p. 75).

However, there remain many commentators on the game – most of them by no means associated with the right of the political spectrum – who remain concerned by this development, particularly from a legal point of view. Penalizing clubs for the behaviour of their fans is known as “strict liability”, and this can present quite a few problems. Thus a leading commentator in a British daily newspaper painted the following scenario. Let us suppose that a club makes every effort to mitigate its liability with perimeter hoardings, programme notes, PA announcements, assiduous rewarding and all-encompassing CCTV. If that club were punished, the latter would immediately place the matter in the hands of the best lawyers available – particularly if points worth millions were to be deducted. In view of the notorious slowness in legal proceedings, which could take the best part of a season to take their course, the implications for the stability of the game are ominous (The Guardian of 23/3/2006, p. S5).

The legal picture could become even more complicated if the parties in question relied upon EU law, and even the Human Rights Act. Also, will FIFA observers attend every game in every country? If so, there is the potential for excluding a large number of clubs in countries where, as has been mentioned earlier, the problem is at its most serious. And if the penalties are imposed not only for racism, but also for discrimination – as has been specifically stated in the relevant FIFA rule – what other kinds of discrimination will be involved? Will this include homophobia and religious hatred (if so, it would be the best way ever devised of breaking the stranglehold over Scottish football of the “Old Firm”)...). It would seem that much more thought needs to be invested into the practicalities of the new FIFA regime before complete victory over the bigots can officially be declared (Ibid).

In the meantime, the European Union has been pressed to urge a more proactive stance on this issue on the part of the UEFA, the European body governing the game. In mid-March 2006, Manchester United and England defender Rio Ferdinand issued a statement to EU executives in Strasbourg giving support to their plans to provide referees with increased powers at matches affected by racist chanting. Match officials would be entitled to take players off the field and abandon games. The EU resolution also calls upon the football authorities to take more decisive action. Mr. Ferdinand makes no secret that the main target of his exhortations is UEFA, and that he plans to visit the European Parliament in order to speak on the issue, claiming that it was time for the European governing body to “stop playing lip-service to the problem” (The Independent of 15/3/2006, p. 73). He added that UEFA should look at imposing huge fines or deducting points within tournaments. In response, UEFA spokesman William Galliard commented:

"Football is moving forward on this issue. Today, punitive measures are taken across Europe to stamp it out. I hope Rio Ferdinand plays for a long time but I believe, before his career is over, we will have dealt with this" (Ibid)

It is perhaps only fair to point out that the drastic action recommended by the England defender could very well give rise to the same legal difficulties as those which have been identified in relation to FIFA’s new approach (see above).

Racism continues to bedevil Spanish football

It will not have eluded the attentive reader of this Journal that the cancer of racism appears to have put down deep and dangerous roots in Spanish football, and that the cruder manifestations of this phenomenon reported in previous issues are not just a series of isolated incidents. Recent events have, unfortunately, served to confirm this theory.

Barcelona’s talented Cameroonian player Samuel Eto’o has on a number of occasions now been subjected to racist abuse at a number of grounds in the Spanish football league [see e.g. [2005] 1 Sport and the Law Journal p. 92]. In early March 2006 he was once again forced to undergo such treatment at Real Zaragoza’s La Romareda stadium, when some spectators hurled monkey chants at him and he had to be restrained by team-mates from walking off the pitch. Zaragoza were issued with a fine of €9,000, which was a significant increase on the €600 usually imposed in such cases, but still appeared on the paltry side to many commentators, including the FIFA President Sepp
14. Human Rights/Civil Liberties


Earlier, Mr. Eto’o had apparently been subject to another type of racist innuendo — although on this occasion he was not an entirely blameless party to the proceedings. During an ill-tempered encounter between Barcelona and Atletico Bilbao at Nou Camp the Cameroonian was involved in an altercation with an opponent in the course of which he spat in his face. This elicited from the Atletico coach Xavier Clemente the observation that spitting was something that “people who had just come down from the trees did”. This caused Spain’s Anti-Violence Committee to make the following statement:

"The Commission have asked the RFEF [Spanish Football Federation] to open a disciplinary investigation into comments made by Clemente at the end of the game. It is worried that these actions and comments could encourage violent conduct and racist or xenophobic actions. For this reason we have asked the RFEF and all the other sporting bodies, clubs, players, coaches and directors to refrain from making these types of statements” (The Guardian of 19/1/2006, p. S5).

Mr. Clemente defended his comments by claiming that he was not in any way referring to the colour of anyone’s skin, but merely about people who spat at each other on the football pitch regardless of whether they were black or white (Ibid). At the time of writing, it was not known whether the Spanish football federation intended to pursue this matter.

However, regardless of the outcome of this affair, it became increasingly clear that something had to be done at the official level to clamp down on the racism for which Spanish football was rapidly acquiring a most unfortunate reputation. Acutely aware of the problem, the European governing body UEFA launched a crackdown on racism in Spanish football by organizing an anti-racism conference in Barcelona towards the end of January. The timing of the event was not unpropitious given that English Premiership sides Arsenal and Chelsea, who each contain a large quota of black players, were due to complete important European fixtures in Spain and therefore were prime targets for the racist element in the Spanish stadiums (The Independent on Sunday of 29/1/2006, p. 58). This was particularly necessary because it seemed that, far from shaming the nation’s football spectators into abandoning this practice, the infamous Spain v. England fixture in mid-November 2004, extensively documented in these columns (Sport and the Law Journal p. 88 et seq.), had actually triggered a fashion for racist abuse. Moreover, the Spanish media did not seem to give this issue the urgent attention it required (The Independent on Sunday, loc. cit.). In addition, the Spanish football authorities were accused of taking insufficiently stringent action against offenders. According to Leo Mann, spokesman for the “Kick it Out” anti-racism campaign:

“We’ve seen the succession of pathetic fines from the Spanish federation, underlining their flippancy towards this issue. We find it incredible that football administrators in Spain remain in denial over the issue of racism” (The Daily Telegraph of 3/3/2006, p. S5).

Whether these imprecations, as well as the threat of the measures now adopted by FIFA (see above), will galvanise the relevant authorities into action remains to be seen.

Racial abuse by Australian spectators mar South African tour (cricket)

Normally, whenever South Africa is mentioned in these columns, it is in order to highlight the problems which the legacy of the apartheid years have continued to beset the sporting scene in that country, particularly on the rugby field. On the occasion described below, however, the sporting representatives of that country appear to have been on the receiving end of such treatment. Then outrage occurred during the tour by the nation’s cricketers of Australia during the closing months of 2005. The trouble had already started during the First Test at the VAACA ground, Perth. The team’s management issued a statement complaining that racial taunts and chants had been issued against several players — and not only the black members of the party. Chief Executive Gerald Majola said:

“We regard racial abuse in a very strong light. We deplore in the strongest terms the racial abuse by some of the spectators against our players. We hope this will not happen again, and appeal to all to abide by the ICC’s anti-racism policy. We thank the relevant authorities for the assurance that the necessary protection for our players for the rest of the tour will be in place” (The Daily Telegraph of 21/12/2005, p. S7).

It was hoped by all concerned that this was just an isolated incident. However, trouble flared again during the Second test at Melbourne, when a man had to be ejected from the MCG for making racist and offensive comments towards fast bowler André Nel. Then during the Final Test, held at the SCG in Sydney. Mr. Nel, who was fielding on the boundary, reported a number of racist taunts to his captain, Graeme Smith, who in turn informed the umpires (The Daily Telegraph of 5/1/2006, p. S14). After the tour had ended, Mr. Majola warned that his team may not visit Australia in the future if such
14. Human Rights/Civil Liberties

abuse persisted. Cricket Australia, who control the domestic game in the host country, apologized and pledged to tighten security at such fixtures (The Guardian of 31/1/2006, p. S2).

In response to the complaints made by the South Africans, the International Cricket Council (ICC) appointed Goolam Vahanvati, India’s Solicitor-General, to travel to Australia and compile a report on the problem. Mr. Vahanvati has already conducted the 2004 investigation into the conduct of the Zimbabwe Cricket Union – which took a wrong turn when several Zimbabwe players refused to testify in front of their paymasters (see [2005] 1 Sport and the Law Journal p. 49 et seq.). The action by the ICC had the effect of taking the matter out of the hands of James Sutherland, the Cricket Australia chief executive (The Daily Telegraph of 1/2/2006, p. S24). The whole affair has, however, prompted calls by Australian officials for new legislation to combat racism, which could result in offending spectators being issued with life bans (The Guardian of 1/2/2006, p. S6).

Following his visit to Australia, Mr. Vahanvati reported back to the ICC Chief Executive, Malcolm Speed, in late March 2006. In his report, Mr. Vahanvati definitely concluded that South African players were subjected to racial abuse during the tour, in the following terms:

“Herschelle Gibbs, Shaun Pollock, André Nel and Boeta Dippenaar were all subjected to racial abuse in different places. It would be wrong to attribute racial abuse only to South African expatriates living in Australia. It was premeditated, co-ordinated and calculated to get after the players” (The Daily Telegraph of 22/3/2006, p. S17).

He added that the Chief Executives of the Australian and South African cricket boards would be issuing a number of recommendations for any changes which may need to be made to the ICC’s anti-racism policy as a result of this affair (ibid).

Italian ice hockey player banned for making racist slurs
In late December 2005, Daniele Veggiato, an ice hockey forward playing for the Italian Alleghe team, was banned for life from his country’s national side after shouting racist abuse at a rival skater (The Times of 29/12/2005, p. 76).

Human rights issues

Belgian court protects sporting performer’s right to private and family life
In the case in question, a dispute had arisen concerning Belgian legislation under which disciplinary penalties incurred by sporting performers should be published on the Flemish Government website. Such information could remain on the website for the duration of the suspension, and the site would constitute the main channel of communications for such disciplinary measures. The name and surname of the performer in question, as well as the dates on which the suspension started and finished, would all appear on the website. The applicants alleged that this legislation violated their fundamental human right to respect of their private life.

The Court awarded the action to the appellants, holding that the information published on the website could be reused and remain in use for much longer periods than the effective suspension period. In addition, much less restrictive means were available for achieving the goal set by the legislation – to wit, that of assisting officials and supervisory staff in ensuring that the disciplinary penalties were respected. The legislation in question was therefore disproportionate and in breach of the right to respect for private and family life (Decision of the Arbitragehof No. 162/2004, 20/10/2004 [2005] Journal des Tribunaux p. 89, in European Current Law 7/05, p. 166).

Gender issues

Wie allowed to compete in men’s events – but for how long?
The issue of gender equality in the world of golf has received a good deal of media attention in recent years – from the admission of women to clubs to their right to compete on an equal basis with men in major tournaments. As was reported in previous issues of this Journal (e.g. [2005] 2 Sport and the Law Journal p. 87) the latter issue has divided the world of golf, but failed to stem the tide of opinion favouring at least an attempt to translate this into reality. This has been particularly the case with the new US teenage prodigy Michelle Wie, who turned professional at the age of 16 and was considered by many to be just the person with whom it might be worth experimenting in this regard. Ms. Wie had, in fact, already been playing in a number of men’s events in Japan and the US when the question arose whether or not she should be allowed to compete in a European Tour event (The Guardian of 21/12/2005 p. 32).
14. Human Rights/Civil Liberties

The fact that Ms. Wie had missed the cut every time she competed in a men’s event did not seem to deter these advocates of gender equality (The Daily Telegraph of 12/1/2006, p. S18), even though, at a meeting of the European Tour’s players’ committee, Jean van de Velde, a leading French golfer, had argued that women should not be allowed to compete in men’s events as long as men are not allowed to enter women’s events such as the women’s British Open (The Guardian of 21/12/2005, loc. cit). However, Ms. Wie’s next foray into serious men’s golf, i.e. the Sony Open which took place in Hawaii in mid-January 2006, was not exactly an advertisement for this worthy objective. In the opening round – admittedly played in tough conditions – she plunged to equal-last position with a score of 79, which was nine-over-par. She was particularly let down by her short game, particularly her erratic putting (The Daily Telegraph of 13/1/2006, p. S15).

In the event, Ms. Wie finished second last in the tournament, having looked very much out of her depth throughout. Although naturally something had to be discounted for her extreme youth, her poor performance provided ammunition to those keen on banning women from competing in men’s events (Daily Express of 14/1/2006, p. 109). It was generally felt that she was completely out of her depth in a 144-strong field, featuring some of the best players on the US tour. This does not mean she will never make the grade in the male events, but that her inclusion may have been somewhat premature – and that the cause for which she was put forward may have been set back by several years.

Penn State University involved in gender discrimination suit (US)

In March 2006, it was learned that the US Penn State University and its women’s basketball coach had become embroiled in a gender discrimination court action brought by a former player. Jennifer Harris, who had been dropped from the team following her side’s first-round loss in the intercollegiate NCAA tournament the previous season, alleges that coach Renée Portland frequently asked her whether she was a lesbian, and pressurized Mr. Harris into changing her appearance in order to look more feminine. Ms. Harris, who in the meantime has moved to James Madison University, also claims that Ms. Portland harassed and targeted her as well as other black athletes before deciding not to renew her scholarship last year. This caused Mr. Harris to initiate a court action in the US District Court for the Middle District of Pennsylvania (Findlaw News, www.findlaw.com, 6/3/2006).

In its defence, the University argues that Ms. Portland was under no obligation to give cause for her decision to drop Ms. Harris from the side and not to renew her scholarship. It also argues that the claimant has no grounds to sue for discrimination because there is no “constitutionally protected property interest” in participation in intercollegiate athletics. She had been on notice that her grant-in-aid status had not been guaranteed for any length of time beyond one year – as a result, states the defendant, her suit falls outside the realm of contracts protected by the due process provisions of the 14th Amendment. However, the National Centre for Lesbian Rights, which brought the action on Ms. Harris’s behalf, described these arguments as “routine” in such cases and expressed their confidence in victory (ibid). The outcome of this case was not yet known at the time of writing.

Islamic fundamentalists attempt to disrupt mixed marathon – but fail (Pakistan)

Previous issues of this Journal have reported on the difficulties faced by women athletes in certain Islamic countries in their attempts to participate in public events. Especially female sporting performers in Pakistan have been on the receiving end of such hostility (see [2005] 2 Sport and the Law Journal p. 90). When it was learned that a mixed marathon was to take place in the capital Lahore early in the New Year, scores of Islamists threatened to disrupt the event. However, the authorities stepped in and detained many of the would-be troublemakers ahead of the event (The Sunday Telegraph of 29/1/2006, p. 34). This provide to be an effective measure. Crowds cheered as hundreds of women and thousands of men competed side-by-side through the streets of the nation’s capital. More than 5,000 police were standing guard in case of trouble, and their presence meant that no protester who had eluded the attentions of the authorities was able to disrupt the event (The Guardian of 30/1/2006, p. 17).

Other issues

Animal rights campaign advertisement banned from Super Bowl (US)

Animal rights campaigners have caused a good deal of controversy over the methods by which they seek to secure their objectives. However, it now seems that these very objectives are also beginning to seem somewhat eccentric, judging by an attempt made by People for the Ethical Treatment of Animals (PETA), the leading animal rights organization of the US, to have a certain slot included in the advertising which accompanies the US Super Bowl (American football).

The advertisement in question is broadly conceived in
such a way as to decry the iniquities of milk and the manner in which it is produced. It mimics the publicity for a “sexploitation” video called Girls Gone Wild, and features good-looking college girls dancing lasciviously before the cameras – only in the PETA version the girls have udders rather than breasts, which soon start leaking milk. It uses the slogan “Milk Gone Wild”, but does not exactly make clear what is the link between exhibitionist college girls and the alleged iniquities of milk. Only a visit to the relevant website sheds some light on the matter, with the actor Alec Baldwin explaining that milk is the product of an industry “gone wild” in which cows are separated from their off-spring only to be slaughtered for meat once they have outlived their productivity. It allegedly contains pus and animal faeces; also, in willful contradiction of the received wisdom that calcium is good for your bones, it could just as easily give the consumer osteoporosis as prevent it (The Independent of 6/2/2006, p. 24).

PETA offered the ABC network the sum of £1.2 million for the right to screen the advertisement during its coverage of the annual football jamboree; however, the prominent US broadcaster turned down the application on the grounds that it “falls outside the boundaries of good taste”. This is from a network which has suffered the inclusion in Super Bowl advertising of slots featuring a dog biting a man in the crotch, a flatulent horse and any number of pitches for erectile dysfunction remedies. However, PETA do not appear to have been unduly concerned at this refusal, since crying foul about alleged censorship is part of its campaigning platform. The advertisement itself in fact remains available to anyone with a computer (ibid) and could very well achieve cult status on the internet.
15. Drugs legislation & related issues

General, scientific and technological developments

Gene doping to arrive “in time for 2008 Olympics”

The attempts of the anti-doping authorities to keep abreast – let alone get ahead – of the latest performance-enhancing substances at times seem to be doomed to eternal failure. It will be recalled from a previous issue of this Journal ([2005] 2 Sport and the Law Journal p. 97) that, no sooner have the sporting authorities found a way of coping – however imperfectly – with the erythropoietin (EPO) drug administered externally, they may now have to deal with a product which generates this substance indigenously. This known as “gene doping”, and consists in manipulating the human genetic code, thus evading standard methods of detection. The substance which produces this effect is called Repoxygen, and evidence from a recent court case in Magdeburg, Germany, suggests that athletes may have be started using it at the recent Winter Olympics in Turin, and may be in common usage at the next summer Olympics, to be held in Beijing in 2008 (The Times of 2/2/2006, p. 78).

Evidence of this new technique was stumbled upon during the trial of Thomas Springstein, the coach and partner of Grit Breuer, twice winner of the 400-metre event at the European Championships who was banned for ingesting the substance Clenbuterol. Mr. Springstein was accused – and subsequently convicted – of supplying steroids to female athletes whom he has been coaching in Germany. The body of evidence against him was enhanced by a police raid on the home which he shares with Ms. Breuer, in the course of which 20 chemical substances were said to have been discovered, 12 of which are yet to be identified at the time of writing. Also abstracted from Springstein’s home was his laptop computer. At the start of the trial, the defendant’s lawyer failed in his plea that the contents of his client’s e-mail inbox should remain private. Certain emails were read out in open court, and it was in one item of correspondence with the doctor of a Dutch speed-skating club that the incriminating evidence was allegedly found. The prosecution claims that Repoxygen was one of the substances discussed in the relevant email exchange. The relevant messages were passed on to Professor Werner Franke, a German cell biologist largely responsible for exposing those behind the doping regimes of the former East German sports system (Journals passim!). He claimed to have been “devastated” by the contents of these e-mails, adding: “We have been expecting gene doping, but not so soon. I don’t know how they have it, but they do. This is the crossing of the Rubicon. This is a real advance in criminality” (Ibid)

It appears that Repoxygen was pioneered in 2002 by Oxford Biomedica, a British-based pharmaceutical company. Used legitimately, it is a hugely significant breakthrough for the healthcare sector for which it had been originally intended, primarily in order to treat serious anaemia. The human body already produces EPO indigenously. EPO, in turn, is the agent which produces the red blood cells conveying oxygen to the muscles. When an athlete’s body tires, this is because it craves oxygen, which is why athletes can enhance performance by injecting synthetic EPO. The brilliance of Repoxygen appears to be that it imparts to the human body the gene with which it can stimulate further EPO production by itself. When it announced the arrival of its breakthrough product in 2002, Oxford Biomedica explained that its use allowed the body to “switch on a gene” in response to low oxygen levels and then, once that level has been raised, to switch off the gene, providing an “exquisite control mechanism” for the production of EPO in situ.

Within three months, anti-doping campaigners had expressed their concern over the possible misuse of the new product. Thus Larry Bowers, managing director of the US Anti-Doping Agency (USADA) warned, at a meeting held in Atlanta in 2002, that it enabled one to turn it on and off at will, thus acting “more or less like the body”. Whilst the relevant authorities attempt to pioneer a test for gene doping, the immediate question asked is how Repoxygen succeeded in becoming available on the black market. Whilst Oxford Biomedica made the Repoxygen prototype, the substance never went into production because the company believed that it was unable to compete on a pharmaceutical market where EPO was so readily available. As a result, claims its Chief Executive, Professor Alan Kingsman, the prototype simply “remained in the fridge”. Prof. Kingsman also maintains that the company supervises its products very closely, which makes its appearance on the black market even more of a mystery. One possibility is that other laboratories have succeeded in reproducing Repoxygen from information obtained when the product was officially launched by Oxford Biomedica (Ibid).

(The trial and conviction of Mr. Springstein are detailed below, p.131)
15. Drugs legislation & related issues

Doping issues and measures – International bodies

(Inevitable) doping issues at the Winter Olympics

Confusion surrounds Italian authorities’ penal policy

It is a sad fact that any major sporting festival will inevitably feature a number of cases in which unlawful substances have been consumed. This was also the expected outcome at the Turin Olympics held earlier this year, which is why anticipatory noises were already forthcoming from many quarters long before the opening ceremony. These had the laudable intention of attempting to inform all the parties concerned exactly what they were to expect if they stepped out of line. Unfortunately, in some cases they provided more confusion than clarification. This was certainly the case with the advance notice provided by the Italian authorities as to the criminal implications of any such cases.

It will be recalled from a previous issue of this Journal ([2005] 3 Sport and the Law Journal p. 55) that, in principle, Italy applies very strict penal rules to the use of doping. This gave rise to speculation as to whether the Italian police would actually enter the Olympic village in order to arrest athletes who failed doping tests. Jacques Rogge, the president of the International Olympic Committee (IOC), then made a special plea that these restraint by the Italian enforcement authorities...

Although the vast majority of participants seem to have heeded this warning, it was not enough to prevent police intervention in certain cases, as can be seen below.

(Interestingly, on the eve of the Games, a number of Italian authors (Ferrari, Luca, Bellomo and Alessia) had published a paper entitled “Turin 2006: the Olympics and the State of Italy” ([2005] 3(11), 14-16, in European Current Law 2/06, p. 56). This article compares the Italian legislation referred to above, i.e. Law 376 on Halting the Illegal Use of Performance Enhancing Drugs 9which introduced criminal charges for doping offences] with the WADA Code as adopted by the Italian national Olympic Committee. The authors examine the potential conflict between the Olympic authorities and an independently operating legal system which could expose athletes to criminal penalties. They suggested restraint by the Italian enforcement authorities...]

The exact scope of the Italian authorities’ policy was to become clear enough to the Austrian national team – see below!

Déjà vu – trouble erupts before competitions start

The Turin games were gripped by an uncomfortable sense of déjà vu when its long-awaited opening ceremony was compromised by swirling rumours that doping cases had already been detected. This had unfortunate overtones of the opening stages of the Athens Olympics two years earlier, when two of the host nation’s top athletes, Kederis and Thanou, were already suspended before the first sporting event could take place (Journals passim). As the opening ceremony was in full swing, it was learned that “eight Nordic (event) skiers” had been suspended for five days following high red blood cell counts. Giovanni Zotta, an Italian representative on the International Olympic Committee (IOC), followed this announcement by stating that preliminary tests performed by the IOC on 98 athletes had yielded the banned substance EPO in several samples. An IOC spokeswoman later denied this, saying that the suspension of the “Nordic event” skiers – who included German Olympic relay champion Evi Sachenbacher Stehle, had been suspended as a health measure rather than a penalty (The Independent of 11/2/2006, p. 61).
15. Drugs legislation & related issues

As a result, the athletes in question were set to miss the women’s and men’s cross-country pursuit races the following day. The action elicited a protest from Ernst Jakob, the doctor attached to the German Skiing Federation. He said that he could not accept that athletes could be banned because of slightly higher blood cell counts, pleading health concerns (Ibid). Indeed, there was no proof that the athletes in question had done anything wrong, since high haemoglobin levels can be caused by dehydration or the human body’s acclimatisation to mountain air. Under the rules of the world governing body for skiing, the FIS, where an athlete incurs a haemoglobin count which exceeds 6.0 grammes per decilitre for women and 17.0 grammes for men, the person concerned must withdraw from the competition for five days. Each athlete has a file detailing their haemoglobin level, and some are allowed dispensation even where their red-blood cell counts are above the permitted amounts (The Times of 11/2/2006, p. 94). Although this incident should not therefore give rise to undue controversy, it did raise the possibility that blood doping had taken place by means of synthetic haemoglobin or transfusions aimed at giving more energy to the muscles. As was to be expected, the German team appealed to the Court of Arbitration for Sport (CAS) (The Daily Telegraph of 11/2/2006, p. S7).

Meanwhile, Zach Lund, a US gold-medal prospect in the skeleton bobsleigh event, was banned from the Games and issued with a one-year ban following a positive drugs test which the athlete blamed on a hair stimulant. WADA had called for Mr. Lund, who tested positive at a World Cup event the previous November, to be banned for two years, but the CAS was satisfied that he had merely failed to check the list of banned substances (Ibid). In the event, Mr. Lund, who blamed the positive test on a hair growth stimulant, was merely issued with a one-year ban but was still excluded from the Games. In addition, in the women’s combined event, Olga Danilova and Larissa Lazutina, both members of the Russian team, were disqualified for doping offences (The Times of 11/2/2006, p. 94).

The strange case of the Austrian skiers (not to mention their ex-coach)

Unfortunately, the flow of doping cases continued throughout the entire tournament. In the course of the second week, it was the Austrian team which experienced the full force of the anti-drugs crackdown when Italian police and doping testers descended on its cross-country skiing and biathlon squad. In all, 10 athletes were required to produce urine samples for the drug testers, more particularly six cross-country skiers and four biathletes. The four-hour raid ended with the police removing a pile of documents as well as “material of various origins” which was destined for further analysis at the laboratory (The Independent of 20/2/2006, p. 66).

The investigation into the athletes’ activities commenced when WADA agents found blood-doping equipment in Austria which was linked to Walter Mayer, former coach to the Austrian team, who had been banned from the Turin and Vancouver (2010) Winter Games because of his involvement with in blood manipulation offences in the course of the Salt Lake City games of 2002. When they learned that Mr. Mayer could have made contact with the Austrian team in Turin, WADA informed the IOC. The former coach was placed under official investigation by Italian magistrates on suspicion of having committed a crime. Austrian protestations that he was not involved in the team proved to be highly dubious when the IOC produced an official team photograph featuring Mr. Mayer (The Daily Telegraph of 20/2/2006, p. S6).

Nevertheless, the Austrians were furious at the treatment of their athletes, especially after their cross-country skiers finished last in the 4x10 km relay. They complained that the police had prevented them from leaving their room on the night before the competition, and that the entire operation had been heavy-handed in the extreme. Karl Schweitzer, the Austrian Minister for Sport, considered it inappropriate for the athletes to have been treated as “serious criminals”, and that they were therefore wrongly disturbed whilst preparing for a race (Ibid). The Austrians have also complained about some of the methods employed by the doping authorities. Hermann Maier complained at having been approached by someone posing as a fan, only for him to reveal later that he was a drugs tester. He felt that such officials should be more open in their approach to the athletes and show their badge, and that they should not treat athletes “as if every one of them was a scoundrel” (The Guardian of 13/2/2006, p. S16).

This was only the start of a bizarre series of events which was to engulf the Austrian camp. Following the police raid, Mr. Mayer fled Turin and drove 250 miles back to Austria, where he was arrested after crashing into a police roadblock 15 miles over the border. He was then charged with civil disorder, damage to property and assault. The wreckage of his car was released after investigators found no traces of illegal substances there, but Mr. Mayer himself was later admitted to a psychiatric hospital in Klagenfurt. The President of the Austrian Skiing Federation announced that Mr. Mayer had been interned because he had
apparently indicated a wish to commit suicide. The Turin Chief Prosecutor (Ministero Pubblico), Marcello Maddalena, confirmed that the former coach remained under investigation for alleged infringement of Italian anti-doping legislation (The Guardian of 21/2/2006, p. S6). Several days later, Mayer admitted that he had in fact attempted to commit suicide. In an interview with an Austrian magazine, he said: 

“I was completely shattered, I couldn’t think clearly. I wanted to take my own life because my world had been destroyed. I wanted to end my life with the car” (The Daily Telegraph of 22/2/2006, p. S13).

It was later revealed that Mayer had been under surveillance for nearly a month before the Turin raid occurred. The International Ski Federation (FIS) had tipped off the authorities after they had tested a group of Austrian athletes staying at the former coach’s home in Ramsau, Austria. In the course of their testing procedures they noticed the presence of blood transfusion equipment, and Mr. Mayer was subsequently tailored for the following month before he arrived at the Olympics (The Guardian of 24/2/2006, p. S5).

It also emerged that during the dramatic police raid, police had seized blood-analysis equipment, 100 syringes, vials of distilled water and 30 packs of drugs, which included asthma medication and anti-depressants. The Austrian Olympic Committee promptly dismissed two members of the Turin team, to wit Wolfgang Perner and Wolfgang Rottmann, who had left after the raid. Mr. Perner claimed he feared arrest after the raid if he remained (The Daily Telegraph of 21/2/2006, p. S12). It was also learned that the Italian police had conducted a second raid on the Austrian cross-country team, two days after the first. This time their target was the house where Walter Mayer had allegedly stayed. The police later confirmed that “medical equipment” had been found at the house, and that this equipment was “useful for the investigation” The Austrian team expressed their indignation at the raid and the manner in which it had been conducted, with Otto Jung, one of the coaches, saying that it “looked as if a bomb had hit the place” (The Guardian of 22/2/2006, p. S10).

The response by the Olympic authorities to this incident was almost as confusing as the series of events which accompanied it. The IOC initially announced that the results of the tests would be published within two or three days, but that deadline passed without any such publication being forthcoming. However, it did emerge that an investigation had commenced by the IOC and the Austrian Olympic Committee, the latter calling upon the services of Dr. Stephan Netzle, the Swiss lawyer and member of the Court of Arbitration for Sport (CAS) who was responsible for confirming the initial ban on Mr. Mayer (The Independent of 24/2/2006, p. 66). However, the IOC indicated that, even if the results did not return positive, Austria may still be penalised if it was believed that there was an attempted use or possession of prohibited substances or methods. Giselle Davies, the IOC Director of Communications, announced that a disciplinary commission would be established “in due course”, and that there were issues to be considered “outside the anti-doping procedures”. By these “other issues”, Ms. Davies was referring to, inter alia, the official postcard, referred to above, on which Mr. Mayer was pictured alongside the Austrian team, which she described as “breaking the Olympic spirit” (The Guardian of 22/2/2006, loc. cit).

Inevitably, it was also feared that the entire affair might affect the outcome of the bid for the 2014 Winter Games, for which the Austrian resort of Salzburg was the hot favourite – at least until the events taking place in Turin. That was very apparent from the remarks made by Dick Pound, the Wada president: 

“The Salzburg bid has 16 months to respond to this but it has taken a hit. The fact that Mayer has been here with the Austrian team is provocation. The guy has been banned to 2010 and they are saying “he’s still here and we love him” (The Daily Telegraph of 22/2/2006, loc. cit.)

Not for the first time, this column feels that, for the head of an international body, who is also a QC, Mr. Pound may not have been displaying either discretion or even the impartiality expected of a man in his position. Nevertheless, the Austrian Chancellor, Wolfgang Schüssel, who met the IOC president, Jacques Rogge, shortly after the drugs raid, maintained that the Salzburg bid had not been affected (The Independent of 24/2/2006, loc. cit). In an attempt to show their good faith in this affair, Austria launched its own investigation into the affair, and announced that the coach Emil Hoch, who had also disappeared after the Turin raid, would be banned from future Olympic Games (The Guardian of 24/2/2006, loc. cit).

The full outcome of the investigations and procedures launched at various levels over this affair were not yet known at the time of writing. However, in late March it was learned that Walter Mayer had brought a court action for defamation against the WADA chief, claiming that he was wrongly accused of blood doping during the Turin Games. His lawyer also indicated that a similar action would be launched against the IOC President, Jacques Rogge (The Daily Telegraph of 30/3/2006, p. S18). No further details are available at the time of writing.
15. Drugs legislation & related issues

**Russian biathlete loses silver after doping test**
During the first week of the Games, it was a Russian athlete who became the first athlete actually to fail a doping test. Olga Pyleva had tested positive, after finishing second in the 15 km biathlon event, for carphedon, a stimulant developed in Russia and of which it is claimed that it increases physical endurance and resistance to cold. Ms. Pyleva was accordingly deprived of her silver medal. She is also set to receive a two-year ban by the International Biathlon Union. Although she could also have faced prosecution under Italian anti-doping legislation (see above!), the prosecuting authorities, at the time of writing, appear to have stayed their hand (The Guardian of 17/2/2006, p. S5). If they fail to take action, the Italian authorities will once again stand accused of inconsistency in their approach.

True to form, it was alleged that the athlete concerned had ingested the substance as a result of medical prescription. Dr. Nikolai Durmanov, who heads the Russian anti-doping committee, claimed that the doctor who had treated her in the Siberian city of Krasnoyarsk for an ankle injury had given her an over-the-counter medicine which did not list carphedon amongst its ingredients. He added:

“This was 100 per cent the physician’s mistake. The main point of our concern is our athletes, because she is innocent and she is in a catastrophe. Her brilliant career has been finished in such a way without her being guilty. The typical Russian way of doing things is immediately find somebody to blame. This case is much more complicated. I can blame myself. We have brought a lot of extra new lab equipment in our lab, we have published a lot of books, leaflets, brochures for our athletes, for medicine workers, but finally it didn’t work. So it’s my responsibility too” (Ibid)

Carphedon is a substance related to bromantane, being a product for which several Russian athletes tested positive at the 1996 Olympics in Atlanta, but eluded punishment because at the time the product was not listed by the IOC on its list of banned substances (Ibid).

**Smigun controversially claims gold in depleted cross-country event**
It has been mentioned above that a number of athletes were banned even before the games got under way, having tested positive for elevated haemoglobin in their blood. This had the effect of depleting the 15 km cross-country pursuit event. By an ironic twist of fate, the event returned a winner the competition least wanted in the shape of Estonia’s Kristina Smigun. The reason for this is that Ms. Smigun had herself been at odds with the doping authorities, having tested positive for a banned anabolic steroid in 2001. In the event, she escaped suspension because WADA Chairman Dick Pound had claimed that the laboratory which tested the B sample had made a mistake, and the ban which had been initially pronounced was quashed on this technicality (The Guardian of 13/2/2006, p. S16).

**Commonwealth games drug-testing delays arouse suspicions, but yield some “positives”(!)**
Following hard on the heels of the Turin Winter Games came the next major international sporting jamboree, to wit the Commonwealth Games in Melbourne. Naturally, it did not require a cynical mind to expect a number of doping cases to arise from these Games. However, after the first half of the Games no positive tests were reported, even though over 1,000 competitors were scheduled to be tested during the event. This seemed a little too good to be true, and gave rise to speculation that the games’ authorities knew more than they were prepared to divulge. When pressed on this matter, the Chief Executive of the Commonwealth Games Federation, Mike Hooper, refused to divulge any facts or figures, let alone the names of any incriminated athletes. He claimed that possible legal ramifications meant that every possible procedure had to be completed – including sending the samples to a Sydney laboratory for analysis – before any statement could be made. Yes in most other major tournaments of this kind the results are made public less than 48 hours after an event has taken place (Daily Mail of 23/3/2006, p. 89). This inevitably gave rise to speculation that someone somewhere might be attempting a cover-up on this issue.

When several days elapsed and still no results were forthcoming, the Games officials once again attempted to justify the delay. Once again, legal considerations were invoked, as is explained by Mike Fennell, the Games President:

“Investigation makes it longer. We believe it’s important to protect the integrity of athletes. I do agree the process is a little long but the process is a little different here to protect the athletes from misinterpretation of what is going on. That has happened at many other games. You do have situations that are announced after games. It is important to protect the rights of athletes properly because the penalties are so severe in the end. We are committed to a process with WADA and ASADA (the Australian anti-doping authority) and are respecting that process completely. That means we are not going to make any announcements about tests until the process has been completed”.

In the event, details of some of the results did emerge. The doping scandals which have hurt it in the past returned to haunt India when two of its weightlifters tested positive for banned substances, taking much of
15. Drugs legislation & related issues

the sheen off their gold-winning performance in the sporting extravaganza so far. The two lifters, Edwin Raju (56kg) and Tejinder Singh (85kg), were caught using performance-enhancing drugs, once again tainting that country’s sporting image (see below p.133). The latest blow means that, at the time of writing, India were faced with the prospect of being issued with another 12-month ban as three lifters have now tested positive in this calendar year, the third being Shailaja Pujari who had dropped out of the Melbourne-bound squad at the last minute. The unfortunate development, which has now become a regular feature in major multi-disciplinary events, ironically comes seven months after India had emerged from a similar one-year doping related ban (www.indiadaily.com 23/3/2006).

It is not yet known whether this incident was at all related to yet another extraordinary “pre-Games” incident. During the week which preceded the opening ceremony, the Australian Federal Sports Minister, Rod Kemp, announced that “unidentified pills” had been found, along with syringes and vials, in accommodation used by the Australian Institute of Sport occupied by weightlifters preparing for the Games. He confirmed that cleaners had discovered the equipment containing a suspicious substance in several rooms at the Canberra complex, whereas the pills were located on the very day of the opening ceremony. All the equipment and substances were sent for analysis. Significantly, Mr. Kemp added that “athletes from other countries” had also prepared at the Institute (www.findlaw.com, 16/3/2006).

At the time of writing, it was not clear whether the dope testing procedures conducted at Melbourne yielded any other cases of unlawful drug-taking.

WADA chief asked to retract drug-taking allegation

The relationship between the world of professional cycling and the head of the World Anti-Doping Agency (WADA), Dick Pound, has never been very cordial, for reasons which may – once again – be located in the WADA Chairman’s talent for ill-thought out rhetoric. These relations plunged to a new low in early January 2006, when the international body representing the sport, the UCI, requested Mr. Pound to make a public retraction of his claim that drug abuse was “widespread” in cycling. In a letter signed by Francesco Moser, the President of Cyclistes Professionnels Associés (the professional cyclists’ international trade union), called upon Mr. Pound to retract his words, accompanied by a veiled threat of legal action. Referring to an article in the British newspaper The Guardian, and an interview which he gave to the Swiss newspaper 24 Hours, the relevant letter stated:

“You have openly attacked the sport of cycling and its actors, stating in particular that doping is ubiquitous among cycling teams. You even dare to imply that the UCI (International Cycling Union, the world governing body in the sport) is complicit in this. You openly accuse cyclists as a whole of behaving against honour, sporting ethics, and pass them off, in the eyes of the public, as cheaters trying to bend the rules, while in fact they deserve respect for their training and their daily effort and sacrifice” (The Guardian of 11/1/1006, p. S6)

In the Guardian article complained of, Mr: Pound had stated that, since the infamous Festina scandal of 1998, drug abuse had “continued unabated within entire teams”. He added that such drug use was not the accidental consumption of a tainted supplement by an individual athlete, but planned and deliberate cheating, using complex methods, sophisticated substances and complex methods, as well as the active complicity of doctors, scientists, team officials and riders. He also stated that there was nothing accidental about all this, and that this cheating proceeded under the allegedly watchful eye of the cycling officials (Ibid).

At the time of writing, it was not known how Mr. Pound reacted to this statement, or what action, if any, the cyclists’ trade union intended to take in the event of Mr. Pound refusing to recant.

Doping issues and measures – Individual countries

Fallout from BALCO scandal continues...

Montgomery banned by CAS

The BALCO affair has occupied such a prominent place in these columns that it is scarcely worth citing the references to it, or even summarising the events leading up to and surrounding it. Suffice it to remind the reader that, as a result of a US federal investigation into the BALCO laboratory in California, Victor Conte, its operator, was sentenced to four months’ imprisonment in October 2005 after having pleaded guilty to the distribution of prohibited steroids. In the course of the investigation, Mr. Conte claimed that he had supplied the THG and EPO steroids to Tim Montgomery, the former world 100 metres record holder, and his partner, Olympic champion Marion Jones. The latter has always denied this change, and may still bring court proceedings against Conte in respect of these allegations (2006) 3 Sport and the Law Journal p. 89).
15. Drugs legislation & related issues

In the meantime, however, the charges made against Tim Montgomery had reached the Court of Arbitration for Sport (CAS), which was due to issue its verdict in mid-December 2005. In the event, in what has provide to be the highest-profile doping case since the Ben Johnson affair in 1988, the CAS ruled against the former record-holder and issued him with a two-year ban. Even though the Court had stopped short of imposing the four-year ban required by the US Anti-Doping Authority (USADA), it is widely thought that the career of Mr. Montgomery, who is aged 30, is now as good as over (The Independent of 14/12/2005, p. 76). During the same session, and still arising from the BALCO affair, the Court also issued a two-year ban against Chryste Gaines, a member of the women’s 4x100 gold medal-winning team at the 1996 Olympics (The Daily Telegraph of 14/12/2005, p. S8).

It is interesting to note that neither Montgomery nor Gaines actually tested positive, but had been charged by USADA solely on the evidence arising from the BALCO laboratory. Mr. Bonds has always hotly denied these allegations, pointing out all the time that he has never failed a steroids test. He has conceded that his body would be a different matter, but he would not return the money on such slender evidence. He also maintained that the only substance given to him by Victor Conte which he ever ingested was flaxseed oil, and that he had easily spent a six-figure sum defending himself against the charges made against him. It seemed, then, that the only prospect the international governing body had of recovering the money was to take legal action against him (The Guardian of 16/12/2005, p. S6).

Renewed allegations made against baseball star Bonds

It will be recalled from previous issues of this Journal ([2005] 2 Sport and the Law Journal p. 85 and [2005] 3 Sport and the Law Journal p. 96) that the sport of baseball was beginning to acquire an unsavoury reputation for drug abuse, and that at least one leading player had been suspected a “client” of the BALCO laboratory at the time of the scandal. More particularly it was alleged that one of the greatest hitters in the game, i.e. Barry Bonds – hitherto more famous for hitting balls into crowds which then give rise to ownership lawsuits than for drug abuse (Journals passim) – had used performance-enhancing drugs supplied by the infamous laboratory. Mr. Bonds has always hotly denied these allegations, pointing out all the time that he has never failed a steroids test. He has conceded that his body vastly and rapidly increased in size during the 1998-9 seasons. Mr. Bonds insisted that this was due to a new gym routine and legal nutritional substances supplied by BALCO (The Independent of 10/3/2006 p. 63).

However, Mr. Bonds’s protestations of innocence have now been put to the test by a recently-published book authored by Lance Williams and Mark Fainaru-Wada (sic), who are the reporters on the San Francisco Chronicle who first exposed the BALCO scandal. This work, entitled Game of Shadows: Barry Bonds, Balco and the Steroid Scandal that Rocked Professional Sports, drew on hundreds of documents and computer records, as well as on police evidence and Grand Jury testimony, and details allegations of the manner in which a potent combination of jealousy, ambition and the need to prove himself drove the great hitter to consume a wide range of drugs. It should be added at this point that, when Bonds staged his amazing late-career surge by hitting 73 home runs in 2001 at the age of 37, steroids were not yet banned from baseball (ibid). However, it must also be borne in mind that his personal trainer, Greg Anderson, was among four men convicted as a result of the scandal (The Daily Telegraph of 9/3/2006, p. S21).

Whatever the case may be, the book in question has hardened suspicions that his remarkable record may have been fuelled in part by artificial chemicals. Although Mr. Bonds has dismissed the book out of hand, it is doubtful whether Major League Baseball can afford the same luxury. At the time of writing, it is thought that the nation’s baseball authority is quietly hoping that Mr. Bonds will retire discreetly very soon, which would spare it the uncomfortable prospect of Bonds reaching the career home-runs total achieved by the legendary Babe Ruth and Hank Aaron (The Independent of 10/3/2006, loc. cit).
US school teams to be tested for steroids

In mid-December 2005, it was learned that the US state of New Jersey had become the first in the country to order random steroid testing in school sports in a bid to stem the increasing use of performance-enhancing drugs which, according to some estimates, affect as many as 8 per cent of all High School athletes. The relevant order, issued by Richard Cooley, who is currently the State’s acting Governor, requires random testing of all teenage teams which succeed in reaching state championship level. The Governor set up a task force which is working out all the practical details of this scheme, as well as the penalties applicable, but these are very likely to provide that players who test positive will be excluded from the competition. Mr. Cooley commented at a press conference called on this issue:

“As a parent, as a coach and a concerned citizen, this isn’t an issue we can ignore (sic). This is a growing public health threat, one we can’t leave up to individual parents, coaches or schools to handle” (The Guardian of 22/12/2005, p. 16)

Mr. Cooley quoted figures from a study conducted by the New Jersey division of health services which had found that steroid abuse among high school athletes in the state had increased from 3 per cent in 1995 to around 5 per cent in 2001. He added that the figure could by now have risen to as much as 8 per cent of the state’s 230,000 school athletes. One parent who welcomed this announcement was Donald Hooton, whose son Taylor, aged 17, hanged himself in 2003 after suffering withdrawal symptoms from steroids. He had started to consume steroids at the age of 16 after his high school baseball coach informed him and another pupil that the needed to “bulk up” if they wanted to be eligible for the second team. During the months which followed, the slightly-built schoolboy gained 30 lbs in weight, but at the same time started to experience mood swings, irritability, aggressive behaviour and acne on his back. His parents had suspected use of recreational drugs, but it was only after they sent him to a psychiatrist that he admitted having purchased steroids from a local gym. A few weeks after discontinuing consumption he killed himself (Ibid).

Mr. Hooton, who is keen to see the introduction of a nationwide testing programme for schools, claimed that much of the responsibility lay with coaches who had adopted a “don’t ask, don’t tell” policy on steroids. He also gave passionate testimony recently to a Congressional Committee which was instrumental in the decision by Major League Baseball to intensify its stance on steroid abuse (Ibid).

Doping issues and measures – Athletics

Court finds Sun innocent – but ban is upheld (China)

It will be recalled from a previous issue ([2005] 3 Sport and the Law Journal p. 90) that a massive drug-testing programme carried out at the Chinese National Games yielded a positive test, to wit that of Sun Yingjie, a leading Chinese distance runner and medal hopeful for the 2008 Olympics. The results of the first and second tests proved to be identical, producing a positive for the banned testosterone derivative androsterone. The Chinese athletics authorities subsequently imposed a two-year ban on the athlete and stripped her of her silver medal (The Guardian of 20/12/2005, p. S2). Her trainer, Wang Dexian, was banned for life for having infringed anti-doping rules for the second time (the first time being in 1995 following a ban issued against another athlete in his care).

This ban had been imposed in spite of the outcome of court proceedings which Ms. Sun brought against Yu Haijiang a former training partner. During the trial, the latter confessed to having spiked Ms. Sun’s kiwi juice with the drug during the Games (La Dernière Heure of 14/1/2006, p. S10). The country’s Athletics Management Centre justified the ban because under international anti-doping rules, athletes were “responsible for what is in their bodies”, and that the fact remained that Sun had ingested steroids (The Independent of 20/12/2006, p. 66).

Australian association investigates drug-pushing claims against former coach

In mid-February 2006, it emerged that Australian sports officials were about to launch an investigation into claims that a former distance-running coach, Said Aouita, pushed performance-enhancing drugs. Australian steeplechaser Melissa Rollison had claimed that the former Moroccan Olympic running champion proposed that she should take human growth hormone (HGH). Mr. Rollison’s allegations followed those made by another top Australian athlete, Mark Fountain, who had made similar claims against Aouita in a letter addressed to the Australian Sports Commission in the course of 2004. Mr. Aouita’s two-year reign as coach had ended that year, but he was cleared of any links with doping. Ms. Rollison alleges that her 18 months under the tutelage of Mr. Aouita were a nightmare, and that he recommended that she should take HGH at a US training camp in 2003 (The Sunday Telegraph of 19/2/2006, p. S11).
15. Drugs legislation & related issues

**German coach found guilty of doping offences**
The Thomas Springstein affair has already been referred to above in connection with the discovery of Repoxygen, a substance which enables gene doping to take place (p.123). The actual trial itself was completed in mid-March 2006, and resulted in a 16-month suspended sentence for Mr. Springstein, the latter having been found guilty of doping offences which included issuing banned drugs to under-age athletes. He was also ordered to complete 150 hours of community service. Mr. Springstein, one of Germany’s best-known coaches, had been accused of supplying the drugs in the course of 2003. Before that, he had been part of the East German sporting régime under which many competitors fell victim to a state-controlled drug-taking programme prior to the fall of the Berlin Wall in 1989. As has been related before in these columns, some of these athletes developed serious health problems such as cancer and heart disease, and are claiming damages from the company which produced these drugs (The Daily Telegraph of 21/3/2006, p. S17).

**French relay champion accused of doping**
In late March 2006, it was learned that Lueyi Dovy, a world gold medallist in the sprint-relay event, was charged with doping offences by a judge in Perpignan, France. Mr Dovy, who was a member of France’s 4x100 metres relay team at the Helsinki world championships, had been questioned a few months earlier during an investigation into the trafficking of banned substances (The Guardian of 24/3/2006, p. S8). The outcome of this affair was not known at the time of writing.

**Doping issues and measures – Cycling**

**Tyler Hamilton affair pursues its legal (and eccentric) course (US)**
It will be recalled from a previous issue of this Journal ([2005] 2 Sport and the Law Journal p. 90) that the US Anti-Doping Agency (USADA) during a stage in the annual Tour of Spain in 2004. It was also reported in the same issue that Mr. Tyler had appealed to the Court of Arbitration for Sport (CAS) against this sentence, casting doubts on the reliable nature of the Tour of Spain test. In mid-February, following an unusually lengthy procedure, the CAS dismissed Mr. Hamilton’s appeal, having found evidence that the test in question had been reliable. The US rider therefore remains suspended until September 23 of this year (The Guardian of 13/2/2006, p. S18). However, even after this lengthy affair it does not look as though the Hamilton affair is over yet.

On the one hand, the CAS is still considering an appeal arising from the Olympic time-trial won by Mr. Hamilton at the 2004 Olympics in Athens. Evidence of a blood transfusion was found in one blood sample, whereas the second “control” sample was unavailable for testing (Ibid). On the other hand, a problem arose over the bizarre situation under which a banned rider may still compete in “unsanctioned” events – even if other cyclists may be banned for riding alongside him! In mid-Marc 2006, certain photographs came to the attention of the world governing body in the sport, the UCI, which showed Mr. Hamilton competing in a race in his home town of Boulder, Colorado. UCI spokesman Enrico Carpani announced that, whilst his organisation could not prevent suspended cyclists from competing in unsanctioned events, it would take action against any licensed professionals racing alongside banned riders ([www.findlaw.com of 21/2/2006). The present writers searches in vain for a rational explanation for this state of affairs.

**Rumsas affair reaches its conclusion**
The intriguing case of Raimonas Rumsas and his various siblings began, as the informed reader will recall, in the second half of 2002 and has lingered ever since (see [2002] 2 Sport and the Law Journal p. 120). The affair commenced when Edita, the wife of the Lithuanian rider in question, was apprehended by a customs patrol near the Mont Blanc tunnel on 28/7/2002, being the day on which her husband finished a surprise third in the Tour de France. In addition to a hoard of drugs, the police found (a) a number of empty syringes which had traces of the EPO steroid (b) a centrifuge used to measure blood thickness, and (c) human albumin, which is capable of being used for the purpose of diluting the blood in order to circumvent random tests.

Edita Rumsas never provided a convincing explanation for the purpose of these drugs in spite of being held for 75 days by the French police. Her husband claimed that they were intended for his mother-in-law Yakstena, but his protestations of innocence received a different perspective when he tested positive for EPO during the 2003 Tour of Italy, and was banned for 12 months. This was the start of a legal saga lasting nearly four years, which ended when a court in the Savoy town of Bonneville issued the couple with a four-month suspended prison sentence each and fined them a total of €6,260, for having imported illegal medicine. The court also issued a 12-month suspended sentence to a Polish doctor, Krzysztof Ficek, for supplying some of the drugs in question (The Guardian of 7/1/2006, p. S5).
15. Drugs legislation & related issues

Although it now seems to have reached its conclusion, the whole affair has raised serious questions about the efficacy of the anti-doping tests used in cycling, because Mr. Rumsas had been tested twice during the 2002 Tour and always proved negative. Although blood doping was never proved in his case, he underwent a blood test during the later stages of the race which revealed that his blood had thickened slightly during the Tour. This could be caused by dehydration; it could also be the result of injecting EPO or the use of blood transfusions. As a result of the court’s verdict, the French Cycling Federation requested disciplinary action against Mr. Rumsas. However, at the time of writing it looked quite unlikely that he would be stripped of his third-place Tour distinction (Ibid).

Armstrong enquiry continues – amidst top-level strife...

The doubts and suspicions which have surrounded the prowess of US cycling champion Lance Armstrong have lingered and festered for such a long period now that they are beginning to assume the overtones of a slightly farcical soap opera. The background to this long-running saga will scarcely need repeating not only to the attentive reader of this Journal, but also to anyone who has taken the slightest interest in matters sporting over the past decade. Essentially, doubts have been expressed from innumerable sources that the Texan cyclist could not have achieved his remarkable run of seven Tour de France victories without the assistance of prohibited substances – even though he had never tested positive during his entire distinguished career. These allegations appeared to have been given some substance by an article featured in a top French sporting newspaper in which it was alleged that Mr. Armstrong had taken the blood booster EPO.

In our previous issue (2005) 3 Sport and the Law Journal p.93) it was related that a Netherlands lawyer, Emile Vrillman, has been appointed to oversee what was expected to be the definitive investigation into this matter (if only because Mr. Armstrong announced his retirement from the sport after his last Tour de France win in 2005). Anyone who wished for a speedy outcome was, however, soon to be disappointed. In mid-December 2005, it was announced by Dick Pound, the chairman of the World Anti-Doping Agency (WADA), that the inquiry was to continue into the New Year (The Guardian of 23/12/2005, p. S5).

In the meantime, this affair continued to cause a good deal of strife among the top echelons of the sport, more particularly the world governing body in cycling, the UCI. In late February 2006, it was announced that Dr. Mario Zorzoli, the head of medical services at the organisation in question, was temporarily leaving his post after the UCI confirmed that a member of its staff had released confidential information at the heart of the Armstrong controversy. It emerged that Dr. Zorzoli’s duties include the supervision of the world governing body’s blood-testing programme. The UCI later confirmed that all 15 of Mr. Armstrong’s anti-doping control forms submitted during the 1999 Tour de France had been passed to the journalist Damien Ressiot, with the US rider’s approval. Initially, it had announced that only one of the forms had been released. The significance of this resides in the fact that Mr. Ressiot was investigating whether Armstrong had clearance to consume medication which was on the banned list as part of his cancer treatment. However, he had also used the barcodes on the forms in question in order to link Mr. Armstrong with positive EPO tests, which the Texan rider strongly denies having used (The Guardian of 28/2/2006, p. S10).

The “definitive” outcome of this investigation is expected to appear by the time the next issue of this Journal appears.

Suspension of Hondo ban by Swiss court causes confusion

No-one has a greater regard for the Court of Arbitration for Sport (CAS) than the present writer. Nevertheless, some of its organisational aspects are open to criticism, none more so than the little-known provision in its rules which allows Swiss residents to challenge its decisions before a provincial court. This exemption was gratefully seized upon by German cyclist Danilo Hondo when faced with the prospect of a two-year doping ban. In spite of his nationality, Mr. Hondo was able to take advantage of this exemption because he owns a home in the Southern part of the Confederation (www.findlaw.com of 22/3/2006).

Originally, his suspension had been pronounced by the appropriate sporting authority, then confirmed by the CAS, after he had tested positive twice for the carphedon stimulant during the Tour of Murcia (Spain). However, the rider obtained an injunction from the local court in Vaud under which his ban was temporarily lifted pending a final decision, expected in September 2006. (Non-Swiss residents may only appeal against CAS decisions before the Swiss Supreme Court – and then only if the decision is “manifestly contrary to the general principles of law.”) The Secretary-General of the CAS, Matthieu Reeb, expressed his concern at this ruling, and questioned the grounds on which the court had issued this injunction, pointing out that Mr. Hondo had failed to produce a valid explanation for his positive test (Ibid.). The outcome of this case was not yet known at the time of writing.
15. Drugs legislation & related issues

Doping issues and measures – Tennis

Argentinian players banned
One of the more surprising developments in the campaign against doping is the number of top tennis performers who have been caught infringing the rules in recent years. Even more curious has been the spate of cases in which Argentinian players have been banned for the consumption of banned stimulants. In late December 2005, it was the Argentinian, Mariano Puerta, the world’s No. 12, who tested positive for the banned stimulant etilefrine after he lost the final of the French Open the previous June. Unless the player is successful in an appeal against this ban, imposed under the anti-doping programme of the International Tennis Federation (ITF), this decision will effectively end Mr. Puerta’s career, as he is now 27 (The Guardian of 22/12/2005, p. S5). He had already served a nine-month ban for the banned anabolic agent clenbuterol in 2003 (Daily Mail of 22/12/2005, p. 70).

A certain degree of paranoia seems to have gripped Argentina on this issue, with players claiming all manner of mitigation for the consumption of banned substances, ranging from baldness treatment to drinking from the glass of a wife who takes medication against hypertension. Mr. Puerto pleaded the latter in his defence. In fact, the panel in question accepted that he had taken the stimulant inadvertently, otherwise he would have been banned for life (The Independent 23/12/2005, p. 62). Two months later, it was Mariano Hood who was issued with a one-year suspension, having tested positive for the drug finasteride. The ITF anti-doping tribunal dismissed Mr. Hood’s defence that he was taking this masking agent in order to prevent hair loss (The Daily Telegraph of 9/2/2006, p. S8).

These two cases are, however, part of a broader pattern involving Argentina’s top performers. Earlier, Guillermo Canas had been suspended for two years after testing positive for the prohibited diuretic hydrochlorothiazide, Guillermo Coria was banned for seven months for having taken nandrolone, and Juan Ignacio Chela incurred a three-month suspension for taking methyltestosterone. Prior to this, Martin Rodriguez had lost ranking points and prize money for a doping offence. All this hasoccasioned much resentment amongst players from this country, who consider that they are becoming universally perceived as doping cheats. They feel this is unwarranted, since players from other countries (e.g. Slovakia and the Czech Republic) have also incurred doping suspensions – as well as the cases detailed below... (The Independent of 23/12/2005, loc. cit).

Younes El Aynaoui (Morocco)
In late January 2006, Mr. El Aynaoui, who plays for Sporting Club Geovillage in Sardinia, tested positive for cannabis. The Italian Sports medicine Foundation announced that he had failed a test during the team championships held the previous month (The Daily Telegraph of 25/1/2006, p. S21). At the time of writing, the result of the test on the B-sample was not yet known. He faces a three-month ban if this sample confirms the first (The Guardian of 25/1/2006, p. S2).

Sesil Karatantcheva (Bulgaria)
In mid-January 2006, the East European prodigy, who is still only 16, was banned for two years. An independent tribunal ruled that the samples provided by Ms. Karatantcheva at the French open in May 2005 and out of competition in Tokyo the following July had tested positive for the banned steroid nandrolone. At the time, the teenager had explained the high level of this substance by claiming to be pregnant (The Guardian of 12/1/2006, p. S7). Both tests were treated as a first offence for disciplinary purposes by the ITF tribunal (The Daily Telegraph of 12/1/2006, p. S6).

David Buck (US)
In late February 2006, this US wheelchair tennis player was suspended for 3 1/2 months after testing positive for cannabis at the previous year’s US Championships. In the process he lost his ranking points and prize money (The Daily Telegraph of 1/3/2006, p. S21).

Other sports (all months quoted refer to 2006 unless stated otherwise)

Canoeing. In mid-December 2005, Australian world champion Nathan Baggaley was banned for 15 months for the use of performance-enhancing drugs. The Court of Arbitration for Sport (CAS) found Mr. Baggaley guilty after he tested positive for stanozolol and methandienone in an out-of-competition test in September 2005. He had pleaded innocent to the charges (The Daily Telegraph of 21/12/2005, p. S22).

Rugby Union. In mid-January, Jason Keyter, the US centre, was banned for 12 months after testing positive for cocaine. He was playing for an English National Two division side (The Daily Telegraph of 13/1/2006, p. S14).

Weightlifting. In late March, it was learned that the International Weightlifting federation (IWF) had suspended the Indian Federation for the second time in two years after four of its lifters returned positive doping tests. The length of the ban was to be determined at some future date. The Federation had been banned for one year in August 2004 after two lifters tested positive at the Athens Olympics (The Daily Telegraph of 30/3/2006, p. S9).
Football

G14 clubs outline plans to run Champions League (but would not dare to break away from UEFA, of course...)

The survival of the strongest has always been an unswerving rule in sport, but up to this point the various authorities who govern its conduct have at least attempted – with varying degree of success – to mitigate some of the more brutal aspects of this principle. However, there are signs that European football may be increasingly going down this road, if the latest plans of the group representing the cream of its clubs are to be believed.

In mid-March 2006, it was learned that the G14 group, which in spite of its name comprises 18 of Europe’s wealthiest clubs, had launched an attempt to kill off the Champions League in its present form and seize ownership of the sport’s most prestigious club competition. In so doing, they have focused particularly on the current arrangement concerning the distribution of income from the European Champions League. Currently, UEFA, the governing body of European football, distributes this income of €416 million among the 32 clubs which participate in it; however, in accordance with a deal struck with the European Commission, a further €34 million is shared between the 52 leagues whose national bodies make up UEFA.

As a result, the income distribution does not quite reflect the economic strength of the parties involved. Just over €6.2 million is allocated to England, where the television market is the largest earner, whereas countries such as Luxembourg and San Marino, whose clubs played no part in the Champions league proper, received €177,000 each. Naturally, the G14 group was not about to tolerate such Communist nonsense, so in mid-March 2006 it issued the following statement:

“G14 favours the model of exploitation of rights that maximises the revenue for participating clubs. Redistribution of wealth in central marketing needs to [consider] the proportional contribution of all those involved. Revenues generated by top international (sic) football would be distributed fairly, meaning a substantial portion made available for “solidarity” to support the grass roots of the game. The size and proportion of this share would be mutually agreed between the governance authorities (sic) and those having generated the revenue – clubs (in the case of the top international (sic) club competitions) and football associations (in the case of the top national team tournaments). Clubs participating in top international (sic) club competitions would take control over the organisation of such competitions as well as the commercialisation of the rights (presuming this is done centrally) (The Guardian of 18/3/2006, p. S8).

Stripped of its pseudo-managementspeak (and pedestrian English), this statement could be interpreted by the reasonably-informed outsider as “we want as much as we can get away with without a figleaf”. However, there is one area in which G14 will definitely wish to remain collective, and that is in its demand for a greater say in the game’s governance, particularly where they seek “a similar evolution at international level, where clubs have control over their own leagues...” (Ibid). It will not have escaped the attentive reader that these noises should be seen in the context of increasing intervention by G14 in the governance of football, as is evidenced by the support it is giving to Royal Charleroi against world governing body FIFA over the release of players for international duty (see above, p.109). In addition, careful observers of the game have noted a similarity with the way in which the English Premier League has evolved – first by breaking away from the Football League, and then, if recent media reports are to be believed (see The Guardian of 18/3/2006, p. S1), by seeking duality in governance of the game and in revenue generation.

However, any notion the G14 group may have had that they would soon be a completely self-governing organisation were quickly dispelled a few days later when the European governing authority, UEFA, warned these clubs that they faced expulsion from domestic football if they continued in this direction, which would inevitably lead towards the formation of a European Super League. Reminding both the G14 group and the public at large that football should not be “a closed shop where only the richest and most powerful are invited to the table”, the “elite” syndicate were told in...
17. Issues specific to individual sports

no uncertain terms that UEFA would not tolerate a structure or system where smaller clubs and nations would never be allowed to achieve their potential (The Independent of 24/3/2006, p. 71). Predictably, this was followed by shrill denials from the clubs involved – or at least one of them. Manchester United Chief Executive David Gill hotly denied that the G14 group wished to break away from UEFA and form their own league (The Independent of 26/3/2006, p. 65). Some observers may doubt the sincerity of this commitment – only time will prove them right or wrong.

Mido disciplined after fall-out with coach
Ahmed Hossam, known to the football public as Mido, is currently Egypt’s best-known footballer. However, his brilliance on the field of play has sometimes been undermined by a suspect temperament, and this aspect of his personality was very much on display during the recent African Nations’ Cup. His national side having made it to the semi-final of the tournament, Mr. Mido had played a competent, but far from outstanding, part in this important fixture when the team management decided to substitute him in the 79th minute (Daily Mail of 8/2/2006, p. 76). The Tottenham striker took this decision very badly, and engaged in an extraordinary confrontation with his coach during which he had to be restrained by team-mates. This temperamental lapse was then penalised by his country’s federation, and as a result he was on the receiving end of a six-month ban. Even though this decision did not, in the event, have any bearing on the outcome of the final – from which Egypt emerged victorious – it attracted some controversy, particularly from the player’s team-mates who considered that the penalty was somewhat disproportionate (The Independent of 9/2/2006, p. 76).

However, the wisdom of Mido’s substitution appears to have been vindicated when his replacement, Amr Zaki, headed in the winner with his first touch (The Guardian of 9/2/2006, p. 54). Egypt then went on to win the final against the Ivory Coast. If a poll conducted by a Cairo radio station was to be believed, the majority of Egyptian citizens appeared to agree with the suspension imposed (Ibid). It should also be pointed out that this had not been the first occasion on which Mr. Mido had incurred the displeasure of the footballing authorities. In 2003, he was suspended by Netherlands club Ajax after he had criticised team selection policy, and he lasted only a year at Marseille before being transferred to AS Roma. He had also fallen out with the previous Egyptian coach, Marco Tardelli (The Independent of 9/2/2006, p. 76).

Tedesco and Langello banned (Italy)
In late March 2006, it was leaned that Giacomo Tedesco, and Antonio Langella, who play for Italian clubs Reggina and Cagliari respectively, were banned for two matches following an altercation during a League fixture. Cagliari’s Nelson Abeijon was also fined a total of €3,000. The two teams had scuffled when walking off the field (www.findlaw.com of 28/3/2006).

World Cup referees told to penalise diving
One of the less attractive features of the modern game has been the extent to which players have been prepared to hoodwink referees into awarding penalties and free kicks by diving in the wake of a tackle. Other features which have disquieted the authorities are time-wasting, reckless tackling and players who go into tackles with their elbows. All these evils have been subsumed into an eight-point list of the worst footballing offences as part of a series of strict guidelines designed to stamp out foul play during the 2006 World Cup tournament in Germany.

This crackdown was set out in early March 2006 at the annual meeting of the International Football Association Board (IAFB) which consists of FIFA and the four British home associations. Never before has diving been given such priority (The Independent of 6/3/2006, p. 68). The 44 World Cup referees were all encouraged to caution or dismiss players who engage in these misdemeanours (The Observer of 5/3/2006, p. S6).

UEFA plans two-referee experiment
As the game of football is placed under the increasingly intrusive spotlight of the audio-visual media, errors – both real and imagined – on the part of the match officials increasingly come under the spotlight of relentless scrutiny, mainly by dint of the relentless juggernaut of the slow-motion replay. This has served to place increasing pressure on the football authorities to find ways of minimizing such errors. In early March 2006 it was learned that the European governing body, UEFA, were to discuss the introduction of dual referees in a radical shake-up of officiating in the sport. It appears that the dialogue which UEFA has been conducting with clubs has raised the possibility of introducing this innovation. It hopes to conduct preliminary tests on this proposal (The Guardian of 6/3/2006, p. S2).

More concrete proposals on this issue were expected by the summer of 2006. Naturally, this column will monitor the outcome of these representations.
17. Issues specific to individual sports

Cricket

Verbal abuse attract investigations, condemnation and penalties

It would be a mistake to believe that verbal jousting is a new phenomenon in cricket, with even the Grace brothers having been known to indulge in it. However, there is rising concern that, in many cases, this “sledging” has now degenerated into a major tactic, involving often quite vicious slanging, used deliberately in order to disorientate the opposition.

Particularly the recent series between Australia and South Africa seems to have featured such unacceptable scenes. At a certain point, the International Cricket Council (ICC) had to warn the players from both camps that they risked misconduct charges if they continued the sledging which had occurred. Both the Australian captain Ricky Ponting and the South African Cricketers’ Association airily dismissed such imprecations, on the basis that what had occurred was mere harmless banter (The Independent of 14/12/2005, p. 70). However, the match officials were compelled to intervene during the Third Test in Sydney when the verbal abuse was directed against them. Australian fast bowler Brett Lee was found guilty of dissent following a heated discussion with umpires Aleem Dar and Billy Bowden. The offence was classed as a “level one offence”; however, Mr. Lee escaped with a mere reprimand (Daily Mail of 4/1/2006, p. 68).

Spinner Shane Warne also got into trouble, but this time over an outburst in which he engaged during an interview with a national newspaper, in which he called the South African captain Graeme Smith “a fool”, adding “you could put an egg on Smith’s face and it would be fried in about two minutes”. This attracted criticism from James Sutherland, the Chief Executive of Cricket Australia, who informed the bowler that his lucrative writing deal would be revoked if he failed to tone down his comments (The Times of 4/1/2006, p. 56). Two days later, fast bowler Glenn McGrath was issued with an official reprimand and fined for obscene behaviour on the fourth day of the third Test (The Guardian of 6/1/2006, p. S6). It was felt, however, that if match referee Chris Broad, the former England opener, had kept a firmer hand on the match the situation would not have escalated to such a point (The Independent of 6/1/2006, p. 67).

Two weeks later, it was wicketkeeper Adam Gilchrist’s turn to fall foul of officialdom. During the first one-day international between the two sides, at Brisbane, he was charged with arguing with Pakistani umpire Aleem Dar over a run-out incident involving Boeta Dippenaar, which Mr. Dar failed to refer to the third umpire (The Daily Telegraph of 20/1/2006, p. S6). Several days later, Mr. Gilchrist was fined 40 per cent of his match fee and issued with an official reprimand for dissent by match referee Jeff Crowe (The Daily Telegraph of 26/1/2006, p. S17).

Graphite-backed bat no longer legal

Sporting figures are constantly seeking to improve their performance through technical innovation, and cricketers are no exception. A few attempts have been made to change the cricket bat, which for centuries now has been produced from willow, but none with any lasting success. Nevertheless, the Australian captain, Ricky Ponting, appeared to have introduced a defining novelty when he adopted the “Kookaburra” bat, which has a graphite strip bonded to the back of the entire blade. However, in mid-February it was learned that, as a result of a voluntary agreement between the makers and the International Cricket Council, this particular bat is to be withdrawn. This followed a ruling by the MCC that the bat failed to comply with Law 6.2 of the rules of cricket (The Daily Telegraph of 17/2/2006, p. S18).

Shabir Ahmed banned over illegal action

In mid-December 2005, it was learned that Pakistani fast bowler Shabir Ahmed, who took five wickets in his side’s win over England in the opening Test of their most recent series, has been banned from bowling in international cricket for 12 months. The International Cricket Council (ICC) issued the penalty following an independent assessment by the University of Western Australia, which concluded that his action was illegal. Mr. Ahmed had been reported for the second time under the revised ICC bowling review regulations by the umpires in the course of the First Test, which was played in Multan in November. He was first reported and suspended earlier last year, but returned to international cricket following remedial work on his action and a full biomechanical analysis. Having been assessed as bowling illegally for the second time, he received the mandatory one-year ban (The Independent of 20/12/2005, p. 67).
17. Issues specific to individual sports

Ice skating

It will be recalled from a previous issue of this Journal ([2002] 1 Sport and the Law Journal p. 111) that the 2002 Winter Games in Salt Lake City were thrown into disarray following the farcical outcome of the figure-skating event. One of the judges, Marie-Reine La Gouagne, admitted that she had deliberatelyunderscored the Canadian pair Jamie Sale and David Pelletier in order to favour their Russian rivals. Although the “trading” of votes had been regarded as normal practice in the sport for years, such was the outcry which followed that the French judge was dismissed, and the International Skating Union urged to take remedial action in the shape of rule change ([2002] 2 Sport and the Law Journal p. 137).

The 6.0 ranking scale, which has been used since 1901, has now been replaced by a system aimed at reducing the opportunity for unscrupulous judges to manipulate the competition. A computer now secretly selects scores from nine of the 12 judges, then discards the highest and lowest marks. The seven remaining scores are then averaged. Under the old system, judges used to compare one skater’s performance with another’s. The system had its first major trial at the Turin Winter Games (The Guardian of 11/2/2006). Not everyone is enthusiastic about the new rules, however. Jayne Torvill, who won the event at the 1984 games, commented that she found it hard to understand, and that it makes it impossible to record a “best score” equivalent to the old 6.0 maximum (ibid). On the occasion of the Turin Games, a judge was dismissed again – but merely for poor performance (The Daily Telegraph of 14/2/2006, p. S13).

Rugby Union

In November 2005, the International Rugby Board (IRB) voted by secret ballot that the 2011 World Cup should be held in New Zealand. This decision has raised hackles in the Asian world of rugby, where it was thought that it was time for the event to be held in its continent. In a letter to IRB Chairman, Dr. Syd Millar from the Asian Rugby Football Union, has called for a re-vote “in an open and transparent way” because the secret ballot was “unconstitutional”. If the IRB fails to comply, the letter suggests that the Asian Union will seek legal redress by means of remedies available to them under English or even European law (The Independent of 9/1/2006, p. 66). The outcome of this case was not yet known at the time of writing.

Tennis

Players now able to use technology to challenge line calls

This year’s US Open at Flushing Meadow, New York, will be the first Grand Slam tournament at which instant replays will be used for disputed line calls. Each player will be allowed two challenges per set in order to review close calls. Once a player challenges a call, the official replay will be provided to the chair umpire and shown on the television broadcast and stadium screens (The Guardian of 7/3/2006, p. S8).

American Football

In mid-January 2006, it was learned that Washington Redskins’ safety Sean Taylor was fined a total of $17,000 by the National Football League for spitting in the face of Tampa Bay Buccaneers’ running back Michael Pittman. However, he avoided suspension (The Guardian of 11/1/2006, p. S2).
Reviews
**Reviews**

**David Fraser (2005)**


The spectre of match fixing in international cricket at the start of the new millennium could have spelt the death knell for the game. Fixing matches was seen as the converse of the values that cricket stands for. That the game could re-assert itself and protect the integrity of the sport actually says a lot about those values. Its is also not without some irony, that the Laws of Cricket that the match fixers were attempting to subvert were first introduced in the nineteenth century to regularise the game of cricket in response to widespread gambling on the sport at that time. Cricket seems to have weathered the storm and both domestically in most Test playing countries goes from strength to strength; internationally Test cricket particularly is having something of a renaissance. The intervention of the law and new forms of regulation with an emphasis on good governance and ethics has helped build-up confidence in the sport. It is clear that if ‘uncertainty of outcome’ is compromised in sporting encounters, its appeal can be irreversibly tarnished.

Match fixing is just one issue that is discussed in the second edition of David Fraser’s ‘Cricket and the Law—the Man in White is always Right’. The first edition did not have great exposure being published by the University of Sydney where Fraser, although British, has worked in recent years. It is terrific that this edition published in the UK will get a wider audience. It should be of interest both to those who have an interest in sports law and those who love cricket. If interest in both these areas coincide, this book is indispensable.

As Fraser argues: “Law and cricket are, I believe, simply different arenas in which struggle over meanings, interpretations, applications of rules by adjudicators, judges and umpires in these instances, engage us politically, ideologically and socially. For example debates about LBW decisions are ‘the same’ as debates about causation in tort or criminal law; debates about dissent on the field are debates about contempt and respect for legal institutions in a democracy.”

While this book provides a thorough theoretical examination of these similarities of cricket and law in chapters such as ‘leg before wicket, causation and the rule of law’ and ‘ball-tampering and the rule of law’ there are a number of chapters focusing on the jurisprudential and adjudicative issues around specific events such as the infamous action of Australian Trevor Chappell’s underarm bowling in the last ball of an international match against New Zealand designed to deny them any chance of hitting the required six runs to win. In addition, the issues and rule changes around the legality of Murali’s bowling in the context of the requirement that the arm is straight at the time of delivery are considered.

In all there are 29 chapters in just over 350 pages, providing analysis of many specific issues. Throughout, the book is full of historical and cultural insights into the game and it reflects meticulous research. There are many fine books on cricket—CLR James’ ‘Beyond a Boundary’ and Derek Birley’s ‘A Social History of English Cricket’ are but two which place an understanding of cricket in its social and historical context. David Fraser’s book is a welcome addition to this body of literature, proving a rich and detailed analysis of the many theoretical and jurisprudential issues found within the mysteries and subtleties of the wonderful game of cricket.

*Simon Gardiner*