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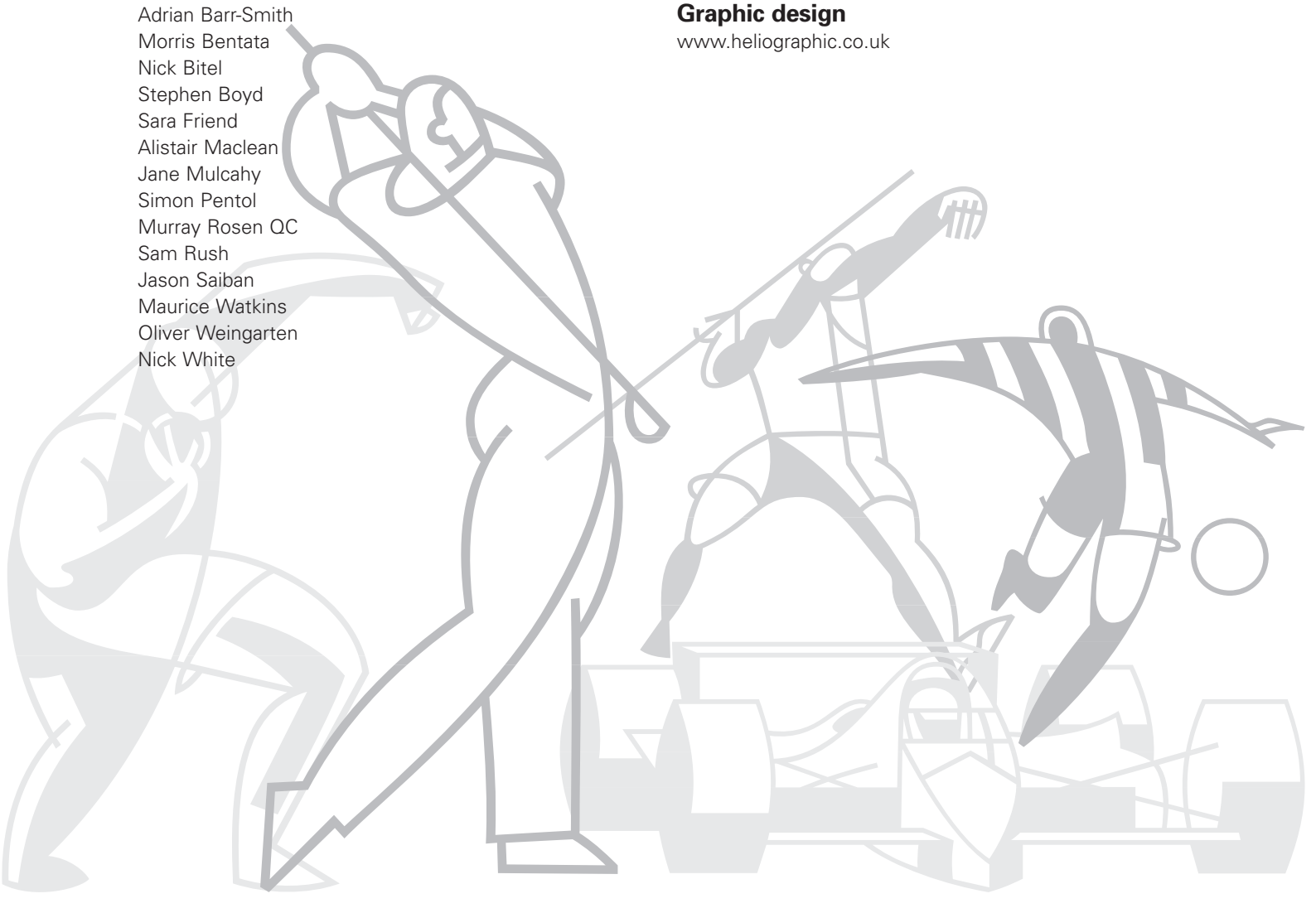

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Editorial

By Simon Gardiner, Editor

This issue of the Sport and the Law Journal concerns a number of on-going and current issues. The Opinion and Practice section provides comment on two topical issues. Firstly, Ross Wenzel's 'What Lies Beneath? the complexities underlying the regulation of the international transfer of minor football players' focuses on the FIFA regulations concerning the movement of players under 18 between clubs and countries. Secondly, Richard Burger and Harriet Boughton's 'On The Ball: Money Laundering in Football' examines the problem of professional football being used as method of money laundering by organised crime gangs.

The Analysis section features three articles focusing on very topical issues. Firstly, Jon Heshka and Kris Lines' 'Swimming – Credibility Crisis or Tempest in a Teapot?' examines the debate on the legitimacy of this form of 'technological doping' of the high-tech swim suits in international swimming. Secondly, Zane Shihab's 'Are Match Officials Fair Game?' reflects on the potential legal liability of match officials for decisions wrongly made. Thirdly, Robert Powell's 'Whereabouts – Where do you stand?' evaluates the new rule enforced by WADA concerning the availability of athletes for anti-doping tests on a weekly basis throughout the year.

Additionally the regular Sports Law Foreign Update by Walter Cairns and the Sport and the Law Journal Reports can be found.

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. BASL

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Opinion and practice

What Lies Beneath? The complexities underlying the regulation of the international transfer of minor football players

By Ross Wenzel, sports lawyer, Infront Sports, Switzerland

Introduction

The Meaning of International Transfers of Minors

The international transfer of football players under the age of 18 ("minors") is regulated by Article 19 ("Article 19") of FIFA's Regulations on the Status and Transfer of Players (the "Regulations").[1] An international transfer in this context catches two distinct situations: firstly, the transfer of a minor from a club belonging to one member association of FIFA (the "transferring club") to a club belonging to a different member association of FIFA (the "transferee club") and secondly, the registration of a minor with a club belonging to a FIFA association of a country of which the minor is not a national in circumstances where the relevant minor has never previously been registered with a club (whether in that association or otherwise).[2] This second situation is effectively a deemed international transfer and shall be referred to as such for the remainder of this article.

International Minor Transfers – An Ambivalent Business

The practice of removing young men or women from their families, friends and accustomed socio-cultural environment is clearly a sensitive one. The primary concern of clubs and agents in identifying and sourcing young talent will be sporting achievement and ultimately economic gain and not the human well-being of the minors concerned. In many cases, however, a minor can benefit substantially from an international transfer; assuming the not uncommon situation of a minor being transferred from a club in a developing country to a club in a developed country, the minor might well benefit from an increased quality of life, higher remuneration for his football services and better resources and facilities to develop both as a football player and a person. It is not the purpose of this article to speculate on the merits of, and justification for, the regulation of the international transfers, but suffice it to conclude in the abstract that international minor transfers are neither wholly beneficial nor wholly detrimental.

FIFA's Justifications and Reasons for Regulatory Intervention

The avowed purpose of Article 19 is to (i) provide a stable environment for the training and education of young players[3] and (ii) safeguard the human (as opposed to economic or football-related) interests of minors, thus curbing abuses which have occurred in the past[4]. One might argue that FIFA's interest in regulating the international transfers of minors transcends the welfare of the players concerned; stemming the talent drain – typically from poorer to wealthier countries – could feasibly foster the development of domestic football in the 'drained' countries and lead ultimately to a global equalisation of football standards. The increased competitiveness of economically weaker countries might well provide hope and inspiration to many in difficult circumstances; it would of course also strengthen the commercial value and global appeal of FIFA's crown jewel, the FIFA World Cup.

Structure and Executive Summary

Part 1 of this article will examine the mechanics of Article 19. It will highlight some of the ambiguities and obscurities which might be exploited by those looking to circumvent the Regulations. Part 2 will consider a recent decision in this area by the Court of Arbitration for Sport ("CAS")[5] to illustrate some of the complexities thrown up by concrete cases. Two possible supplemental exceptions to the prohibition on international minor transfers will be discussed in this context. Also, Part 2 will suggest that partnership agreements with the European Community can perhaps be exploited as a tool to facilitate the transfer of minors over 16 to European clubs. Finally, Part 3 will briefly

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consider the role of the new sub-committee of the FIFA's Player Status Committee in supervising and policing this area. The article considers the temporal and procedural difficulties which the sub-committee might face and assesses the merits of a more generic exception to the prohibition on international minor transfers which could be exercised only in rare circumstances at the discretion of the sub-committee. Such a generic rule might afford the various judicial bodies the flexibility to ensure justice rather than merely strict legal compliance.

Part 1: The Mechanics of Article 19

The Default Rule and its Three Exceptions

The default rule of Article 19 is that international transfers of minors (in the dual sense outlined above) are prohibited (the "Default Rule"). There are three exceptions to the Default Rule.

- The first exception (the "Parent Exception") applies where the minor's parents move to the country of the transferee club for reasons "not linked to football."[6]

- The second exception (the "EU Exception") applies only where both the transferring club and the transferee club are located within the EU or the EEA (together, the "Relevant European Territory") and the player is aged between 16 and 18.[7] This exception is subject to certain additional conditions with regard to ensuring the well-being and academic and football-related education/training of the minor.

- The third exception (the "Border Exception") applies where the minor lives within 50km of the border of the country of the transferee club and that club is also located no more than 50km from the border. Additionally, there can be no more than an aggregate distance of 100km between the home of the minor and the club, the minor must continue to live at home and both associations must consent to the transfer.[8]

Shades of Grey

The Parent Exception

With respect to the Parent Exception, many of the difficulties are evidential. It would be easy for an agent or a club to arrange for the father/mother of a promising young football talent to be offered a job in the relevant country. Provided the links between the employer and the club/agent are sufficiently difficult to trace, this exception offers an easy loophole to those persons seeking to vitiate Article 19.

The case of CAS 2005/A/956 Carlos Javier Acuña Caballero v/FIFA and Asociación Paraguaya de Fútbol (the "Acuna Case") is an interesting example of these evidential difficulties. In brief, a woman moved from Paraguay to Cadiz in Spain and the son moved with his mother and registered with Cádiz C.F. The Panel in this case had some difficulty in establishing whether the mother's job offer as a chef in Cadiz or the son's football motivated the move to Spain; in the end, the testimonies of the various witnesses for the transferee club were inconsistent and the transfer was found to contravene Article 19. One suspects that, with more subtle structuring and witness preparation (if necessary), the outcome could well have been different.

Considering the Parent Exception from a more technical perspective, one might question whether its wording would operate to prevent transfers (or at least create doubt) in situations to which the exception should presumably apply. If a football manger moved with his family to manage a club in a different country, would a minor son or daughter of the manager be entitled to transfer his registration to a new club? The parents' motivation to move would certainly be "linked to football" in such a case. Although the Commentary on the Regulations perhaps intimates that it is the football of the minor which is relevant here, the wording of Article 19 itself should perhaps be clarified.

If a minor (over the age of 16) who has never been registered with a club moves (without his parents) to a country of which he is not a national for a job not related to football, is he prevented from registering with a local club as an amateur.[9] If a club arranged for a seven year old (without prior registration) to come over with his parents to the country in which the club were located, the Parent Exception would of course not apply. However, a minor who has spent a significant part of his life in the country of his first registration will be considered a national from a sporting perspective.[10] Would the club be able to register the minor after a period of several years?

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The Commentary on Article 19 states that the term "parents" should be interpreted in the narrowest sense and should not be deemed to include close relatives. Where a player has been raised by and/or lives with a close relative – whether due to the death or abandonment of his/her biological parents – it seems unfair that the exception should be prevented from applying to a de facto parent. One might also question whether the Parent Exception could be deemed to apply where a minor comes to a country without his parents (for whatever reason) as a political asylum seeker.

The EU Exception

It seems likely that the EU Exception has arisen not through sporting logic or practical need, but in order to accommodate the exigencies of EC law. Certain commentators have in any event questioned the compatibility of Article 19 with EC law.[11] However, the Acuna Case determined that Article 19 did not breach any *mandatory principle of public policy under Swiss law or any other national or international law* as it pursued a legitimate objective (i.e. the protection of the welfare of minors) and did so proportionately.

One obvious objection to this exception is that it favours the clubs in those countries belonging to the Relevant European Territory. If FIFA is forced in the post-Bosman era to comply with EC law (as softened by any concessions deriving from the specificity of sport), would it not be more equitable to extend the consequences of such compliance (which could be perceived as either negative or positive depending on the territory and the stakeholder concerned) to all of its members. The EU Exception is an interesting example of FIFA's regulations being contingent on political vagaries; if an additional country joins the EU, then the transfer of a 16 year old from or to that country becomes possible where it might previously not have been. If another group of countries in a continent other than Europe formed a community based on a common market and constituted a legal regime conferring freedom of movement and establishment etc, FIFA would presumably come under pressure (whether at the behest of a court of the new community or in anticipation of such behest) to widen the scope of this second exception beyond the Relevant European Territory.

The above comments deal perhaps less with the technical interpretation of the EU Exception and more with certain of the wider issues it raises; Part II of this article will deal with some of the ambiguities and obscurities of this exception within the context of a recent CAS decision.

The Border Exception

The Border Exception seems fairly straightforward at a first glance. However, one might ask oneself how the Player Status Committee or CAS would rule in a situation where, even though the player lived no further than 100km from the relevant transferee club and no more than 50km from the relevant border, the journey by road amounted to 250km (e.g. due to the need to circumvent a mountain range). The question is whether the distances referred to in the exception are measured on a "as-the-crow-flies" basis or taking into account the contingencies of vehicular transportation?

Does the fact that the player has to "live at home" mean that he cannot spend one night in the location of the club? If the residency requirement is not that draconian, perhaps Article 19 (or the commentary thereto) should set out limits or guidelines. Would the Border Exception still apply where the parents (or guardians) of the minor moved to a residence close to the border for no other reason than the transfer of the minor to the relevant club or would such a football-related move be discriminated against by implying the logic underlying the Parent Exception? As an aside, the rule would seem to benefit those clubs which are located within 50 km of a border as such clubs would benefit from a wider catchment area for minor talent.

Part 2: CAS and the European Exception to the Default Rule

The Midtjylland Case

The recent decision (the "Decision") by CAS – CAS 2008/A/1485 Midtjylland v/ FIFA – dealt with Article 19 and in particular, the EU Exception. The case concerned the systematic transfer to a Danish club, FC Midtjylland (the "Danish Club"), of Nigerian minor players. The Danish Club had an arrangement with a Nigerian club, FC Ebedei (the "Nigerian Club") pursuant to which inter alia minor players from the Nigerian Club were transferred to the football academy of the Danish Club. The Player Status Committee of FIFA issued a decision condemning the practice of the Danish Club as a violation of Article 19. The Danish club appealed to CAS which rendered the Decision on 6 March 2009. The Decision has been hailed as a victory for FIFA in its fight against the abuses of minors[12]. However, the arguments contained within the Decision highlight some of the complexities in this area and arguably provide some encouragement for agents, clubs or other stakeholders looking to discover and exploit loopholes in Article 19.

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Cotonou and Equality of Working Conditions

One argument raised by the Danish Club was that the players should, by virtue of Article 13 paragraph 3 of the Cotonou Agreement ("Article 13(3)"), benefit from the EU Exception. The Cotonou Agreement is a partnership agreement between the European Community and certain African, Caribbean and Pacific states; Article 13(3) prevents the member states of the European Union from discriminating on the basis of nationality against workers of the relevant signatory countries who are legally employed in a member state "as regards working conditions, remuneration and dismissal."

The argument of the Danish Club was given relatively short shrift on the basis that the Nigerian minors (being students) were not employed in Denmark. The analysis would presumably have been different if the players had come into Denmark as workers (assuming Danish immigration and labour law and policy would have allowed the same). Once established in the territory as workers, Article 13(3) would presumably have applied. If one accepts the view of the Panel[13] that this non-discrimination provision only relates to working conditions and not access to work, a further question is whether access to work is limited to initial access to work (i.e. the first employment in the relevant territory). In other words, do working conditions for a national of a Cotonou state employed in an EU member state include the conditions governing the transfer from one job to another within that state? It is submitted that the facility with which an employee can move from one job to another within a territory does have a direct effect on the relative bargaining strength of the existing employer and the employee and, therefore, an indirect effect on working conditions.

If Article 13(3) does cover transfers of employment within the EU by nationals of the signatory countries of the Cotonou Agreement, then EU countries with less stringent labour and immigration policies could perhaps allow talented 16-18 year olds from the Cotonou states to take up employment only to transfer to a football club after a perfunctory period had passed. For the purposes of that transfer, they could not be discriminated against on the basis of nationality. Although the EU Exception is neutral from a nationality perspective14, it is at least possible that the non-application of the EU Exception would amount to an indirect discrimination on the basis of nationality in these circumstances. A 16 year old Nigerian national who has recently taken up employment in Denmark (e.g. as chef), would of course be likely to have a registration (if at all) with a club outside of the Relevant European Territory and therefore not fall within the literal scope of the EU Exception when transferring to a Danish football club. Of course, a minor with the nationality of an EU country working in Denmark as a chef and wanting to transfer to a Danish club would be likely to be registered with a club in the Relevant European Territory. The central question is whether the non-application of the EU Exception to the Nigerian minor in these circumstances amounts to an indirect discrimination on the basis of nationality with regard to working conditions.

If it does, then Article 13(3) should (by extending the benefit of the EU Exception to them) benefit minors from Cotonou states switching from a non-football job to a football job in the Relevant European Territory and (as a necessary part of that switch) transferring their registration from a club in the relevant Cotonou state to a transferee club in the Relevant European Territory. In short, it is clear from the Decision that the Cotonou Agreement cannot be used to facilitate the transfers of minors directly from a transferring club in a Cotonou state to a transferee club in the Relevant European Territory. However, Article 19 could perhaps be obviated by less stringent domestic immigration and labour policies in certain EU countries and a sophisticated two-stage transfer approach.

The Supplemental Exceptions to the Default

The Decision mentions two supplemental exceptions to the Default Rule which are not set out in Article 19 (but which are apparently accepted by FIFA). Both supplemental exceptions relate to students:

The Student Exception

The first supplemental exception (the "Student Exception") applies where the player concerned can establish *without any doubt* that the reason for relocation to another country is related to their studies and not to their activity as football players. It is submitted that, at least with respect to elite football talents moving to high profile clubs, it would often be difficult to meet this burden of proof. The phrasing of this first supplemental exception in the Decision would appear to suggest that it can only apply where the reason for the relocation is not related in any way to football. However, more general comments about the supplemental comments at paragraph 7.3.7 of the Decision intimate a softer interpretation i.e. that the reason for the relocation must be driven by academic pursuits and that football must at most be a subsidiary consideration.

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The Development Agreement Exception

The second supplemental exception (the "Development Agreement Exception") applies where the association to which the transferring club belongs and the transferee club have signed an agreement within the scope of a development program for young players, subject to the satisfaction of certain other conditions relating to education and the duration of the transfer. One wonders to what extent these agreements would be policed and, bearing in mind the corruption apparently prevalent in many of the football associations of the countries which would be concerned, what considerations would lead to the conclusions of such agreements. It certainly seems feasible that the welfare of the minors might not always be the only, or even determining factor. Whereas a club which has cajoled an association into signing an ill-policed and (perhaps ill-motivated) development agreement might be able to quarry young foreign talent without breach or penalty, a club which technically infringes Article 19 – but makes every effort to ensure the welfare and prosperity of the minor concerned – could be warned and fined. As was intimated within the context of the Parent Exception, it is questionable whether the rules as they stand do more to penalise and prevent exploitation itself or rather those who are sufficiently brazen or unsophisticated to be caught "exploiting".

Although neither the Student Exception nor the Development Agreement Exception was applicable on the facts of the Midtjylland case[15], the Decision does apparently widen the scope of the exceptions to the Default Rule. It is interesting that FIFA apparently chose neither (i) to incorporate these supplemental exceptions in the latest version of Article 19 (which will be effective on 1 October 2009) nor (ii) to update the Commentary on the Regulations to make clear that these purported supplemental exceptions are not (or are no longer) valid.

Part 3: The Sub-committee of the Player Status Committee

The Sub-committee

The latest version of Article 19 (effective 1 October, 2009) constitutes a sub-committee of the Player Status Committee which will be responsible for supervising the regulation of the international transfer of minors (the "Sub-committee"). In future, the association to which the transferring club belongs will be prevented from issuing an international transfer certificate unless the Sub-committee has approved the transfer. Whereas the existence of a body to examine in more detail the facts of each individual case (and ensure that Article 19 is properly enforced) must be a welcome addition to the regulatory infrastructure, one might question how a single, centralised and non-permanent body will be able to dedicate the time and resources necessary to examining the facts and legal aspects of every international minor transfer.

The Sub-committee will have to deal not merely with the high-profile transfers of rare talents to well-known professional clubs; as has been shown, more mundane transfers or deemed transfers are caught by the scope of Article 19 (e.g. a non-national who registers with an amateur club for the first time, or a young talent who transfers to a club five kilometres from his parental home but (importantly) in a different country). Cases such as these fall squarely within the three (or perhaps five) exceptions to the Default Rule but will still generate work for the Sub-committee – liaison with the relevant parties, fact finding, documentation etc. The Sub-committee will presumably need a certain legal machinery behind it in order handle this workload and be able to respond in time to the temporal dictates of the transfer market.

In view of the above, one wonders whether FIFA considered the possibility of delegating certain responsibilities in this area to its member associations or even the confederations. A more decentralised approach may have been more efficient. Would it not have been possible (at the risk of losing a degree of control and procedural consistency) to constitute similar committees at a confederational, or even national level? At least these subsidiary committees might be used to filter the cases so that the Sub-committee would only need to concern itself with complex or controversial transfers16 referred to it by such subsidiary bodies.

Another issue to consider in this context is the effect (or one of the possible effects) of a contested decision by the Sub-committee. No doubt the clubs, agent, player and association17 will not always accept the decision of the Sub-committee without challenge. All internal channels have to be exhausted before taking a dispute to CAS. One imagines that a decision of the Sub-committee will, if not accepted by one of the parties, have to be appealed to the Player Status Committee (or at least a single judge). Indeed, Article 23(3) of the Regulations states that decisions from the Player Status Committee or single judge (but not from the Sub-committee) are to be appealed directly to CAS. If a transfer deadline brings urgency to the case, then a party may even have to consider seeking provisional measures18 or a stay of execution19 from CAS.

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However, it is submitted that, in such a sensitive area, CAS will be unlikely to have recourse to its (rarely used)20 interim powers or a stay of execution of the appealed decision e.g. by injuncting FIFA to permit a transfer pending the resolution of the case.

The upshot of the above is that, in order to meet the demands of the transfer market, FIFA will presumably have to hold frequent meetings of the Sub-committee during the registration periods of the principally affected associations. These meetings will have to be co-ordinated with the sittings of the Player Status Committee so that appeals can be heard. If after appeal, one or more of the parties does not accept the decision, it is perhaps unlikely that CAS (even with its expedited procedure21 and/or interim measures) will be able to hear the case in time. The aggrieved party will presumably have to wait for the next registration period, by which time the minor might helpfully have reached majority.

The Sub-committee Going Forward

There seems to be at least some doubt as to whether the three exceptions to the Default Rule are exhaustive. The two supplemental exceptions seem to suggest that there is scope for transfers (not falling within the three stated exceptions) to be allowed in exceptional circumstances. The article has already posited other such circumstances (e.g. an asylum seeker without family in the relevant territory). Now that transfers will have to be pre-approved by the Sub-committee, FIFA should perhaps consider adding a more generic exception to the Default Rule, to be applied by the Sub-committee in its absolute discretion and only in exceptional circumstances. The Commentary on the Regulations could make clear (by listing certain non-exhaustive examples) that this generic exception would only be used in very limited circumstances. The advantage of such an approach is that it builds in some flexibility to the system and would allow the Sub-committee to expand incrementally the exceptions to the Default Rule where necessary; the disadvantage is that a generic exception (notwithstanding any guidance in the Commentary) might open the floodgates to speculative approval requests, concentrate too much discretionary, legislative power in the hands of the Sub-committee and lead to accusations that their application of the generic exception is arbitrary and unfair. In any event, it would be desirable for the Sub-committee, at least in the case of rejected transfer requests, to publish its reasons for such rejection and thus build up a body of knowledge clarifying further the interpretation and application of Article 19.

Conclusion

Whereas the exceptions to the general prohibition on international minor transfers are without doubt necessary, one suspects that (where the economic or sporting stakes are deemed high enough), unscrupulous clubs and agents will go to extraordinary lengths to structure and shape events so that one of the exceptions will apply – coincidental jobs for the parents of the football player, a move to a border town or the sudden academic ambition of young footballers which can only be fulfilled in a certain country. As the motivation to circumvent the rules is high, the rule-makers must ensure that the rules are both clear and properly enforced. The Sub-committee could be a useful (if very busy) tool in the process of incrementally clarifying Article 19 and ensuring certainty and fairness for players, clubs, associations and other stakeholders. BASL

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1 *The latest version of regulation 19 of the Regulations (which will come into force on 1 October, 2009) is set out in full at Appendix A.*

2 *Regulation 19 para. 3 of the Regulations*

3 *Commentary on the Regulations, p 58*

4 *FIFA Circular 769 to its member associations dated 24th August 2001.*

5 *CAS 2008/A/1485 Midtjylland v/ FIFA*

6 *Article 19 paragraph 2(a) of the Regulations*

7 *Article 19 paragraph 2(b) of the Regulations*

8 *Article 19 (2)(c) of the Regulations*

9 *CAS 2008/A/1485 Midtjylland v/ FIFA establishes that Article 19 applies equally to amateurs as professionals.*

10 *See paragraph 3 on the Commentary on the Regulations.*

11 *The Sporting Exception in European Law, page 179 et seq (Richard Parrish & Samuli Miettinen) – Cambridge University Press, 6 March 2008.*

12 *Fifa.com article entitled "CAS backs FIFA's efforts in the protection of minors": http://www.fifa.com/aboutfifa/federation/administration/releases/newsid=1037279.html.*

13 *Such view being based on the interpretation of a similar provision in the Russian partnership agreement in the case of Igor Simutenkov v Ministerio de Educación y Cultura & Real Federación Española de Fútbol (Case C-265/03).*

14 *Paragraph 2 of the Commentary on Article 19 of the Regulations.*

15 *Academic pursuits were certainly subsidiary to football and the relevant development agreement was between the Danish Club and the Nigerian Club (as opposed to the Nigerian Football Association).*

16 *Or perhaps inter-confederational transfers only*

17 *The Football Federation Australia (FFA) has recently stated that it intends to enforce Article 19 rigorously in order to protect its domestic talent and development programs: See article entitled "FFA clamps down on transfer of minors" by Michael Cockerill in the Brisbane Times, May 26 2009.*

18 *Article 37 of the CAS Code*

19 *Article 48 of the CAS Code*

20 *Provisional and Conservatory Measures – an Under-Utilised Resource in the Court of Arbitration for Sport; Ian Blackshaw – Entertainment and Sports Law, Volume 4 Number 2.*

21 *Article 44(4) of the CAS Code*

On The Ball: Money Laundering in Football

By Richard Burger, Senior Associate, Reynolds Porter Chamberlain LLP. and Harriet Boughton, Trainee Solicitor, Reynolds Porter Chamberlain LLP.

Whilst the football sector has long been an attractive destination for money obtained from criminal sources, money laundering in the sector has reached new levels of sophistication. The OECD's Financial Action Task Force, in cooperation with its French counterpart, GAFI, recently published a report (the report) warning of the football sector's increasing vulnerability to money laundering and fraud.

Entitled *"Money Laundering through the Football Sector"*, the report suggests that it is the sector's structure, financing and culture that make it particularly susceptible to money laundering. Particular concerns arise from the ownership of football clubs or players, the functioning of the transfer market and betting activities. Studies of more extreme cases suggest that the football sector is used to traffic human beings and illegal drugs, as well as to commit tax crime.

The report suggests that money laundering through the football sector is more complex than ever before, and identifies weaknesses and loopholes in the prevention systems and controls currently in place in clubs. It stresses the importance of clubs putting in place adequate and tested measures to protect themselves from money laundering, especially during the present transfer window, and in such a poor economic climate.

Weakness of the sector

The report identifies three areas of weakness of the sector:

1. Structure

The football market is easy to penetrate. There is a complicated and, at times, opaque network of stakeholders and money flows. A diverse selection of legal structures is used to establish clubs. Often the management of clubs lacks the professionalism seen in sectors of equivalent financial importance.

2. Finance

Clubs have large financial needs and considerable sums are often involved in transactions. This is especially the case in the international transfer market, where there is little or no control over the origins or destination of monies.

A number of financial transactions fundamental to the operation of a football club have the potential to be abused by money launderers, for example:

- player transfers
- sponsorship or advertising arrangements
- purchasing land or buildings
- sub-letting of land or facilities
- licensing arrangements with traders at the premises
- third party investments

A considerable stream of a club's week-by-week revenue comes from cash-based ticket sales, and revenue from year-to-year is highly dependent on results. This includes media rights income, advertising income and ticket sales. To a certain extent, this unpredictability of future assets provides an incentive for clubs to seek out alternative financial sources, such as short term cash investments.

3. Culture

The societal role of football makes individuals involved in it reluctant to shatter the illusion of the game's innocence and therefore the reporting of offences is limited. The report suggests that involvement with a football club offers criminals non-material rewards such as legitimate social status in the local community and an entry to the establishment. Importantly, there is also a certain social vulnerability of some players (in particular, younger or foreign players) making them more easily manipulated. The practice of an individual purchasing a player for part or all of the duration of their career is a good example of this. Players originating

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from less economically developed countries are more vulnerable to such manipulation.

Threat to the English Football League

The UK's Premiership is Europe's largest football league with an annual revenue of approximately EUR2.2bn. As such, it inevitably poses an attractive destination for dirty monies. The Stevens Enquiry of 2006 scrutinised 362 transfers made by Premiership clubs and cleared all but 17 of them of any wrongdoing. However, it served to highlight numerous irregularities surrounding the actions of certain agents registered by FIFA and the Football Association.

In March 2008, the FA considered the threat of corruption in the sector sufficient to warrant publishing guidance for clubs on the Money Laundering Regulations 2007 (the MLRs). That same season (2007-08), nine individuals were arrested in connection with corruption in football including board members, managers, agents and players. A number of raids were carried out by the police in accordance with their powers under the Proceeds of Crime Act 2002 (POCA).

Necessary systems and controls

The report identified well-known money laundering techniques varying from very basic to complex and sophisticated schemes. These include trade-based money laundering, the use of non-financial professionals, money laundering through the security sector, the real estate sector and the gaming sector, as well as using cash, cross border transfers, tax havens and front companies.

Football clubs must be at the top of their game if they wish to have sufficiently robust systems and controls in place to prevent money laundering or handling the proceeds of crime.

As a starting point, professional and semi-professional clubs need to be aware of the implications of, and their obligations under, the money laundering legislation, particularly POCA and the MLRs. Clubs should be aware of the risks, what they should look out for, how to deal with any suspicions and what happens if the club or its employees get it wrong. Employees and players should understand their own responsibility in the process of fighting illicit activities.

Stress testing existing systems against best practice examples

In order to effectively guard against the risks associated with potential money laundering or the handling of the proceeds of crime, clubs should review their existing systems and controls and, where appropriate, consider the following:

- Appointing a senior manager to be responsible for money laundering issues, (a Money Laundering Reporting Officer) (MLRO)
- Increasing employee awareness of the relevant legislation and training employees to identify potentially suspicious transactions
- Implementing internal controls on transactions so that employees have appropriate and limited authority to bind the club
- Maintaining up to date records of transactions
- Identifying business partners and carrying out enquiries prior to transactions
- Co-operating with other clubs in their information exchanges
- Monitoring customer activity
- Reporting any suspicious activity

However, such safeguards and measures should be applied proportionately. In the context of transactions, clubs should ensure that they know:

- exactly who they are dealing with
- how the party legitimately acquired the land/property they are dealing with
- how the purchaser/investor/trader/agent found the funds to pay the club

These considerations are particularly relevant in the context of international transactions where intermediaries are involved and international co-operation is key. Given the international dimension of the football sector, difficulties in international exchange of information and the use of tax havens are a major stumbling block in the detection and prosecution of money laundering through the football sector. Going forwards, clubs operating in different countries need to work co-operatively to identify and combat the use of the football sector for money laundering purposes.

On The Ball: Money Laundering in Football

Risks faced by directors and senior management

Directors and senior management can face personal criminal liabilities for money laundering offences; for example, a breach of POCA is a criminal offence and can result in unlimited fines and/or up to 14 years' imprisonment.

To comply with their obligations under POCA, in the event of knowledge or suspicion of a transaction which may involve criminal property, the club or employee must make a disclosure at the first instance to a Police Constable or to the club's MLRO.

Most disclosures are made to the Serious Organised Crime Agency (SOCA), who will assess the transaction. Consent from SOCA would be required for the transaction to proceed. Following any disclosure, clubs and employees should be aware of their obligations in respect of "tipping off" and the risk of prejudicing a police or SOCA investigation. They must not inform ("tip off") the person / business entity who is the subject of the report that a disclosure has been made. A person found guilty of "tipping off" or prejudicing an investigation is liable to possible imprisonment of up to five years and/or a fine.

POCA offences

In the context of the football sector, the offences most likely to be committed under POCA are acquiring, using or possessing criminal property or converting or transferring criminal property. Clubs might also enter into, or become concerned in, an arrangement which facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.

MLRs offences

As regards the MLRs, these will apply to the general activities that clubs will be involved in such as accepting deposits and dealing in investments and goods (including player transactions) by way of business over EUR15,000. Obligations under the MLRs include satisfactory identification of clients, record keeping, staff training, internal reporting and having an MLRO to deal with potentially suspicious transactions.

Conclusion

As a truly global and high-value sport, football has undergone exponential growth and commercialisation, matched by the growth in profits that can be made out of the sector. Criminals will continue to demonstrate versatility and ingenuity in finding new methods for laundering the proceeds of their illegal activities and the football sector will not escape the dangers of being misused in this way. Whilst the increasing influx of big money into football has had numerous positive effects, it has inevitably resulted in a higher risk of fraud and corruption.

Professional money launderers will consistently look for new avenues to launder the proceeds of crime. Clubs must therefore be vigilant as to the transactions they carry out and be fully aware of their obligations under the relevant preventative legislation. If the football sector is to be seen as a robust industry with an effective regulatory framework, requiring financial transparency and adequate financial management with proper external accounts, there is much work to be done. BASL

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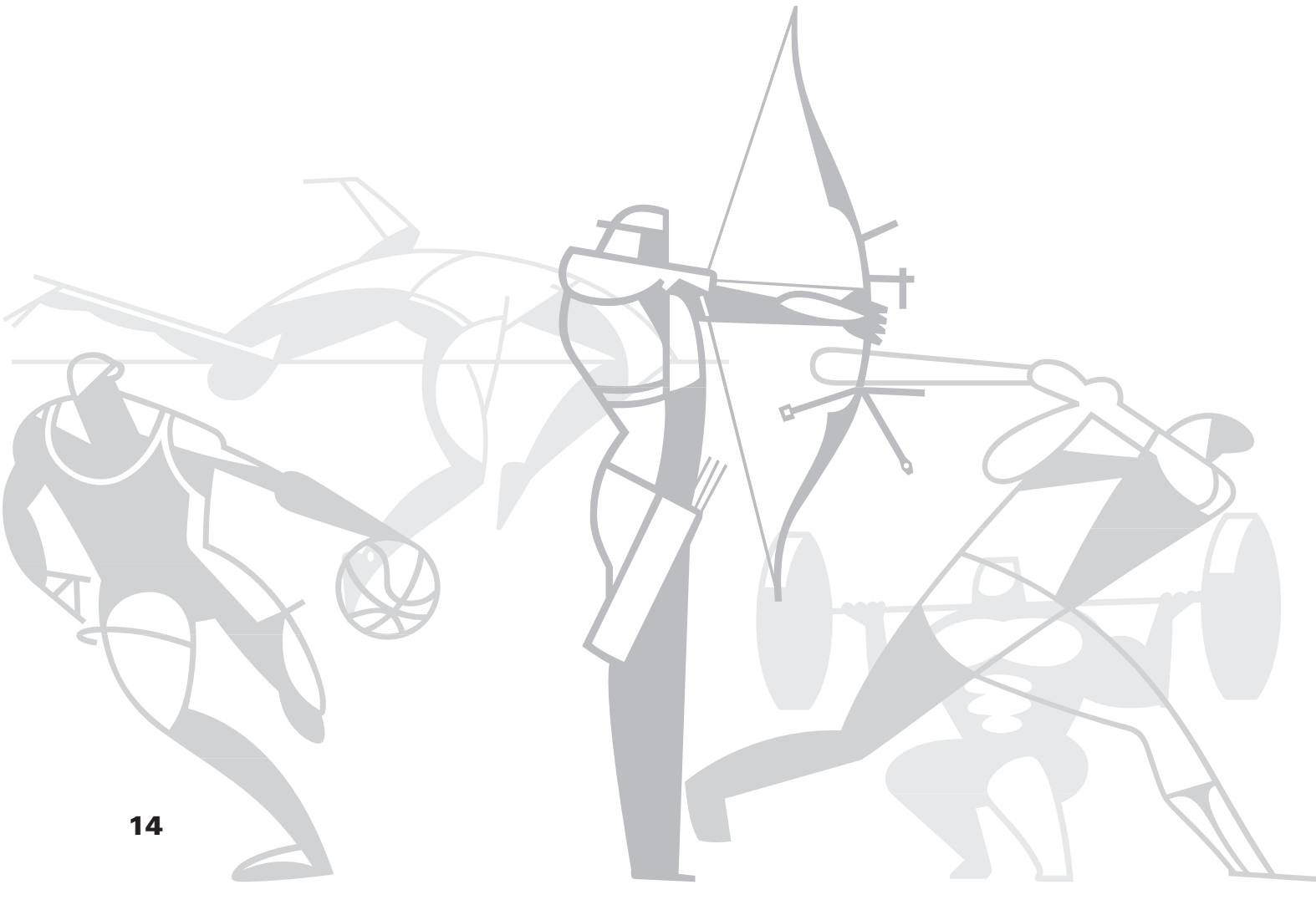

Swimming – Credibility Crisis or Tempest in a Teapot? Assessing FINA's competency to regulate high-tech swimsuits

By Jon Heshka, Assistant Professor at Thompson Rivers University, Canada and Kris Lines, Head of Sports Law at Staffordshire University

Abstract

While the Beijing 2008 Olympic Games witnessed 66 swimming records set in the Water Cube, the furor over the innovative swimsuits worn gave rise to allegations that such gear was tantamount to 'doping on a hangar'. This paper evaluates the competency of FINA and the coherence of the WADA Code to effectively deal with the interface of technology with swimming in particular and sport in general.

Introduction

The tidal wave of swimming records broken at the Beijing 2008 Olympic Games by athletes wearing the next generation of swimsuits was a remarkable feat. The sheer number of records set ought to give pause as to whether such accomplishments were the result of a coincidental confluence of never-before-seen raw talent[1] or, in the alternative, may have been aided by the superior environmental conditions at the Water Cube and/or the exotic fabrics and designs of the adorned swimsuits.

Scientific advances in equipment and arena design have proceeded at a pace faster than the capacity of sports governing bodies to regulate it. This is not inconsistent, for example, with the ethical challenges facing medicine and the ongoing controversy over stem cell research,[2] the in-vitro fertilization of women who are 60 to 70 years of age[3] or balancing the individual good over the common good with costly surgeries to the very old.[4] Hospital ethicists strive to find a principled and balanced position from which to make decisions regarding the interface of medicine with patients. Where sporting governing bodies have attempted to regulate the interface of innovative technology with sport, it has only given rise to a quagmire of highfalutin and equivocal principles which are inconsistently applied across the sporting spectrum.

Much of the problem in this area can be traced back to the paradoxical tension between sport's primal connection for it's Corinthian ideals[5] and society's evolutionary pursuit for excellence. We seek to see who the fastest or strongest sportsperson is but are unsure as to whether s/he ought to be empowered with 21st century tools or not. Indeed, it may be argued that the days are long gone when an athlete was able to rely solely on natural ability girded by endless training and a good diet in order to excel in his craft. The modern professional athlete has a team of coaches, therapists, nutritionists and sports scientists[6] all seeking to gain that extra advantage or shave that last 1/100 second off a lap time. It is in this light that this paper analyzes performance which is technologically modified through environmental or engineering means.

Misplaced in the miasma over technological innovation in sport is an acknowledgement that athletes have historically benefited from a range of technologically-inspired features explicitly designed to enhance performance. Examples include radical changes to the golf ball,[7] the invention of the running shoe cushioned outsole,[8] the curved ice hockey stick[9] and graphite tennis racquets.[10] The approach of sport governing bodies to technological evolution in equipment design ranges from tennis embracing the use of exotic materials in its equipment[11] to hockey regulating it,[12] golf banning it[13] and swimming not quite knowing what to do about it.[14]

The phrase 'technological doping' was coined by Alberto Castagnett, coach of the Italian swim team, in response to the perception that the Speedo LZR swimsuit conferred an unfair competitive advantage and illicit performance enhancement. The infamy of the Speedo LZR also gave rise to the expression 'doping on a hangar' which captures the concern some have in the interaction of sport with technology. This pejorative portrayal of technological innovation in sport as being synonymous

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with chemical doping has unfortunately poisoned the well of debate and serves as the springboard from which to launch an analysis of technology in sport.

This paper will discuss the WADA Code and its relevance in the regulation of technology, analyze the framework around which the world-wide swimming organization Federation Internationale de Nation (FINA) permits or prohibits performance enhancing techniques, and proposes alternative ways of thinking about technology in sport. Swimming in particular will be examined although other sports will be assessed as well in order to draw upon different approaches.

The WADA Code and its Relevance to Innovative Sport Technology

The raison d'être for the World Anti-Doping Agency (WADA) Code is to "preserve what is intrinsically valuable about sport."[15] Its value lies in "the spirit of sport" and the "essence of Olympism" and is embodied by ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; community and solidarity.[16] Doping is anathema to the spirit of sport[17] and the Code prohibits substances that meet two of the following three criteria: it has the potential to enhance or enhances sport performance, it represents a potential or actual health risk or it is contrary to the spirit of sport.[18]

The intent of this paper is to offer some focus around the extent to which the intersection of technology with sport is compliant with or in contravention of the WADA Code. Improved clarity would assist sports governing bodies, and FINA in particular, with its regulation of high-tech swimsuits.

WADA 4.3.1.1: The Definitional Conundrum of Performance Enhancement[19]

The governing ethos of sport is a contest on a level playing field whose outcome is determined solely by the individual merit of the participating athletes.[20] Neither WADA nor sports governing bodies have yet to develop rigorous definitions for fair play or cheating or distinguishing performance-enhancing techniques that constitute cheating from those that are consistent with the spirit of sport. [21]

Instead, athletes, sports governing bodies and the courts often default to a simplistic analysis of performance enhancement. World women's marathon record holder Paula Radcliffe[22] has written that "Running is about who works hardest and then runs fastest [fairly]."[23] Just as the Ontario Court of Justice ruled in Johnson v. Athletic Canada and IAAF that a fair race "involves only his own skill, his own strength, his own spirit and not his own pharmacologist,"[24] it is submitted that such views are naïve and idealistic. The reality is that an elite athlete's skill and strength are optimized through a legion of support personnel which often include coaches, trainers, physiotherapists, psychologists and nutritionists – recall, for example, the initiative of the British Olympic Association (BOA) to streamline its Sports Science Research Unit, Intensive Rehabilitation Unit and Clinical Services[25] – and the resulting enhancement to sporting performance produced from these improvements based upon the technology used.

With such a range of interpretations as to what constitutes fair play – from the Chariots of Fire inspired honour of Paula Radcliffe to the state-sponsored sports science programme of the BOA, it is posited that the regulation of performance enhancing technologies would be aided if there was definitional agreement on what is it that makes a technology truly enhancing and subject to sanction. Arguments for or against the infusion of technology with sport are hampered by the imprecision of the terminology used. Words should not be synonymously used to describe effects which are not in fact the same. Before performances can be discriminated on the basis of the extent to which technology has impacted the outcome, the labels used to describe the performances must themselves be defined.

It is not presupposed that the following definitions are wholly correct; it is however necessary to start from somewhere for a debate to be stimulated. A technology which returns an athlete's performance to its pre-existing / pre-injurious condition shall be termed performance correction, i.e. undergoing either Lasik surgery to return to a pre-existing visual acuity or rotator cuff surgery to return to a normal state of strength and range of motion. A technology which enables an athlete to make the best use of their ability is performance optimization or maximization, i.e. technology is embedded in exotic energy drinks and protein shakes, receiving massage therapy, training with a heart rate monitor or even using hypoxic tents to simulate altitude. A technology which allows an athlete to do what would not otherwise be conceivably possible without its intervention is performance enhancement. Ingesting EPO or blood doping is banned because they are a biomedical shortcut allowing the athlete's body to exceed its genetic potential.[26]

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The WADA Ethical Issues Review Panel on artificially induced hypoxic conditions to modify performance labeled something in contravention of the spirit of sport based upon the passivity of the technology. It was asserted that such passive use lacked virtue and hence violated the spirit of sport.[27] This will be analyzed further in the paper.

WADA 4.3.1.2: Technology as a Sporting Health Hazard?

It is trite to re-state but one of the three criteria against which a method is included on WADA's Prohibited List is whether it presents an actual or potential health risk to the athlete.[28] The approach of sports governing bodies' vis-à-vis safety is morally and subjectively loaded. This is the only reasonable conclusion in light of the legitimation of violent contact sports like rugby, hockey or other sports, the potentially injurious environment of women's gymnastics[29] and indeed the excitement building over the inclusion of women's boxing – a sport premised on throwing punches and landing blows to the head and torso of the opponent and whose ultimate goal is to inflict sufficient injury to render the opponent unconscious with a knock-out – in the London 2012 Olympic Games[30] but prohibits performance enhancing substances on the grounds that they may present a health risk to an athlete.

It is submitted that the preoccupation of sports governing bodies with the well being of athletes is proper. An example of risk reducing technology is the microchip transponders that all swimmers in an open water race must wear on each wrist.[31] It is supposed that the primary safety concerns for FINA regarding technology and swimming would be to minimize the likelihood of drowning as a result of reduced buoyancy or increased drag and to minimize the potential for overheating which can give rise to a myriad of thermo-regulated illnesses. Open water swimmers do not wear the hip belts with energy gels popularized amongst runners for the reason that they would not only weigh down the swimmer but increase the drag resistance – the net effect being that greater effort would be required to swim a set distance and swim times would hence get longer. In response, FINA allows for escort safety crafts to supply swimmers with nourishment.[32] These are legitimate safety reasons for not allowing a performance enhancing technology (hip belts) on the grounds they present an unreasonable safety risk and for permitting a technology (escort safety boats) whose effect is to enhance a swimmer's performance.

It is conjectured that athletes pushed to the limits of their genetic potential risk higher rates of injury than those who do not. This is likened to the concept of 'red-lining' whereby, like a F1 engine, it metaphorically illustrates how an athlete responds when performing at the very threshold of, or potentially beyond, their genetic potential. As with a red-lining engine, the athlete runs the real risk of damage and failure which in this instance means injury. This intuitively makes sense insofar as any mechanical device pushed to its limit risks higher rates of breakdown. Hence, some athletes are more vulnerable to asthma,[33] colds,[34] or major injuries caused by overtraining[35] or fatigue-induced trauma.[36] This argument is sustainable insofar as some forms of technology may facilitate athletes being pushed to the brink, or beyond, of not only what is possible, or genetically predisposed, but what is desirable in terms of safety.

There are a myriad of examples in which technological innovation in equipment has improved the safety of sportspersons and reduced unnecessary exposure to risk. Whereas the marathon is one of the original athletics events contested at the Games of the I Olympiad in Athens in 1896, it was not until the advent of cushioned running shoes[37] (which reduce the impact force transferred to the legs thereby enabling runners to train more) that faster times and healthier athletes were achieved.[38] Similarly, while swim goggles are taken for granted by today's swimmers, before they were invented and became commercially viable,[39] an athlete competing in a pool or ocean without goggles ran the risk of eye irritation from chlorine or infection from water borne bacteria and swam. Were the debate to be held today whether or not goggles enhance performance, it could be argued that goggles are not integral to the contest (a swimmer can complete the race without its usage) and they serve no useful purpose other than to enable the swimmer to swim faster.[40]

Whilst there may be justifiable safety reasons for a specific technology to be banned, it is submitted that in the main, innovative equipment which serves to modify or enhance sport performance does not pose a health risk to the user. Thus, in most instances, protection of the athlete's health is unavailable as a rationale in the regulation of technology in sport.

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WADA 4.3.1.3: Spirit of Sport

Typical of codes of ethics' tendency to be platitudinous and lacking enough specificity to be anything more than inspirational,[41] the WADA Code equates the spirit of sport with "the essence of Olympism" and "how we play true" and is characterized, almost tautologically, by the values of ethics, fair play and honesty; health; excellence in performance; character and education; fun and joy; teamwork; dedication and commitment; respect for rules and laws; respect for self and other participants; courage; community and solidarity.[42] Given that one of the purposes of the Code is to promote fairness[43] – which WADA leaves undefined – its rationale is to defend the ethereal 'spirit of sport', and that a method which violates the spirit of sport is one of the three criteria to be considered for inclusion on WADA's Prohibited List,[44] a breach of rules rationalized by inexplicit and indistinct concepts is unsatisfactory. Duke University School of Law published a position paper on this issue underscoring the ambiguity at issue noting that "[i]t is neither fair not consistent to define the term [spirit of sport] in a way that authorizes the arbitrary application of an ambiguous term that provides no guidance at all in establishing the line between virtue and its opposite."[45]

Sport is about trying to gain advantages over the competition.[46] There will always be physiological and psychological inequalities.[47] The means with which athletes attempt to gain an advantage creates inequality. Inequality is manifested in athletes who are naturally faster or stronger, or who live and train at altitude enabling them to have greater endurance. Inequality is also programmed into sport by athletes who are either richer than others or who are from developed nations with well-funded federations which can afford the world-class facilities, gear and personnel.[48] Hence, the deck was stacked against Equatorial Guinean swimmer Eric Moussambani, whose only training facility was a 20 meter hotel pool, as it appeared he might drown competing in the same stadium as multiple gold medalist Ian Thorpe at the Sydney 2000 Summer Olympic Games.[49] It cannot be seriously suggested that Mr. Moussambani was competing on a level playing field as Mr. Thorpe nor can the same can be said of the countless athletes who get outlapped on the track or in the pool.

This gives rise to the not-unfamiliar argument that high-tech equipment gives an unfair advantage to athletes or countries that have large budgets from which to research such matters as biomechanics, physiology, immunology and nutrition.[50] Indeed, professional cyclist Craig Lewis of Team Columbia-Highroad has commented, "It [cycling] was first named the race of truth for a reason. Now it's just a race between the biggest budgets."[51]

To an extent, it has always been thus. The inconvenient truth is that sportspersons from developed countries or more affluent communities have more access to resources than sportspersons from less developed countries or impoverished neighborhoods. This means that athletes who have more money or are generously supported by government or corporate sponsors are better able to train and compete against those who do not have such support. There of course will always be exceptions to this rule but it is difficult to dispute the charge when, in men's Olympic swimming for example, the United States has won 34.9% of all medals ever awarded and the top three countries (the US, Australia and Japan – all developed nations) account for 53.2% of all medals.[52] This illustrates the weakness of the 'level playing field' argument by those who assert that the cost of technologically innovative swimsuits discriminates against sportspersons who cannot afford them. It is a matter of record that the odds are already stacked mightily against anyone from a developing nation from winning in international swimming.[53]

Indeed there are even sports which by their mere existence ought to give pause to the egalitarianism which supposedly underpins sport. Only 19 nations[54] out of the 204 present[55] at the Beijing 2008 Olympic Games competed in Equestrian events (dressage, eventing, and jumping), an Olympic event since 1900. It is submitted that participation in equestrianism is limited by the cost of participation rather than by interest or willingness to participate. Hence, the argument that high-tech swimsuits are in contravention of the spirit of sport on the basis that their cost makes it out-of-reach for all swimmers is without substance relative to the presence of equestrianism on the world stage.[56]

A 'race of truth' would presuppose a contest pitting raw talent versus raw talent. It is an indisputable fact that all athletes, independent of the performance enhancing technologies (i.e. bikes, F1 cars, tennis racquets) benefit from technologically-inspired techniques or practices approved by sports governing bodies such as tracking heart rate and VO2 max readings whilst training, biomechanical modeling, isokinetic weightlifting equipment, etc. To some extent, then, the concept of a 'race of truth' is a Corinthian ideal which has been compromised, not unfairly but realistically, over time to accommodate the realities of modern day sport.

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The WADA Ethical Issues Review Panel was charged in 2006 to judge whether the use of artificially induced hypoxic conditions designed to modify performance violated the spirit of sport. Like the maelstrom surrounding swimming in its treatment of high-tech swimsuits, the review panel recognized the controversy and confusion which had arisen due to the absence of clear principles and clear rules.[57] Specifically mentioning improved running shoes and swimsuits as examples, the review panel stated that whilst "sport has embraced technology and the expert systems that go into the design of improved equipment and refined training methods," it found artificially induced hypoxic conditions to be in violation of the spirit of sport because the passive nature in which performance modification is realized lacked virtue.[58] In spite of the panel deciding that hypoxic chambers were in contravention of the spirit of sport – although conceding the need to define it more clearly and applicably – the WADA Executive Committee inexplicably decided not to add it to the list of Prohibited Substances.[59]

The limitation to a definition founded in passivity is that there are many modes of sports training which are passive but which enhance performance. Accordingly, the Kantian imperative[60] suggests that if an act is unfair then the elements which make it unfair must be capable of being applied universally. This would mean that such passive practices as mental imagery, rest and recovery, use of cooling vests (and arguably air conditioned facilities) and adaptation of one's sleeping patterns using lights and alarms to assist in time zone acclimation would be in violation of the spirit of sport.[61] Whilst these arguments are structurally valid, the premise is false because it is argued that there are passive methods which do not contravene any definition, however obtuse, of the spirit of sport.[62]

Technological Doping in Swimming: Pounding a Square Peg into a Round Hole?

As the preceding discussion illustrates, it is inherently difficult for sports governing bodies to regulate technology in sport because there is no coherent and cogent basis from which to make judgments as to what is fair and what is cheating. The WADA Code offers little guidance and what guidance it does provide is sometimes uneasily forced like a square peg into the round hole of the particular circumstances. In the absence of a principled basis applied consistently throughout sport, individual disciplines have been left to regulate the interface of technology and sport independently and differentially. This same kind of inconsistency, of course, prompted the harmonization of anti-doping regulations as enshrined in the WADA Code.

The sports scene is very different today compared to 100 years or even ten years ago. Notwithstanding that a constant throughout time immemorial is the striving of the human condition to improve their being and their environment,[63] it is necessary that there is some constancy in sport and that there be fair limitations imposed around the framing of the sporting contest consistent with the objective of the competition. These take the form of the technical rules governing how the sport is contested as well as the anti-doping rules set forth by WADA. Hence, it is important that sports governing bodies set reasonable limits with respect to the equipment used or the environment in which the contest is held.

Making waves about the environment

Sports governing bodies do not have a consistent approach regarding regulation of the competition environment. Whereas the International Association of Athletics Federations (IAAF) has strict rules governing the environmental conditions (i.e. wind) in which a record may legitimately be set,[64] the International Skating Union (ISU) has no such qualms. Other than prescribing such things as the length and width of the track,[65] the regulations are silent with respect to the medium on which the speed skater interacts, i.e. the ice. Whereas there are regulations governing both the skater and the skate,[66] there is no mention about the arena or the ice surface. The absence of regulatory oversight and control enables host venues to engineer 'fast ice' by manipulating such variables as ice temperature, ice pressure,[67] air temperature, ceiling height and barometric air pressure. This has given rise to the competing reputations of the Calgary and Salt Lake City Olympic Ovals[68] as each having the fastest ice on earth. One speed skater went so far as to colourfully and colloquially call the rink in Utah as 'the dope s—t'[69] in the official log. In this light, where the ISU, the ice makers and the speed skaters all appreciate how the medium can make for enhanced performances, it would appear that this sport embraces the role technology plays in facilitating faster races without violating the spirit of sport.

FINA appears to have a contradictory approach in its management of the interface of technology with swimming. When the United States started using triple wave-breakers, the purpose of which is to absorb the wave energy generated from swimming and flatten the water making it easier to swim, down each lane in the 1970s, FINA banned the practice on the grounds that the rest of the world could not afford to follow.[70] However, with little regard to cost, China built the Water Cube at the Beijing 2008 Olympic Games which has been called 'the fastest pool in the world' due to

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design features which were engineered to reduce turbulence and increase speed.[71] Indeed, FINA authorized the Chinese to construct a three metre deep pool (one meter deeper than the minimum required)[72] with ten lanes[73] (instead of the historical eight lanes used in previous Olympic Games and World Championships).[74] As former Olympian and commentator Christine Brennan noted, "It's physics and it's not sports, but it makes sense."[75]

FINA has continued with this approach in its approval for 2010 of the new slanted Omega starting blocks which have been reported to shave as much as 1/10 of a second off the time it takes for a swimmer to enter the water.[76] It is also worth noting that the cost of these starting blocks is 300% more than their predecessors.[77] While on the one hand it may be argued that such enhancement of the environment in which the sportspersons operates compromises the spirit of sport insofar as diminishing the accomplishments of past great sports performances, on the other hand it must be similarly acknowledged that many other sports, including track and field, have had environmentally engineered improvements and that all of these enhancements came with a cost. Regardless of the view adopted, it is clear that any advantages which are accrued at races where there exist superior environmental conditions are equitably distributed so that no one particular sportsperson is disadvantaged.

Transparent Swimsuits

Equitable distribution of technology's benefits regrettably does not apply to non-standardized swimsuit designs. The sport of swimming is currently in the midst of a technological arms race,[78] as competitors seek to gain an advantage over their peers. As the following paragraphs will show however, this problem is very much one of the governing body's own making.

In 2000, the issue of full body swimsuits and the effect that these might have on a swimmer's buoyancy was the subject of an Advisory Opinion by the Court of Arbitration for Sport (CAS).[79] The request was brought to CAS by the Australian Olympic Committee (AOC) after concerns were raised that Australian athletes would be penalized for wearing such clothing at the Sydney 2000 Olympic Games. FINA declined a request to join the Opinion. In one respect, the Advisory Opinion provided the clarification that the Australians were seeking. At the same time however, it can also be viewed that it not just opened Pandora's box, but proceeded to empty its entire contents into the pool. The Opinion found that both Speedo's "Fastskin"™ suit and adidas's 'full bodysuit' offered an improvement in swimming efficiency over previous suit designs.[80] Despite this acknowledgement, however, CAS went on to confirm that "there is no specific rule regulating the bodysuit. It was submitted that the rule in connection with swimming suits is the same for all aspects of the sport and this is GR6 [the costumes should be in good moral taste]. This rule does not provide minimum measurements leaving the swimming suit dimensions free from control under the relevant existing FINA rules."[81] The opinion also confirmed that FINA's "SW10.7 rule [that no swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance] has never been interpreted as being applicable to swimsuits, and certainly not to their dimensions or material."[82]

The Opinion concluded several pages later with the clarification that FINA had the ultimate authority and ability to determine whether the bodysuit was a performance technology, and given this finding, it was not the role of CAS to review or offer an opinion on the use of the swimsuit in the absence of procedural, good faith or natural justice issues.[83] While this decision was undoubtedly consistent with previous legal precedent, it also highlighted the vacuum that FINA was not willing (or was unable) to fill, and it was this leadership failure from the governing body concerning suit enhancement technology that allowed the swimsuit manufacturers to develop their current range of products. FINA's attempt on 14th May 2009 to then re-regulate this area by issuing new rules governing swimwear[84] (the 'Dubai Charter') was certainly a step in the right direction, but any hope that this document would, of itself, put the technology genie back into the bottle after a decade of comparative free-for-all,[85] smacks of naively commanding the tide to stop. While both the intention[86] and preamble of the Charter were laudable,[87] the technical rules governing the manufacture of the swimwear and FINA's subsequent enforcement (or not) of these rules seem inconsistent and reactionary,[88] and it is these areas that will need to be addressed in particular if the sport is to regain its credibility once again.

Impact of Technology on Swimming

The extent to which swimmers' performances were enhanced by the architecture of the Water Cube pool or by the technologically innovative swimsuits adorned is debatable. There were, however, 66 Olympic records set in Beijing compared to the eight broken in Athens.[89] Comparing the number of swimming world records set in Olympic years, there were 108 records broken in 2008, a 635% increase over the 17 records set in 2004,

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a 327% increase over the 33 set in 2000, a 2160% increase over the 5 set in 1996 and a 675% increase over the 16 set in 1992.[90] FINA has acknowledged that the rate with which swimming times declined had accelerated; it had consistently seen a gain on the clock of between 0.75% and 1% across each four-year Olympic cycle pre-2008 compared to a figure closer to 2% in 2008.[91] The rewriting of swimming's record books in 2008 has led to Dr. Ross Tucker and Dr. Jonathan Dugas provocatively suggesting that "the impact of technology in swimming dwarfs that of doping."[92] Some commentators have characterized the impact of technology in swimming as having bastardized the essence of the sport[93] and having contributed to what others are calling a "credibility crisis" in swimming.[94]

Such alarmist skepticism leveled at FINA and competitive swimming does not take into adequate account the nature of society and sport to want to continuously improve.[95] Critics point out that the speed with which records were broken in 2008 is more revolutionary than evolutionary. It is impossible to deny the tsunami of records broken by swimmers wearing technologically innovative suits and indeed difficult to dispute the proposition that the swimsuits had something to do with it.

With Formula One,[96] tennis[97] and most recently cycling[98] all tightening equipment regulation, the focus seems to be shifting back to the raw and unadulterated ability of the athletes. Just as with FINA's attempts to turn back the clock and ban high-tech swimsuits, International Cycling Union (UCI) President Pat McQuaid has stated that "We decided to bring both the sport and the manufacturers back to reality. The sport needs to be a sport of athletic ability, not technical ability."[99] The Lugano charter is cycling's equivalent to swimming's Dubai Charter and, notwithstanding some typically grandiose claims contained within such documents, informs the sport that technology is pushing cycling performance to depend more on the form of the man-machine ensemble than the physical qualities of the rider and that this goes against the very meaning of cycle sport.[100]

While both charters are correct to suggest that the equipment should be secondary to the athlete, how that is determined remains unclear. Not only did the WADA Ethical Issues Review Panel distinguish between passively versus actively attained performance enhancement, it also noted that, "the spirit of sport celebrates natural talents and their virtuous perfection."[101] It is submitted that coupling the spirit of sport with nature, at the exclusion of enhancement which is assisted via artificial means, is improper as there is very little in modern elite sport which is wholly natural. A running track with its exotic surface,[102] a swimming pool with its engineered methods to dampen waves, or even a fitness centre with its menagerie of cutting-edge strength and endurance training equipment cannot truthfully be called natural competition or training environments.

Harvard University professor Michael J. Sandel suggests that the concept of athletic enhancement is "troubling because it distorts and overrides natural gifts"[103] and that the overriding objective of regulators should be to "distinguish changes that improve from those that corrupt."[104] The approach is conceptually sound but breaks down in application. The latter statement requires agreement on what is considered normal. It would be necessary that there be agreement as to what constitutes a normal range of physiological responses (strength, endurance, flexibility, mobility, etc.) in order to differentiate the application of technology which corrects a condition to either a pre-existing state (or within a reasonable range of what is considered normal) from one that enhances a condition beyond what is the norm.

There are several difficulties with this proposition. Elite sport is not about normality but is a celebration of hierarchies.[105] Fourteen time Olympic gold medalist Michael Phelps has size 14 feet, an arm span nearly 3" (7.5 cm) longer than his height, and has a 30" (76 cm) inseam on a 6'3" (1.91 m) body while seven-time Tour de France winner Lance Armstrong has an oversized heart, extremely high maximal oxygen uptake (VO2 max) and remarkably low lactic acid concentrations.[106] In the light of world class athletes, what then is normal?

Judge Richard Posner[107] posits that the question of the legitimacy of technological interventions comes down to whether the particular intervention disrupts or obscures the hierarchy.[108] Posner asserts that sport has benefited from many uncontroversial technological improvements including better nutrition, better health care, better training methods and, in the context of running, better tracks and shoes.[109] Therefore, so long as the benefit is equitably distributed and the hierarchy maintained, the performance enhancing technology is considered legitimate. What matters most is that a level playing field is maintained during the sporting contest and what does not matter is that there is not maintenance of such a playing field over time immemorial.[110] It may thus be argued that the "credibility crisis" of swimming and the crumbling of its records is part of sport's natural, albeit rapid, growth.

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Comparisons of swimming's records over time are then irrelevant unless similar comparative analyses were to be conducted with other sports in which technology plays a supporting role. Would it be fair, for example, to hypothetically match tennis greats Roger Federer[111] against Bjorn Borg[112] or Rod Laver?[113] It is submitted that such comparisons are moot and that Laver's legacy is safe irrespective of how he would stack up against Federer. In this context, comments such as those made by five-time Olympic gold medallist Aaron Piersol, "A lot of old records that were really, really good are being taken down by people you never heard of"[114] come across as rather petty.

Another limitation to Sandel's argument is drawing the line between changes that improve from those that corrupt. Before Lasik eye surgery, Tiger Woods had won only one professional major championship (the 1997 Masters Tournament) with vision so poor he could not see the big E on the eye chart.[115] After surgery in 1999, Woods went on to win five straight tournaments en route to another 13 majors. Clearly Woods' Lasik surgery improved his eyesight but, to Sandel's question, was it beyond what is considered normal to the point of corruption?[116]

Those anchored to the natural-good/artificial-bad schism should advocate a return to running events contested on cinder tracks, swimming races hosted in rivers, lakes or oceans[117] and weight training based on moving around large rocks.[118] Such claims are, of course, patently preposterous. Thus there is no basis to the argument that a performance enhancing method is fair if it is natural, but cheating if it is artificially induced.

Alternative Approaches – Finding a Way Out

Essentially, the problem currently facing FINA is how to restore confidence in a sport under siege from an increasingly vociferous public.[119] Swimming's governing body arguably already has the means to accomplish this task through the Dubai Charter. Indeed, as CAS confirmed in 2000,[120] FINA is within its rights to create new technical rules to regulate swimming and swimwear. The challenge therefore relates not to the existence of the rules per se, but rather to the detail of their application and enforcement.

Any ban of the high-tech swimsuits from 1st January 2010, as FINA wishes to do,[121] must also have a principled foundation underpinning it, otherwise such a ban will be viewed by some as capricious and arbitrary and would leave the governing body exposed to lawsuits by manufacturers[122] who may allege that they are being unfairly targeted and penalized when other methods of technologically-inspired performance enhancement exist in swimming.[123] The regulations are therefore only as good as their underpinning logic.[124] When inconsistencies such as the permissiveness of technology in swimming exist elsewhere in the sport, or circumstances change, then rules and codes must adapt.[125]

As the swimsuits clearly do not pose a health hazard to the users, FINA would have to rely upon the two remaining criteria to declare the "method" prohibited under the terms of the WADA Code: that it enhances or has the potential to enhance sport performance and that it violates the spirit of sport. Such a stance would be tantamount to a Faustian pact for FINA though, as the Federation would not only have to argue that the high-tech swimsuits violate the spirit of sport but would also have to concede that the swimsuits enhance performance, thereby voiding 66 Olympic and 100+ world records. Hence, FINA cannot look to the WADA Code for guidance in tackling what was simplistically called "technological doping" or "doping on a hangar" but which has subsequently confounded the organization. Referring to such suits as "cancer"[126] as FINA executive director Cornel Marculescu did at a recent meeting, does not serve to inform the debate either.

FINA's approach in relation to pre-approving a list of eligible swimsuits,[127] before tagging specific suits[128] and then inspecting that suit immediately prior to competition[129] are sensible measures which accord with similar measures taken in other sports such as Formula 1[130] and fencing.[131] These measures will obviously have resource implications for the governing body and competition organisers though. What is more controversial is in deciding which swimsuits are eligible for selection in the first instance. While it is possible to identify a swimsuit and categorically state that it illegally enhances performance, proving this enhancement in a quantifiable way is much more difficult,[132] and differentiating it from a similar suit that provides a level of enhancement which is acceptable is even more demanding. Indeed, phrasing the debate as FINA did through the Dubai Charter as 'pure scientific fact' is doomed to failure, as they have now found out to their cost, since the governing body's understanding of the science behind the performance enhancing technologies is not sufficient to effectively regulate the intricacies of this area.[133] This is not the fault of the manufacturers. Rather, culpability lies with the creation and interpretation of the FINA's own rules. Although the stated aim of the Dubai Charter was to make the swimwear approval process clearer and more transparent, the unedifying spectacle of publishing and then revising approved lists[134] has only served to muddy the waters further.

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T.E.C.H. Matrix

Given the ubiquitous and myriad ways in which technology is infused with sport, governing bodies would benefit from not only definitional consistency and rule application but from a model from which to view the phenomena. A four-point 'TECH' (Training, Equipment, Clothing and Human Enhancement) matrix[135] has been proposed to aid sports governing bodies in better understanding how to regulate and adjudicate technology in sport.

- (T) – Training: refers to equipment, technology or resources that may be prohibited by the governing body for use within a competition setting, but may provide advantages for athletes while they are learning or refining the skill.[136]

- (E) – Equipment: represents the most obvious intersection of technology with sport, and as such is the largest of the categories and includes the objects necessary for the accomplishment of the sporting endeavour.[137]

- (C) – Clothing: this refers to any item that is adorned by an athlete or worn as a 'second skin'[138] during the sporting performance.[139]

- (H) – Human Enhancement Technology (HET) in the context of sport is the expression used to describe the convergence of medicine, biotechnology and cognitive science to make the athletes go faster, higher and be stronger.[140]

By acknowledging the ubiquitousness of technology in sport, it demonstrates that this issue is not isolated and that simple and piece-meal solutions are inadequate. Instead, the same ethos and urgency which catalyzed the promulgation of the WADA Code ought to give rise to a principled foundation and coherent framework for regulating technology in sport.

The debate should be less on whether or not such swimsuits enhance performance. Judging by both their success in the pool and by their manufacturer's own marketing claims,[141] it would appear that such suits do indeed enhance swimming performance. The issue which FINA has painted itself into a corner is that it allows for performances to be enhanced through environmental engineering but refuses performances to be enhanced as a result of swimsuit design improvements. It is within the purview of any international sports federation to draw a line between what is permissible and what is not and to regulate accordingly.[142] Where FINA may be vulnerable is in not drawing that line straight or in applying a principled approach to how it regulates the intersection of technology in swimming.

Conclusion

The purpose of this paper was to illustrate the weaknesses of the current framework regulating technology in sport in general, and swimming in particular, and to introduce alternative means with which this issue could be contemplated. It was intended to offer principled guidance on how to navigate the most reasonable route out of the current state of affairs. Without such a basis, sport runs the risk of 'chasing its tail' and going around in circles.[143]

FINA's efforts to prohibit the swimsuits for elite racers but permit it for Masters swimmers is illogical. FINA spokesperson Pedro Adrega has simply stated that, "the Dubai Charter is not applicable to Masters."[144] It is without precedent for a single sport governing body to adopt two different standards with respect to equipment or clothing that enhances performance in the same sport on the basis of the competitor's age. Intended no doubt to exhibit Solomon-styled wisdom,[145] the approach instead suggests panic rather than a deliberate and thoughtful response to a challenging situation.

FINA's dilemma is rooted in part by enabling hosts to engineer pools that offer superior conditions so sportspersons can swim faster times but prohibiting swimsuits which are designed with the same goal in mind. The issue is not that one approach is better than the other; it is that they are inconsistent. The logical basis upon which FINA regulates technology is lacking if the principles underpinning one decision are undermined and contradictory of its approach in another.

Advances in technology mean it is no longer possible to compare like with like.[146] This is as true in swimming as it is in track and field, tennis, golf and many other sports. Whilst FINA has permitted the engineering of superior environmental conditions such as pool depth, number of lanes, and have now approved the use of angled starting blocks starting in 2010, all for the express purpose of enhancing sporting performance, it is curious, and arguably anomalous, that the Federation should be taking such an adversarial stand on swimsuits. BASL

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1 Jane, 'World's Fastest Swimsuit makes big splash and causes serious waves' <http://prettytough.com/worlds-fastest-swimsuit/> accessed 28/6/09
2 D Vergano 'Controversy doesn't derail stem cell progress' USA Today (17 May 2009)
3 A Dawar, 'Pregnant woman, 66, set to be oldest woman to give birth in Britain.' The Guardian (London 16 May 2009). Professor Severino Antinori, who helped current record holder Patricia Rashbrook become a mother at age 62 wryly noted that, "It is possible to give a child to the mother up to the age of 83 but it is medically criminal to do this because the likelihood is the child will lose his mum and suffer from psychological problems." Editorial, 'Britain's oldest mother-to-be, 66, dismisses concerns about her age.' The Telegraph (London 17 May 2009)
4 "It's the duty of medicine to get young people to become old, not to keep old people alive forever," stated medical ethicist Daniel Callahan in J Aleccia 'Surgery in the super old: Success at what price?' MSNBC (18 December 2008) <http://www.msnbc.msn.com/id/28282424/ > accessed 28/6/09
5 In the Foreword to DH Catlin, Doping: an IOC White Paper (IOC, Lausanne 1999), Juan Antonio Samaranch referenced the souls of our predecessors in describing the spirit of sport.
6 For example, the British Olympic Association is working towards a more "streamlined and seamless" programme with an integrated Sports Science Research Unit, an Intensive Rehabilitation Unit and Clinical Services to support its athletes in anticipation of the London 2012 Olympic Games. 17 June 2009. <http://www.olympics.org.uk/news.aspx?GT=Invariant&NE=3656&AT=&GA=&SP=> accessed 28/6/09
7 In the early 17th century, golf balls were made of feathers covered with leather. They are now made of a solid or liquid core covered with a dimpled plastic casing. <http://www.thedesignshop.com/history.htm> accessed 28/6/09
8 Bill Bowerman, co-founder of Nike, poured liquid urethane into his wife's waffle iron in 1972 to invent a sole which offered optimal traction. Nike's classic combination of entrepreneurship and innovation enabled them to also invent the wedged heel, the cushioned mid-sole and nylon uppers. <http://web.mit.edu/invent/iow/bowermanknight.html> accessed 28/6/09
9 Stan Mikita and Bobby Hull of the Chicago Blackhawks in the National Hockey League are credited with inventing the curved stick in the early 1960's. R Ray & M Kearney, The Great Canadian Book of Lists (Hounslow Press, Toronto 1986) 275 <http://findarticles.com/p/articles/mi_hb5273/is_200112/ai_n20703424/?tag=content;col1 > accessed 28/6/09
10 International Tennis Federation (ITF). <http://www.itftennis.com/technical/equipment/rackets/history.asp> accessed 28/6/09
11 The ITF authorized the move away from wooden to graphite racquets in order to enable the player to strike the ball with greater velocity.
12 National Hockey League (NHL) Rule 19(a) states that sticks shall be made of wood or any other approved material and Rule 19(b) details the curvature of the blade. <http://www.nhl.com/rules/rule19.html> accessed 28/6/09
13 The R&A (The Royal and Ancient Golf Club of St Andrews) and the United States Golf Association banned Callaway's ERC Forged Titanium Driver because of the club's spring-like effect.
14 FINA has asked all member federations to approve a complete return to textile suits beginning January 1, 2010. C Lord, 'FINA Asks Feds: Back A Return To Textile Suits.' SwimNews.com (9 June 2009) < http://www.swimnews.com/News/view/6922> accessed 28/6/09. It also appears that FINA is contemplating using one set of swimsuit rules for elite swimmers and another for masters swimmers. C Lord 'Time To Chose Your Weapon: Elite Or Master.' SwimNews.com (10 June 2009) <http://www.swimnews.com/News/view/6918> accessed 28/6/09
15 World Anti-Doping Agency, World Anti-Doping Code (Montreal 2009) 14.
16 Ibid.
17 Ibid.
18 World Anti-Doping Agency (n15), Article 4.3.1.3, 33
19 DL Coleman & JE Coleman, Jr 'The Problem of Doping' (2008) 57 Duke Law Journal 1769
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21 Coleman (n19) 1751
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24 [1997] O.J. 3201.
25 (n 6)
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32 FINA OWS Rule 6.13 – Swimmers may take sustenance.
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44 Article 4.3.1 World Anti-Doping Code (n15) 32.
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61 As cited in Malloy and others (n26) 293.
62 Ibid.
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82 Ibid.
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permeability and use.

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97 *US Tennis Association Handbook of Tennis Rules and Regulations cited in "Tennis Ball Specifications Defined for Four Types." (20 September 2008) <http://sports.balls.com/rules/tennis-ball-specifications-defined-for-four-types.html> accessed 28/6/09*

98 *Austen, (n51)*

99 *Ibid.*

100 *UCI, The Lugano charter, (8 October 1996) <http://www.uci.ch/Modules/BUILTIN/getObject.asp?MenuId=MTI2NjA&ObjTypeCode=FILE&type=FILE&id=MzQxMDc&LangId=1> accessed 28/06/09*

101 *Murray, (n27)*

102 *For example, the University of Oregon installed its Benyon Sports Surfaces 2000 dual durometer, full-pour polyurethane track which features maximum return of energy and superior shock absorption comlements of a bio-engineered force reduction layer of butyl rubber and full-depth color polyurethane finished with a custom-made surface consisting of embedded Ethylene Propylene Diene Monomer (EPDM). Editorial, 'The fastest track in the world.' Product Design & Development (28 November 2007). <http://www.pddnet.com/article-the-fastest-track-in-the-world> accessed 28/6/09*

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104 *Ibid, 37.*

105 *Posner, (n38) 1729.*

106 *EF Coyle, 'Improved muscular efficiency displayed as Tour de France champion matures are examples of athletes with unnatural physical abilities.' (2005) 98 Journal of Applied Physiology 2191-2196.*

107 *U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.*

108 *Posner, (n38) 1729.*

109 *Ibid, 1731.*

110 *Ibid.*

111 *Winner of 14 tennis major championships including five Wimbledon Championships.*

112 *Winner of 11 tennis major championships including five consecutive Wimbledon Championships.*

113 *Ranked #1 in the world for 7 years from 1964-1970 and twice won four Grand Slam singles titles.*

114 *C Lord, 'Why Ruin Rome with a(nother) lie.' SwimNews.com (17 May 2009) <http://www.swimnews.com/News/view/6862> accessed 28/6/09*

115 *H Gola, 'Fore! Look out for Lasik.' Daily News (28 May 2002) 67.*

116 *For example (6/3 UK or 20/10 US). Posner, (n38) argues at 1730 that baseball players should "not be allowed to enhance normal vision because super vision is one of the ingredients of the innate skill that the baseball contest ranks" without offering any guidance as how to establish enhancement.*

117 *Olympic swimming events were contested in the ocean in Athens in 1896, in the Seine River in Paris in 1900 and in a lake in St. Louis in 1904.*

118 *Facetiously suggested in Malloy and others (n26), 294.*

119 *The French newspaper, L'Equipe has even refused to comment on swimming records until FINA imposes stricter rules on swimsuits: C Lord, 'L'Equipe Takes the Lead in Protest Race' swimnews.com (23/06/09) < http://www.swimnews.com/News/view/6962> accessed 28/06/09*

120 *Advisory Opinion CAS 2000/C/267 (n79).*

121 *C Lord, 'FINA Asks Feds: Back A Return To Textile Suits.' (n14).*

122 *Blueseventy, whose 'nero comp' suit was worn by Britain's David Davies when he broke the British 400 metres freestyle record in March 2009, launched a civil suit in the Swiss courts on 4 June 2009 claiming FINA's new testing procedure for swimsuits is unfair. S Hart, 'FINA face court over swimwear testing policy.' The Telegraph. (03 June 2009) <http://www.telegraph.co.uk/sport/othersports/swimming/5438167/FINA-face-court-over-swimwear-testing-policy.html> accessed 28/6/09*

123 *Whilst FINA is preoccupied with high-tech swimsuits, it is blinded to other methods of performance enhancement which are rooted in technology such as pool depth, wave breakers, empty lanes and, soon, slanted starting blocks.*

124 *Malloy and others (n26) 293.*

125 *Ibid.*

126 *C Lord, 'Swimming To Be Revived After Rome Circus.' SwimNews.com (28 May 2009) <http://www.swimnews.com/News/view/6890> accessed 28/6/09*

127 *FINA List of Approved Swimsuits (19/06/09) <http://www.fina.org/project/index.php?option=com_content&task=view&id=2389&Itemid=9> accessed 28/06/09*

128 *Editorial, 'FINA approves 202 high-tech racing swimsuits, rejects 10' cbcsports.ca (19 May 2009) <http://www.cbc.ca/sports/amateur/story/2009/05/19/sp-fina-suits.html> accessed 28/6/09*

129 *Ibid.*

130 *See Parc Ferme, FIA Formula One Rules <http://www.formula1.com/inside_f1/rules_and_regulations/sporting_regulations/5249/> accessed 28/6/09*

131 *FIE Rules of Fencing, <http://www.clfc.org/FIErules.htm> accessed 28/6/09*

132 *For example, how should an air-trapping effect be measured?*

133 *C Lord, 'Rome 2009: The Circus is on, All Suits Allowed' swimnews.com (22 June 2009) < http://www.swimnews.com/News/view/6955> aceessed 28/6/09*

134 *C Lord, 'Tyr accuses FINA of Failure and Inconsistency' Swimnews.com (25 June 2009) < http://www.swimnews.com/News/view/6972> accessed 28/06/09*

135 *Presented by Kris Lines of Staffordshire University at the 2009 Socio-Legal Studies Association Conference at Leicester De Montfort Law School on 7 April 2009.*

136 *For example, psychological support and mental skills training, specialist resistance training and conditioning equipment, tracking heart rate and VO2 max readings whilst training, biomechanical modeling to optimize an athlete's natural ability, massage and recovery training.*

137 *For example, the swimming environment (depth, lanes, platforms), starting blocks, measuring and timing devices, escort safety boats, floats, paddles.*

138 *T Magdalinski, 'Sport, Technology and the Body: the nature of performance' (Routledge, London: 2009) 111*

139 *For example, swimsuits, goggles, hip belts, micro-chip transponders, fins*

140 *For example, the use of prosthetics, surgical enhancements, genetic engineering or manipulation, blood spinning, neurofeedback or Downstream Regulatory Element Antagonistic Modulator (DREAM) technology.*

141 *Arena (who supply the Italian team) advertise their own Powerskin R-Evolution swimsuit as offering a 54/100 of a second advantage in a 50m free style race, 24% longer time at peak speed and 20% less drag. <http://www.arenapowerskin.com> accessed 28/6/09*

142 *Advisory Opinion CAS 2000/C/267 (n79)*

143 *See FINA's approach to innovative swimsuits which has ranged from almost anything goes to the swimsuit regulation of the Dubai Charter and its consequent by-product of litigation to rejection of the technology and going back to the basics.*

144 *Editorial, 'FINA Confirms Dubai Charter Not Applicable to Masters Swimming.' Swimming World Magazine. (12 June 2009) <http://www.swimmingworldmagazine.com/lane9/news/21392.asp> accessed 28/6/09*

145 *See Bible, Kings 3:16-28.*

146 *Gillon, (n83)*

Are Match Officials Fair Game?

By Zane Shihab, Max Bitel Greene

Introduction

"Probably the worst decision I've ever witnessed in football"[1]

When Stuart Attwell, the youngest referee in the history of the Premier League, awarded Reading the now infamous 'phantom' goal against Watford earlier this season the decision seemed so unfathomable it even attracted derision from the Reading players.

That decision came, rather incongruously for the Football Association, against the backdrop of the well publicised Respect campaign which was introduced for the 2008-09 season at professional and grassroots levels. The campaign was aimed at, amongst other things, referee recruitment and retention by tackling abuse towards match officials.[2]

The Respect programme followed a massive overhaul of the management, training and development for all match officials operating in the professional game which was introduced for the 2001/02 season by The Football Association, FA Premier League and Football League. As part of this revamp, each referee would be paid an annual retainer plus match fees whilst being allowed to continue in their chosen careers. At that time, Adam Crozier, then FA Chief Executive, proclaimed that:

> ***"This is a big development for football. We will see a fundamental reorganisation of match officials which will lead to continuing improving standards of refereeing, which is a priority for everyone."***[3]

Whether turning professional has improved the standards of the match officials is a moot point. However, what is certain is that never before have the financial implications of the decisions of match officials been so great. With winning the UEFA Champions League worth an estimated £85 million,[4] could Chelsea have sued referee Lubos Michel for not awarding them a penalty when Ferdinand brought down Malouda in the box in the final? Is it any more farfetched than Sheffield United winning their claim for compensation against West Ham for fielding the ineligible Carlos Tevez?

With millions at stake why should a match official be any different from other professionals and not be liable to compensate for the result of his or her negligent decision?

It's a great game to imagine what famous refereeing mistakes you might litigate over. Cast your mind back to the 1978 World Cup where the controversial Welsh referee Clive Thomas (renowned for, amongst other things, his strong opposition to extravagant goal celebrations, going so far as to break them up) caused uproar when he blew the whistle for full-time between a corner being taken and Brazil's Zico scoring directly from it with a header. Technically, Thomas may have been correct as the amount of time was at the discretion of the referee, however, what would the situation have been if the official was acting outside the rules of the game, would Brazil have been able to sue?

What about England suing the Tunisian referee Ali Bin Nasser for failing to spot Maradona's infamous "Hand of God" goal in the 1986 World Cup...but could it happen?

The basis of the tort of negligence is a claim that the defendant failed to observe the necessary standard of care owed to the claimant and that this negligent act caused damage to the claimant. Thus, negligence is a measure of when a person's conduct has failed to live up to that normally expected of someone in the defendant's position and *"requires the infliction of injury in circumstances where the tortfeasor had no intent, but his action or omission fell shot of an appropriate objectively set standard"*.[5]

There have been a number of sports specific cases that have resulted in the law of negligence developing from the broad 'neighbourhood principle' that was formulated by Lord Atkin in the 1930's.[6] The test applicable today involves the satisfaction of three criteria. The claimant must establish: (i) that the defendant owed him a common duty of care; (ii) that he breached that duty; and (iii) that damage resulted.

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In the case of an action against a match official, therefore, five main issues arise: (a) whether the match official owed a duty of care to the participants and/or club; (b) if so, what standard of care is required; (c) whether the breach has resulted in injury or damage and that the injury or damage is sufficiently closely connected to the breach; (d) whether, and to what extent such voluntary participation in the sporting contest provides a defence to the claim and; (e) whether a claim will fail due to policy considerations.

(a) Does a Duty of Care exist between Match Officials and Clubs?

In Caldwell v Maguire[7] Judge J stated that "a duty is owed to those who ought reasonably to be in contemplation as being affected by a particular act" and, further "the duty itself is to take reasonable care to avoid injury to another person or property".

Whilst the application of this duty to sport remains controversial, it is well established that a duty has been found to exist between participants, participants and spectators and match officials and participants. This was confirmed in the High Court of Australia where Kitto J said:

> ***"I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or game…an activity in which participants place themselves in a special relation or succession of relations with other participants so that adjudication under the common law upon a claim by one participant against another for damages for negligence in respect of injuries sustained in the course of the activity requires only that the tribunal of fact apply itself to the same kind of question of fact as arises in other cases of personal injury by negligence".*** [8]

Both Caldwell and Rootes relate to a duty owed by participants of the sport, however, it has also been found that those refereeing or otherwise supervising the sport may be liable for any failure to display reasonable competence which results in damage. The two prominent decisions in relation to liability of officials are the cases of Smoldon v Whitworth[9] and Vowles v Evans.[10]

In Vowles, the Welsh Rugby Union was held vicariously liable for injuries received by a participant (the loose-head prop of Mr Vowles's team) during a game of rugby union. Without a suitably qualified substitute, the referee Mr David Evans (rather ironically a practicing solicitor specialising in personal injury), should have proceeded with uncontested scrums, a safety measure designed to account for the presence of inexperienced front row forwards. However, there was a faulty engagement of the scrum resulting in the injuries received by the plaintiff. It was the first case in which an amateur referee in any sport has been held liable in the context of an adult amateur game.

Comparisons can clearly be drawn with Smoldon, another case involving Rugby Union. Smoldon, like Vowles was playing in the position of hooker and bore the full force of the competing packs when the scrums went down. In Smoldon's case, the referee failed to deal with persistent collapses and furthermore failed to enforce rules designed specifically to maintain safety in scrums for junior players. The consequences of this failure were the match referee was held liable for the catastrophic injuries (paralysis from the neck down) received by Ben Smoldon.

The argument that match officials only owe a duty to their employers (and not clubs) can also be dismissed. In Phelps v Hillingdon Borough Council[11] Lord Nicholls posed and answered the following question:

> ***"Take a case where an educational psychologist is employed by an education authority. In the course of his work he assesses a pupil whose lack of progress at school has been causing concern all round: to teachers and parents alike. The child has a learning difficulty. The psychologist sees the child and carries out an assessment. He makes a diagnosis and advises the education authority. The diagnosis is hopelessly wrong. No reasonably competent educational psychologist, exercising reasonable skill and care, would have given such advice. In consequence, the pupil fails to receive the appropriate educational treatment and, as a result, his educational progress is retarded, perhaps irreparably. When carrying out the assessment and advising the education authority, did the psychologist owe a duty of care to the child?***
>
> ***I confess I entertain no doubt on how that question should be answered. The educational psychologist was professionally qualified. He was brought in by the education authority to assist it in carrying out its educational functions. The purpose of his assessment was to enable him to give expert advice to the education authority about the child. The authority was to act on that advice in deciding what course to adopt in the best interests of the pupil with a learning difficulty. Throughout, the child was very dependent upon the expert's assessment. The child was in a singularly vulnerable position. The child's parents will seldom be in a position to know whether the psychologist's advice was sound or not.***
>
> ***This seems to me to be, on its face, an example par excellence of a situation where the law will regard the professional as owing a duty of care to a third party as well as his own employer."*** [12]

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Although there are limits to the extent to which this duty lies. The concept of 'neighbourhood' for instance has been found not to require an international governing body to change its rules to make the sport safer[13] or extend any duty to prevent disappointment to spectators.[14]

It is therefore apparent that whilst a match official does owe a duty to the participants of a sport it is less clear just how far that duty extends.

(b) What standard of care is required by a Match Official?

To consider which standard should apply to match officials it is first helpful to analyse the standard of care owed by players to other players and to spectators. In Sumner[15] a rider in an equestrian competition lost control of the horse and hit and injured a press photographer standing on the edge of the arena. The Court held that spectators accept the risk of a lapse of judgment or skill in competitors who are going all out to win but do not accept the risk of participants having a 'reckless disregard' (to act consciously with respect to causing injury) for their safety. This judgement has been followed in subsequent cases.[16]

However, this interpretation was rejected in Caldwell[17] where it reinforced that the test to be used is negligence in all the circumstances. The law is already used to applying the test of negligence to a wide range of activities, thus it should be more than able to be applied to sport as long as the relevant circumstances are properly taken into account. Reckless disregard was considered to be merely a useful evidential tool. In that case, Judge J asserted that:

> ***"since both the identification of the individuals to whom the duty is owed and the existence and extent of the duty are substantially determined by conceptions of reasonableness, the facts of and relating to any given case will determine whether or not a duty is established and, if so, whether or not breach of that duty can be shown".***

This rationale was supported by Kitto J in Rootes where he stated that:

> ***"...the conclusion to be reached must necessarily depend, according to the concepts of common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury...the tribunal of fact may think that in the situation to which the plaintiff's injury was caused, a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the 'rules of the game'. Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of unreasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances.***
>
> ***The question to be asked was 'was the defendant's conduct which caused the injury to the plaintiff reasonable in all the circumstances, including as part of the circumstances the inferences fairly to be drawn by the defendant form the plaintiff's participation in what was going on at the time?".***

In Caldwell, Tuckey LJ said that the scope of the duty is "to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to such fellow contestants".[18]

Accordingly, the concept of 'reasonableness' is central to establishing the appropriate standard of care. The duty of care between participants in competitive sports is a duty to take all reasonable care, taking into account the particular circumstances in which the competing players were placed. In addition, mere errors of judgement will not necessarily amount to negligence as the damage can occur in a matter of seconds.[19]

Similarly, in relation to match officials, Smoldon has determined that the level of care required of the official towards a player is a level appropriate in all the circumstances, taking full account of the factual context in which he was exercising his functions as referee. There would be no liability for errors of judgement, oversights or lapses of which any participant might be guilty of in the context of a fast moving contest. However, as Lord Bingham of Cornhill CJ states, the duty owed by referees to players and that owed by a participant to a spectator are not indistinguishable:

> ***"in [the latter] cases it was recognised that a sporting competitor, properly intent on winning the contest, was (and was entitled to be) all but oblivious to spectators. It therefore followed that he would have to be shown to have very blatantly disregarded the safety of spectators before he could be held to have failed to exercise such care as was reasonable in all the circumstances. The position of a referee vis-à-vis the players is not the same of that of a participant in a contest vis-à-vis a spectator. One of his responsibilities is to safeguard the safety of the players. So, although the legal duty is the same in the two cases, the practical content of the duty differs according to the quite different circumstances"***

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Further, in a refereeing context he sets out the way in which the duty of care was to be applied:

> ***"The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual; context in which a referee exercises his functions and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed…[the learned trial judge] did not intend to open the door to a plethora of claims by players against referees, and it would be deplorable if that were the result. In our view that result should not follow provided all concerned appreciate how difficult it is for a plaintiff to establish that a referee failed to exercise such care and skill as was reasonably to be expected in the circumstances of a hotly contested game of rugby football…".***

Therefore, player's duties to other players and to spectators have been found to be on an equivalent level but case law suggests that it takes much more to establish that the match official's actions were of such a degree of negligence that the duty was breached.[20]

(c) Did the breach result in injury or damage and is the injury or damage sufficiently closely connected to the breach?

Once it has been established that a match official has breached his duty, the plaintiff must also show that, on the balance of probabilities, the breach has resulted in loss and that the loss is sufficiently closely connected to the breach. In the vast majority of sports related negligence cases causation is not a contentious issue. However, it is more problematic to establish a causal link in cases that involve breach by match officials.

There are two parts to the question of causation, causation in fact and causation in law. The starting point for establishing causation in fact is the 'but for' test. If the loss would not have been occasioned but for the defendant's breach, then there is a prima facie factual causation.[21] This poses difficulties for the plaintiff as it may be difficult to prove beyond reasonable doubt that a match official's negligent decision has changed the result of a game and, however flagrant the breach of duty, the claim will fail if the claimant would have suffered the same loss in the absence of the breach.[22]

If factual causation can be established, it remains necessary to demonstrate causation in law. In general, this requires that the damage be not so remote from the breach that it is unjust to hold the defendant liable.

In Re Polemis[23] the Court of Appeal held that a defendant can be held liable for all consequences flowing from the wrongful conduct regardless of how unforeseeable. However, in The Wagon Mound[24] it was held that damage that is not itself reasonably foreseeable cannot be attributed to the defendant and this is now considered a better formulation of the law.

Further, under the law of negligence a claimant can be denied damages because, although the defendant did do something negligent, the chain of causation between that negligence and the injury is broken by a novus actus interveniens (a new intervening act). If, for example, defeat by a team is not a predictable consequence of a negligent refereeing decision because of new intervening acts, a negligence claim will fail.

Readers will remember the farcical scenes when in the World Cup 2006 Graham Poll, while refereeing a crucial 2-2 draw between Croatia and Australia, brandished the yellow card three times at the Croatian defender Josip Simunic. Under the Regulations of FIFA the two yellows warranted a red card and expulsion. But Mr Poll, unaccountably, forgot his first attempt to discipline the unruly Croat. As confusion reigned, Simunic was finally shown red after the final whistle, having uniquely received three yellow cards in one match. There was no doubt that this was negligence on the part of the referee but could the Socceroos have sued him?

The obvious answer would seem to be no as it could not be shown that had he been sent off, Australia would have gone on to win. Yet a similar lack of causation argument seems to have failed in the "Tevezgate" affair.

The facts surrounding this dispute are well publicised. On 27th April 2007 the Hammers were fined £5.5 million by the Premier League for fielding two Argentinean internationals, Carlos Tevez and Javier Mascherano, who were owned by third-party companies in breach of Premier League rules. However, the Hammers escaped a points deduction and, on the final day of the 2006/07 season, Tevez scored the winning goal against Manchester United, to cement West Ham's Premier League status.

In August 2007 Sheffield United lost an initial appeal against their relegation but continued their fight and in September 2008 the Independent Tribunal ruled in their favour. In a confidential judgment leaked to the press the Tribunal stated:

> ***"We have no doubt that West Ham would have secured at least three fewer points over the 2006-07 season if Carlos Tevez had not been playing for the club…Indeed, we think it***

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more likely than not on the evidence we heard that even over the final two games of the season West Ham would have achieved at least three points less overall without Mr Tevez. He played outstandingly well in the two wins West Ham secured in those last two games." [25]

The Tevez case represents something of a milestone and is perhaps the single-most important development in establishing causation in sports-related negligence cases in recent years.

Take for example the recent San Diego v Denver NFL game where a refereeing error led to Denver getting an undeserved victory. The umpire, Ed Hochuli wrote afterwards that "Affecting the outcome of a game is a devastating feeling. Officials strive for perfection – I failed miserably." [26]

This sounds like an admission of negligence and causation. Does this mean that he could be liable to San Diego if they miss out on the play offs by virtue of the lost points. As a trial lawyer, Hochuli should know better than to admit to such failings in open correspondence!

(d) Does a voluntary participation in the sporting contest provide a defence to the claim?

It could be argued that participants in the sport, for example the two competing football teams, impliedly and, in some cases, expressly[27] consent to taking risks which otherwise would be a breach of the duty of care.

There are two principal defences for tortuous claims: (i) consent and; (ii) volenti non fit injuria ('no injury is done to a person who consents'). Both are complete defences and based on the principle that if you want contacts made with you, or are prepared to run the risks that contacts might be made with you, you cannot seek compensation for injuries caused by those acts.

Consent is a defence to trespasses against the person and therefore has little relevance to our hypothetical example concerning match officials suffice to say that despite previous rulings to the contrary[28] participants cannot consent to force that goes beyond that which is normally expected. Indeed, in Condon v Basi,[29] despite the fact that the Court noted that "in a competitive sport whose rules and general background contemplate that there will be physical contact between the players...By engaging in a sport or pastime the participants may be held to have accepted the risks which are inherent in that sport or pastime...", the Court went on to say:

"but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises and if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connection, the rules of the sport...may constitute one of those circumstances: but...they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist." [30]

Volenti operates to exonerate a defendant from liability for what would otherwise be an actionable breach of duty and allows a person to assess the degree of risk involved with an activity in order to decide whether or not to participate. If someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they cannot then sue if harm does in fact happen.

However, where a match official has been found to be negligent because a decision was unreasonable and/or unexpected, the issue of volenti does not arise because participants run the risk of loss only from such acts as can be reasonably expected from a participant playing or officiating according to the reasonably accepted standard of play.

(e) Will a claim fail due to policy considerations?

Ultimately, claims against referees for failures to adhere to rules may fail on public policy grounds. In Agar v Hyde,[31] in the High Court of Australia, where two rugby players suffered spinal injuries and claimed against members of the International Rugby Football Board alleging that the rules relating to scrums exposed them to unnecessary risks, it was held there was no duty. It was said that to impose a duty would diminish the autonomy of those who voluntarily participate in games and would deter regulators from continuing to supervise the game lest they be held liable for an individual's free choice.

A similar example can be found in the American case, of Bain v. Gillespie.[32] Referee Jim Bain made a controversial call late in the Big Ten Conference basketball championship game between the University of Iowa and Purdue University that allowed a Purdue player to make a free throw that gave Purdue a last-minute victory. John and Karen Gillespie operated a novelty store in Iowa City specialising in University of Iowa sporting goods and souvenirs. The Gillespies claimed that Bain's malpractice caused Purdue to eliminate Iowa from the championship of the Big Ten Conference, thereby destroying a potential market for

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the Gillespie's memorabilia touting Iowa as the Big Ten champion. However the Judge found that:

> ***"It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure (the) Gillespie's business … and subject him to liability. Heaven knows what uncharted morass the court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling."***

Or, as one sporting saying has it; the referee is always right, even when he is wrong.

This standpoint is shared by the Court of Arbitration for Sport which has consistently maintained that the autonomy of match officials is unchallengeable except in very limited circumstances. This position is based on the rationale that the "the game must not be constantly interrupted by appeals to a judge", purely technical rules of the sport were "the responsibility of the federation concerned" and the panel were "less well placed to decide than the referee in the ring or the ring judges".[33]

Indeed "CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what are sometimes called 'rules of the game'...[T]hey are not, unlike on-field judges, selected for their expertise in officiating the particular sport".[34] In other words, the match official's decision is final, refereeing mistakes are all part of the game and the participants have to accept that risk.

However, CAS has stopped short of ruling out all challenges to the decisions of match officials and have gone as far to say that even a technical rule or decision could be reviewed where there is an error of law, an arbitrary decision, or malicious intent;[35] and when "decisions are taken in violation of ... social rules or general principles of law".[36] Further, CAS has stated that the Court can declare a referee's decision invalid where he has no power under the rules.[37]

Watson v British Board of Boxing Control[38] also confirmed that policy considerations would not necessarily prevent the Court from finding that a duty of care was owed. In this case the boxer Michael Watson brought an action against the Board claiming that it had been under a duty of care to see that all reasonable steps were taken to ensure that he received immediate and effective medical attention and treatment should he sustain injury in the fight. He contended that they were in breach of this duty with the consequence that he did not receive the immediate medical attention at the ringside that his condition required. As a result, Watson sustained serious brain damage. On 24 September 1999 Ian Kennedy J, gave judgment in favour of Watson. Against that decision the Board appealed but in finding with the original judgment Lord Phillips MR stated:

> ***"Mr Walker [Counsel for the British Boxing Board of Control] also suggested that a finding in favour of Mr Watson in this case would involve postulating that other sporting regulatory bodies, such as the Rugby Football Union, owed duties of care to the participants in their sports in relation to their rules and regulations.***

It does not follow that the decision in this case is the thin end of a wedge. The facts of this case are not common to other sports. In any event it would be quite wrong to determine the result of the individual facts of this case by formulating a principle of general policy that sporting regulatory bodies should owe no duty of care in respect of the formulation of their rules and regulations. I conclude that the Judge correctly found that the Board owed Mr Watson a duty of care"

Conclusion

Criticism of referees, particularly in the world of football, is nothing new and the late Bill Shankly famously remarked that "the trouble with referees is that they know the rules, but they do not know the game".[39]

However, with the very recent developments in the Tevez case, match officials and their pay masters should fear more than mere disparagement. The seemingly insurmountable hurdle of remoteness no longer appears to be so overwhelming and consequently there is a real prospect of a club who suffers financial loss as a result of a match official's negligent decision being successful in a claim for negligence. Indeed, there have been a number of recent reports suggesting that clubs have considered taking legal action against referees for seemingly incomprehensible decisions.[40]

The most obvious defendant in cases of negligence is the person who causes the loss, i.e. the match official's themselves. However, it is well established that the plaintiff can join the defendant's employers to the claim on the basis of vicarious liability if the defendant employee's negligent actions were performed during the course of employment. This means that in the case of the match officials operating at the highest level in of football in England, the Premier League would be liable for a match official's negligence.

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In a recent Court of Appeal judgment[41] Redruth Rugby Club was held vicariously liable for the actions of one of its semi-professional players. It was held that it was fair and just to hold Redruth vicariously liable for a punch by one of its players, so that the claimant could obtain an adequate and just remedy and so that clubs are encouraged to attempt to minimise the risk of foul play in the future by their players. The decision is likely to have far reaching consequences for both professional and semi-professional sports clubs across the country.

The vicarious liability of employers therefore provides an additional defendant who is likely to be better able to pay any compensation; a potentially invaluable doctrine in the case of a club suing a match official for loss of profits due to a negligent decision.

Thus with governing bodies so exposed to the threat of litigation, the age-old technology debate resurfaces. Sports such as cricket, tennis and rugby have embraced technological progress to great effect. However, despite undertaking numerous trials,[42] football has been extremely reluctant to implement any such technology.

The arguments emanating from the traditionalists are well established. They maintain that technology will disrupt the beautiful game by making it too stop-start due to the delay between the incident and final decision. They also assert that on occasions even video replays are inconclusive (Geoff Hurst's second goal in the 1966 World Cup final providing a case in point).

However, where fail-safe technology is available to the governing body, it could be contended that failure to put it into operation could in itself be negligent. Technology is already used to some extent in football[43] and advancements such as a device to indicate when the ball has crossed the goal line appears to represent natural progression. In acknowledgment of this, in March last year the Football Association voted in favour of the implementation of goal line technology at the Annual General Meeting of the International Football Association Board.

Despite the obvious benefits, football's lawmakers, led by FIFA president Sepp Blatter and UEFA head Michel Platini opposed the Football Association and voted to abandon all further goal-line technology research in favour of an experiment of two additional referees, one behind each goal.[44] David Collins, general secretary of the Football Association of Wales (who voted with FIFA), said: "Football is a game played by human beings, and there was a feeling technology can hinder the flow of the game...Other sports have embraced technology – but they are far more stop-start."[45]

This decision has been met with widespread incredulity throughout the game and even prompted the Premier League Chairman, Sir David Richards, to accuse Platini of "killing football".[46]

Sir David is right to be concerned. At the time of writing Watford are struggling against relegation from the Championship to the third tier of English football. If they were to be relegated, will they seek compensation from the Football League over the 'phantom' goal awarded to Reading by Atwell (a mistake that would surely have been avoided had goal line technology been utilised) if the three points they might have secured proves the difference between relegation and survival?
Watch this space. BASL

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1 *http://www.telegraph.co.uk/sport/football/leagues/championship/3043039/Attwell-in-clear-afterppworst-ever-decision—-Football.html*

2 *http://www.thefa.com/TheFA/Respect/*

3 *http://www.thefa.com/TheFA/Refereeing/NewsAndFeatures/Postings/2002/06/13045.htm*

4 *http://uk.reuters.com/article/footballNews/idUKL2049585200805 21*

5 *The Field of Play, Michael J Beloff QC and Rupert Beloff, para 5, p.153 Halsbury's Laws centenary essay collection*

6 *A person will owe a duty of care not to injure those who it can be reasonably foreseen would be affected by their acts or omissions (Donoghue v Stevenson [1932] AC 562)*

7 *Judge J Caldwell v Maguire [2001] EWCA Civ 1054, [2002] PIQR P6, [2001] All ER (D) 363 (Jun).*

8 *Rootes v Shelton [1968] AR 33 at 37*

9 *[1997] PIQR P133, CA*

10 *[2003] EWCA Civ 318*

11 *[2000] 3 WLR 776 at p.802*

12 *See also Perrett v Collins [1998] 2 LL.L.Rep. 255*

13 *Agar v Hyde [2001] HCA 41*

14 *MacDonald v FIFA, The Times 7th January 1999*

15 *Woolridge v Sumner [1963] 2 QB 43*

16 *Condon v Basi [1986] 1 WLR (involving participant violence).*

17 *Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054*

18 *Caldwell v Maguire and Fitzgerald [2001] EWCA Civ 1054 at [11], [2002] PIQR P6 at [11]*

19 *See Pitcher v Huddersfield Town FC QB Transcript: 17 July 2001.*

20 *See Allport v Wilbraham [2004] EWCA Civ 1668 for an example of where such negligence was not established*

21 *Although the defendant hospital had been negligent in failing to examine the deceased, there was no proof that that the deceased's death was caused by that negligence (Barnett v. Chelsea & Kensington Hospital [1968] 1 All ER 1068).*

22 *Although the defendant was in breach of the duty of care owed to the claimant's husband, the breach was not factually causative of his death (McWilliams v Sir William Arrol [1962] 1 WLR 295 (HL)).*

23 *Re an Arbitration between Polemis and Furness, Withy & Co. Ltd, [1921] 3 K.B. 560.*

24 *The Wagon Mound [1961] AC 388 (PC)*

25 *http://www.guardian.co.uk/football/2008/sep/23/premierleague.sheffieldunited?gusrc=rss&feed=networkfront*

26 *http://www.signonsandiego.com/uniontrib/20080916/news_1n16ref.html*

27 *For example, Premier League football clubs agree to be bound by the decisions of a match official*

28 *Hawkins J held in R v Coney that "It may be that consent can in all cases be given so as to operate as a bar to a civil action; upon the ground that no man can claim damages for an act to which he himself was an assenting party"*

29 *Condon v Basi [1985] 1 WLR 866, where the defendant tackled the plaintiff during a football match in such a manner as to lead to the plaintiff to suffer a broken leg.*

30 *Barwick CJ at p.34 in Rootes v Shelton [1968] ALR 33*

31 *See Footnote 11 supra*

32 *357 N.W.2d 47 (Iowa App. 1984)*

33 *Mendy v Association Interantionale de Boxing Amateur (AIBA) (CAS OG Atlanta 1996/006 Digest Vol 1. p.413 para. 13*

34 *Segura v International Amateur Athletic Federation (IAAF) (CAS OG Sydney 2000/13: Digest Vol.2 p. 680, para 17)*

35 *FN Neykova v International Rowing Federation (FISA) & International Olympic Committee (IOC) (CAS OG Sydney 2000/12), where the losing Bulgarian rower queried the photo-finish that placed her second in her event at the Sydney Olympics. CAS felt that this was "different to that of a typical official's field of play decision" (CAS OG Sydney 2000/12 Digest Vol.2 p.674. para. 13)*

36 *Mendy v Association Interantionale de Boxing Amateur (AIBA) (CAS OG Atlanta 1996/006 Digest Vol 1. p.413 para. 13 – 14*

37 *Canadian Paralympic Committee (CPC) v International Paralympic Committee (IPC) (2000/A/305; Digest Vol.2 p. 567) here, the principle that a sporting federation must follow its own rule seems to have trumped any principle of autonomy.*

38 *[2000] LTL C7200353*

39 *http://en.wikiquote.org/wiki/Bill_Shankly*

40 *http://www.dailyrecord.co.uk/sport/2008/05/12/dundee-united-plan-to-sue-referee-over-rangers-match-blunders-86908-20415162/*

41 *Andrew Gravil v Richard Carroll and Redruth Rugby Football Club, Redruth Rugby Football Club [2008] EWCA Civ 689*

42 *For example, http://www.telegraph.co.uk/sport/football/international/2350844/New-trial-for-goal-line-technology.html*

43 *For example, where an incident is not seen by the officials during the game, the Football Association can analyse TV footage, photographic evidence, etc before deciding on whether to take disciplinary action against the player.*

44 *http://www.fifa.com/aboutfifa/federation/bodies/media/newsid=707751.html*

45 *http://uk.eurosport.yahoo.com/08032008/1/goal-line-technology-trials-scrapped.html*

46 *http://www.guardian.co.uk/football/2008/mar/11/1*

Whereabouts – Where do you stand?

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Introduction

Although some might consider the word "whereabouts" to be fairly dated with somewhat old-fashioned connotations, it is a term which is fast becoming common-place in the sporting world; from athletes, to journalists, to fans. It does, of course, refer to information that certain elite athletes are required to provide to either their international federation (IF) or national anti-doping organisation (NADO) in accordance with their sports' anti-doping rules for the purpose of facilitating out-of-competition testing without notice.

The new athlete whereabouts requirements introduced by the 2009 World Anti-Doping Code (Code) are likely to represent a fundamental change to the daily lives of elite international athletes in almost every sport. This article seeks to summarise the new rules and the rationale behind them, review just some of the many views expressed by athletes, federations and others in recent months and examine some legal challenges to the rules which are reportedly being mounted.

The new rules

So why did the World Anti-Doping Agency (WADA) change the rules? WADA has maintained that the Code was always intended to serve as a living document, evolving to meet needs.[1] In 2006, WADA initiated a consultation process for the purposes of reviewing and fine-tuning the provisions of the 2003 Code together with the associated International Standards (mandatory for all Code signatories and aimed at bringing harmonisation among anti-doping organisations (ADOs) in various areas: testing, laboratories, therapeutic use exemptions, the list of prohibited substances and methods, and protection of privacy and personal information), building on the experience gained by WADA and its stakeholders in the application of the Code over the previous three years.

The whereabouts requirements are contained in the new International Standard for Testing (IST). The process included four rounds of consultation and the publication of various drafts and re-drafts. According to WADA, more than 140 official submissions were received from athletes, ADOs and governments. The final version of the revised IST was approved on 10 May 2008 by WADA's Executive Committee and came into force on 1 January 2009, the same time as the revised Code.

According to WADA, a prevailing theme of the feedback received during the consultation process was the desire of stakeholders for greater harmonisation of rules for the provision of athlete whereabouts information and missed tests. Article 2.4 of the 2003 Code provided that the following was an anti-doping rule violation: "Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules". Furthermore, the 2003 IST contained no specific requirements relating to whereabouts.[2] Therefore, prior to this year, ADOs had substantial flexibility regarding: what information athletes needed to file; what constituted a missed test; how many filing failures/missed tests constituted an anti-doping violation (and in what period); and the sanctions that could be imposed. One consequence of this broad discretion was athletes from the same country but from different sports being subjected to different sanctions, which led to a perception of unfairness and a considerable amount of confusion, particularly among the public. Another problem arising from this lack of harmonisation was that it made it difficult for an IF to recognise a whereabouts failure (being a filing failure or a missed test) declared on an athlete by a NADO with testing authority over the same athlete (and vice versa). The consultation process therefore identified the need for WADA to develop a common set of mandatory requirements, applicable to all sports and countries.

Section 11 of the 2009 IST necessarily contains a substantial amount of detail on the new whereabouts regime including: the requirements for each ADO to establish a registered testing pool; exactly what information needs to filed by athletes, to which ADO, by what means and by when; what constitutes a filing failure/missed test; the sharing of information between IFs and NADOs; and their mutual recognition of whereabouts failures declared by one and other.

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However, there are two main aspects of the new rules which have caused the most headlines and debate among the sporting community.

Firstly there is the requirement for athletes included in a registered testing pool to notify the applicable ADO, in advance and on a quarterly basis, of where they will be for every day of the year. For each day, the athlete must provide: (i) the address of the place where he will be residing; and (ii) the name and address of each location where he will be training, competing, working or conducting any other regular activity (such as education) as well as the usual time-frames for such activities. However, perhaps the most important (and controversial) aspect of the new filing requirements is that the athlete must also include one specific 60-minute time slot and corresponding location between 6am and 11pm each day where he will be available for testing. Should an athlete fail to file the required information for a particular quarter, this will constitute a filing failure (unless he can show an absence of negligence on his part).[3] It is only if a doping control officer arrives at the location specified by an athlete as the place at which he will be available for testing during the 60-minute period, and the athlete is unavailable for testing at that location, that the athlete can have a missed test declared against his name (unless he can show an absence of negligence on his part).[4]

Secondly, there is the harmonisation of what constitutes a doping violation and the sanctions to be applied. Any combination of three missed tests and/or filing failures within a period of 18 months constitutes an anti-doping rule violation under article 2.4 of the 2009 Code, leading to the opening of disciplinary proceedings by the ADO with jurisdiction over the athlete. If the ADO upholds the violation, it must impose a ban of between 12 and 24 months, depending on the degree of fault of the athlete.[5] An additional consequence is that the hearing panel must disqualify the athlete's competitive results since the date of the third whereabouts failure, unless fairness otherwise requires.[6]

Practical concerns

In recent weeks, the media has portrayed the views of various high profile sportsmen, coaches and sports bodies on the new whereabouts regime. The majority of these views have been negative, with people bemoaning the added administrative burden imposed on athletes, together with the increased chances of falling foul of such stringent requirements and the potentially disasterous consequences which a resultant anti-doping violation could have on their careers. But to what extent are these complaints justified when you consider such factors as: the relatively small percentage of athletes in each sport to whom the rules apply; the ease with which such athletes are able to submit and alter their whereabouts information; the anti-doping rules of certain sports governing bodies prior to 1 January 2009; and (perhaps most importantly) the extent of the threat of drug-taking to sport and sporting integrity?

While advocating the maintenance of the status quo for drugs testing in football, the chief executive of the Professional Footballers' Association (PFA), Gordon Taylor, recently told the BBC, "We feel to invade the privacy of a player's home is a step too far" and made the point that "For most of the year, the whereabouts of players is always known – either at their training ground or matches".[7] These sentiments were echoed forcefully by Michel Platini, president of UEFA, who said that "I totally support the recommendation not to follow WADA's code. WADA can find footballers for 330 days out of the year. I think they have a right to be left alone for one month each summer".[8]

There are a number of grounds on which these views could be challenged. Football is a good example of a sport where the number of players affected by the new whereabouts regime would make up a very small percentage of the total number of individuals who compete in the sport on a full-time basis (because ADOs do not have the time or the money to test everyone, they focus their resources on those athletes at the top end of their respective sports). Although, at the time of writing, the FA's registered pool has not yet been finalised (in football, the new rules are expected to come into effect at the beginning of next season), reports suggest that it is expected to comprise of only 30 elite players based in this country. Some would argue that, although the new requirements will undeniably be a burden on those players to whom they will apply, it is a small trade-off for the huge financial rewards that these players receive as a result of the massive popularity of football in this country and it is therefore entirely reasonable for such players to be expected to take the lead in the fight against doping by complying with the new whereabouts requirements for the greater good of their sport.

Although footballers in this country are routinely subjected to drugs tests both after matches (in-competition) and during training (out-of-competition), until now the scope for them to be tested outside of their team-based activities (i.e. either at their homes or during the off-season) has been fairly limited[9]. There are those who cite the relatively small number of football

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players who have been caught using performance-enhancing substances, particularly when compared with other sports such as cycling, athletics and weightlifting, as an argument against the need for the new whereabouts system in football. Others would argue that this should not mean that footballers are treated differently to other athletes and that they should at least be held to the same standards as Britain's Olympians. After all, surely all elite athletes share similar traits, in which case footballers are just as likely to take short cuts as participants in other sports.

It is without doubt that adapting to the new rules will represent a greater challenge to footballers designated in a registered testing pool than it will for athletes in other sports that have had individual whereabouts systems in place for sometime. Whereas the filing and updating of whereabouts information is now familiar to Olympic athletes, it is something that will be completely new to most footballers. Currently, clubs are required by the FA to provide regular details of training schedules for their professional squads and youth teams to allow out-of-competition testing to be planned and conducted,[10] but players themselves are only required to file whereabouts information in certain limited circumstances[11]. However, this should be countered by the fact that the 2009 IST expressly provides that, for the sake of convenience and efficiency, an athlete in a team sport may delegate the making of his whereabouts filings to his team, not only in respect of periods of team activity but also in respect of periods where he is not with the team, provided that the team agrees. In such circumstances, it would obviously be necessary for the player to provide the information as to his individual whereabouts to the team in order to supplement the information that the team provides in relation to team activities.12 Although this will clearly be of great administrative help to footballers (and indeed players of other team sports), the players themselves will remain liable for whereabouts failures even if these occur due to the fault of the team.

However, not everyone in the football world has balked at the perceived intrusive nature of WADA's new whereabouts regime. A perhaps surprising source of support has been Rio Ferdinand; the Manchester United and England defender who was banned from playing for eight months after he failed to attend a doping test five years ago. Ferdinand has said that he is in favour of footballers being brought into line with the way that competitors in other sports are tested. During a recent interview, Ferdinand offered the following advice to young footballers: " My advice to young players would be that you have to deal with whatever rules are out there...make sure you are there to be tested and let people know where you're going to be. It's as simple as that".[13]

Objections to the new whereabouts rules have also been expressed within the international tennis community. Although a whereabouts regime has been in existence for several years, it has so far been confined to the final weeks of the tennis calendar. Now, of course, players nominated in a registered testing pool will be required to file whereabouts information for every day of the year. The International Tennis Federation's (ITF) registered testing pool for 2009 consists of the top 50 ranked men's and women's singles players, the top 10 doubles players and the top 15 in the wheelchair events. Given that the world's best tennis players have more influence on how their sport is run than in most other sports,[14] the recent comments made by three of the four best players in the men's game are of particular significance. Rafael Nadal, the world's number one tennis player, told the press "I think it [the new whereabouts rules] shows a lack of respect for privacy. I think it's a disgrace, particularly knowing what our sport is like". To put this in context, the professional tennis circuit is fairly unique in that the nomadic nature of a player's life makes it difficult to predict where he is going to be.[15] Throughout the year, professional tennis players compete in knock-out competitions around the globe on a weekly basis. When they get knocked-out of a tournament, they may move straight on to the next event, return home (or elsewhere) to train, or go on holiday, depending on a variety of factors such as the stage of the tournament at which they were eliminated, when/where their next tournament is and any injuries they may be carrying.

Andy Murray has also criticised the new rules in unequivocal terms, calling them "draconian" and complaining that they make it "almost impossible to live a normal life". The British number one also provided a colourful account of how he received a 7am visit from the testers at his home in the UK shortly after returning from this years' Australian Open. He felt that the visit was "ridiculous" on the basis that he had been tested just four days earlier, straight after his last match of the tournament. While most people would sympathise with Murray – such visits are likely to be fairly unpleasant for any individual, particularly if that individual is recovering from a long flight – his comments bring to light two important elements of the new whereabouts regime. The first, which is sometimes overlooked, is that out-of-competition testing of an athlete is not limited to the 60-minute time slots for which he has made himself available. Testing may be undertaken at any time or place,[16] notwithstanding that an athlete can only be

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liable for a missed test if an unsuccessful attempt is made to test him during a specified 60-minute time slot, at the specified location.[17]

The second point that arises from Murray's words is that, whereas the fact that he was tested just four days after undergoing an in-competition test seemed absurd to him, this is firmly in-line with WADA's rationale for implementing the new whereabouts requirements. If an athlete is following a carefully planned doping regime (which is likely to be the case when dealing with the calibre of athletes included in registered testing pools), he (or his coach or physician) will ensure that he ceases taking the performance enhancing substance(s) sufficiently in advance of competing so that, if he is tested in-competition, the prohibited substance(s) will not be detected. Therefore, the chances are that in-competition testing will only catch those who fall within one of two categories: (i) those who are not intentionally cheating (i.e. they inadvertently ingest a prohibited substance) and (ii) those who are intentionally cheating, but who fail to stop taking the prohibited substance(s) when they are supposed to (as mentioned above, such cases are likely to be fairly rare given that elite athletes who elect to cheat are likely to have sophisticated doping regimes). This explains the strong push by WADA for tougher out-of-competition testing. However, to be truly effective and so provide clean athletes and their respective sports with the greatest possible protection from cheating, the ADOs must have the ability to test athletes without notice, and this cannot be achieved unless the testers know the whereabouts of athletes at all times. As Stuart Miller, the ITF Anti-Doping Manager, put it, "There cannot be effective out-of-competition testing without player whereabouts, it is the cornerstone of effective control".[18]

However, there are some players who believe that the benefits of the new whereabouts rules in countering unfair competition in their sport outweigh the additional administrative burden placed on their shoulders. Former world number one, Roger Federer, recently acknowledged that the new regime was "tough" and "a significant change to what [the players] were used to before", but then went on to say that, if the trade-off was a clean sport, he was in agreement.[19]

With sports such as tennis and football, where the players have had little or no previous experience in submitting whereabouts information, the key would appear to lie in ingraining into the players the routine associated with filing and amending their whereabouts information so that it becomes second-nature to them (similar to the way that, for example, tennis players have to change their flights and book in and out of hotels depending on how far they progress in a tournament). WADA has certainly made great efforts in affording athletes ample opportunity to submit and amend their information quickly and easily. The preferred method for entering whereabouts information is WADA's on-line whereabouts management system (Anti-Doping Administration and Management System, or 'ADAMS') which gives athletes the opportunity to enter and update their whereabouts information wherever they are in the world in a secure and convenient manner. Athletes can also update their whereabouts information by sending an SMS to ADAMS.[20] Last minute updates only need to be submitted if the location or time of an athlete's designated 60-minute time slot is changing and such updates can be made up to one minute before the specified hour commences. Considering the prevalence of mobile phones, laptop computers, smart phones and PDAs in today's society, ADOs would argue that athletes are being given every opportunity to ensure that the testers are kept informed of their whereabouts, thereby limiting the risk of incurring missed tests. It should be noted that, although an athlete will be presumed to have been negligent if an ADO declares a whereabouts failure against him, the athlete can rebut this presumption by establishing that no negligent behaviour on his part caused or contributed to the failure.[21] However, when you consider the various means by which athletes can update their whereabouts information, together with the fact that such updates can be made as late as one minute before the designated 60-minute time slot, this would seem to be a difficult hurdle to overcome; the circumstances would have to be exceptional. The president of the ITF, Francesco Ricci Bitti (also a member of WADA's executive committee), summed up the position as follows: "While appreciating the difficulties of the implementation of a whereabouts programme in tennis, the goal for all of us is a clean sport. Out-of-competition testing forms a vital part of the World Anti-Doping Code".[22] However, as can be seen above, more than a few players would no doubt disagree with him.

In addition to the practical and administrative concerns of athletes and sports bodies regarding the filing requirements, fears have also been expressed about the consequences of falling foul of them. Some athletes are worried about the ease with which they could amass three whereabouts failures within a relatively short space of time, the subsequent ban that would be imposed and, perhaps most significantly, the likelihood that their reputation will be irreversibly tarnished as a result (regardless of the fact that no drugs test has been failed). A case in point is the mixed reaction from the public and the press to Christine Ohuruogu's gold

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medals in the 400m at both the 2007 World Championships in Osaka and the 2008 Olympics in Beijing, after she had served a year-long ban from athletics which was imposed by the IAAF in 2006 after she had missed three out-of-competition tests. At that time, the British Olympic Association also handed Ohuruogu a lifetime ban from competing at future Olympic Games for Great Britain. However, that ban was successfully overturned on appeal, hence Ohuruogu's restored eligibility for the Beijing Olympics. As is evident from the Ohuruogu case, whereabouts requirements have been a feature of elite athletics for a number of years already. Prior to 1 January 2009, British athletes within the national registered testing pool had to submit their whereabouts information for five days a week. Athletes were able to pick any hour between 5am and 11pm, and they were only required to be in the stated place for a portion of that hour. The new IST has, in addition to extending the system to seven days a week, moved the earliest available time-slot back to 6am and requires athletes to be available for the full stated hour.

Earlier this month, Pete Gardner, chief executive of the British Athletes Commission, revealed that, "There are some athletes who are so worried about missing tests inadvertently that they have said if they get to two missed tests they would seriously consider retiring before missing a third...They have seen what has happened to people who have fallen foul of the three missed-test rule – and how the public have reacted – and, as clean athletes, they don't want to tarnish their records".[23] Therefore it seems that even individuals who are used to dealing with a relatively stringent whereabouts regime consider that the new system represents a step too far. However, this attitude can be contrasted with that of US tennis player Mike Bryan who, together with his brother Bob, occupies the world number one doubles ranking. The American had two strikes to his name within just five weeks of the start of the new regime; reportedly caused by a combination of forgetfulness and a flat tyre. Notwithstanding that one more filing failure or missed test in the next 15 months could lead to him being banned from the sport for between 12 and 24 months, Bryan merely commented, "I think we have just got to get used to the strictness".[24]

WADA has responded to the various calls to revisit the new rules by reiterating that they were approved only after a lengthly consultation during which all stakeholders were urged to provide their feedback.[25] As WADA director general, David Howman, plainly put it:

> ***"This consultation took 18 months to two years before it was settled, so people had plenty of time to think of a better idea but we didn't hear one".***[26]

Legal Considerations

So far this article has examined the new whereabouts rules together with some of the practical and administrative concerns and objections that have been raised in opposition to them. However, there have been reports in recent weeks of potential legal challenges being mounted in an attempt to force WADA to back-track on the new requirements. Each of these challenges appear to be based on one or more of the following three grounds: Article 8 of the European Convention on Human Rights (ECHR); data protection laws; and the EU Working Time Directive.[27]

Article 8 ECHR

A group of 65 Belgian athletes, including footballers, volleyball players and cyclists, have asked a Belgian court to rule on whether WADA's new whereabouts rules are in breach of Article 8 of the ECHR, which concerns an individual's right to privacy. The case has been brought against the Flemish regional government which is the ADO for the Dutch speaking region of Belgium. Kristof de Saedeleer, the Brussels-based lawyer who is acting on behalf of the 65 athletes, has likened the new system "to putting a whole town in prison to catch one criminal". He disputes the need for athletes to notify their whereabouts for the next three months and joined Andy Murray in calling the measures "draconian".[28] Article 8 states:

> ***"1. Everyone has the right to respect for his private and family life, his home and his correspondence.***
>
> ***2. There shall be no interference by a public authority with exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."***

Even if the athletes successfully establish that the new whereabouts rules do interfere with their Article 8 rights, such interference will not constitute a breach of Article 8(1) if it can be justified under Article 8(2). Therefore, if interference with Article 8 was to be established, the Flemish ADO would need to show that the rules: (i) are in accordance with Belgian law; (ii) are necessary in a democratic society; and (iii) fall within one of the express exemptions set out in Article 8(2), namely, national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, or (as appears most appropriate in these circumstances) the protection of the rights and freedoms of others. Furthermore, it must be shown that the means

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employed in the interference are proportionate to the legitimate aim pursued. The Flemish ADO, together with WADA, will therefore be hoping that, if the claimants succeed in establishing that the new rules infringe Article 8, the court will be satisfied that the interference is justified in the interests of protecting athletes and sport itself from the threat of doping and that the court considers the new rules to be a proportionate means of pursuing this legitimate aim. One aspect of the whereabouts regime which should assist the Flemish ADO on the issue of proportionality is the fact that the rules only apply to a relatively small number of athletes.

Although doubts have been expressed as to the likelihood of the athletes winning this case,[29] a successful outcome is likely to encourage similar challenges in other jurisdictions and seriously undermine WADA's work. Andy Parkinson, UK Sport's acting head of drug-free sport, admitted that any threat to the new whereabouts system was concerning. He said that it would mean having "to go right back to the start and reassess how we test athletes" and added that, "...if we can't get access to athletes, and we don't know where they are, it would make our job almost impossible."[30] A ruling on the challenge by the Belgian athletes is expected in late 2009.

Data Protection

The Code requires athletes to furnish a large amount of personal information to ADOs, including sensitive medical information, information derived from analysing specimens, racial or ethnic origins and, of course, details of athletes' whereabouts. These requirements create a clear tension between, on the one hand, the increasing efforts of ADOs to combat evermore sophisticated doping techniques by implementing more extensive and unpredictable testing and, on the other hand, the general increase in awareness of data protection issues combined with the endeavours of national and regional data protection regulators to safeguard the privacy of individuals. In an attempt to square these two competing claims, WADA conducted a consultation process beginning in late 2007 which included key stakeholders, legal experts, governments and privacy regulators from several countries.

The outcome was the creation of the International Standard for the Protection of Privacy and Personal Information which, together with the new Code, came into force on 1 January 2009. According to WADA, "The purpose of the International Standard for the Protection of Privacy and Personal Information (ISPPPI) is to ensure that all relevant parties involved in anti-doping in sport adhere to a set of minimum privacy protections when collecting and using athlete personal information, such as information relating to whereabouts, doping controls and therapeutic use exemptions".[31] However, during the consultation process there was resistance to the draft ISPPPI from European data privacy regulators who felt that its provisions were not sufficiently strict. The problem is that the ISPPPI is ostensibly binding on ADOs in countries throughout the world and, while certain countries have fairly stringent and developed data protection laws (e.g. European countries which are covered by EU directives on data privacy), others have few (if any) data protection laws and therefore limited practical experience in applying privacy standards.[32] Some believed that the ISPPPI should have been more flexible; allowing countries in the latter category greater room to manoeuvre. Others, such as the European data privacy regulators, asserted that the standard should be no less rigorous than the EU directives. Therefore, WADA had the unenviable task of devising a standard that achieved a sensible balance between these two conflicting views.

Such was the extent of the European regulators' concern that the Article 29 Working Party – the independent EU advisory body on data protection and privacy – conducted a review of the third draft of the ISPPPI and published an opinion which assessed its provisions against the European data protection rules – the most restrictive data protection laws in the world.[33] Following the publication of the opinion, a group of European governments reportedly threatened not to sign up to the new Code on the basis that the ISPPPI was incompatible with European data protection laws and provided insufficient protection to athletes' data.[34] However, as WADA has been at pains to emphasise, the ISPPPI is intended to be a minimum, common set of rules to which ADOs must conform when collecting and handling athletes' personal information pursuant to the Code.[35] Indeed, the ISPPPI expressly acknowledges that "Anti-Doping Organisations may be subject to data protection and privacy laws and regulations that impose requirements that exceed those arising under this International Standard. In such circumstances, Anti-Doping Organisations must ensure that their Processing of Personal Information complies with all such data protection and privacy laws and regulations."[36]

However, this did not prevent EU Athletes – a group representing elite European athletes that submitted a complaint to the European Commission over the new whereabouts rules in December 2008 – from throwing its hat into the ring by saying that, like the European governments, it is also concerned about WADA's handling of athletes' personal data. Yves Kummer, the president of EU Athletes, also expressed his concern

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that the new whereabouts rules interfered with athletes' rights which were protected not only by human rights laws (see above) but also by European employment legislation[37].

Employment Legislation

It has recently been reported that FIFPro, the Dutch-based international umbrella group of football players' unions, is mounting a legal challenge to the new whereabouts rules on the basis of the EU Working Time Directive[38]. The directive provides that Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks[39] and FIFPro questions whether having to make oneself available for a drugs test 365 days a year can be consistent with this entitlement. FIFPro is also asking its 42 member associations to write to their respective data protection regulators, complaining about the new Code.

Conclusion

In summary, it is abundantly clear that a number of elite athletes are unhappy with WADA's new whereabouts regime. Their objections stem from their view that the new rules are overly burdensome from an administrative standpoint and unduly intrusive on their private lives. In certain sports, there is a feeling that the new rules are disproportionate to the threat of doping in those sports. Some potential legal challenges that have come to light in recent months have also been touched on. However, as all of these challenges are at an early stage, it is difficult to predict their respective chances of success. WADA, on the other hand, would argue that no notice out-of-competition testing is one of the most (if not the most) effective means of deterrence and detection of doping and is imperative to strengthening the confidence of both athletes and the public in doping-free sport.[40] Such testing becomes almost impossible unless ADOs know where athletes are at any given time. So the question is, which is most important – the preservation of the privacy of the elite athletes to whom the new rules apply, or the global battle against doping in sport? As this article has shown, this depends on who you ask, the sport(s) with which they are associated; their individual circumstances and whose interests they represent.

What seems to be clear is that, should the objectors to the new rules succeed in forcing WADA to back-track (whether on the basis of legal or other grounds), it could undermine WADA and constitute a serious set-back to its fight against doping in sport. The author's view is that, although there is no doubt that the new rules are onerous for athletes (particularly those who have had little or no previous experience of whereabouts requirements), elite national and international athletes do have a responsibility – to their sport and to their fellow competitors – to show that their sport is a clean one. Complying with whereabouts requirements should be seen as a trade-off for what these athletes receive from their sports in return. It is hoped that those athletes who are not familiar with whereabouts, and are designated within the registered testing pools of their respective ADOs, will quickly become accustomed to the routine of providing and updating their information. According to Stuart Miller, the affected tennis players have made the transition fairly smoothly: "...of those 125 players in the pool there have been relatively few issues – by and large the compliance has been excellent...The new rules on player whereabouts were only brought in on January 1, so I'm hoping that once there is an increased level of familiarity with them, things will go even smoother".[41] BASL

1 See article 23.6 of the 2009 Code.
2 Compare this with the detail contained in section 11 of the 2009 IST.
3 Section 11.3.5 of the 2009 IST.
4 Section 11.4.3 of the 2009 IST.
5 Article 10.4.3 of the 2003 Code provided for a broader range of between three months and two years.
6 Article 10.8 of the 2009 Code.
7 "Home drugs test idea upsets PFA", www.bbc.co.uk, 11 November 2008.
8 "Platini and Murray join storm of protest over whereabouts rules", Sportcal, 6 February 2009.
9 An important exception is contained in section 5(a) of the FA's Doping Control Regulations & Procedural Guidelines 2009. Section 5(a) provides that any player who is not available for testing at the squad time and location stated in the whereabouts information submitted by his club must, in advance of such absence, provide the FA with details of an alternative venue at which he will be available for testing on the same day as his absence, including a stipulated 60-minute time slot between 6am and 11pm during which such testing may take place. Any player who either fails to provide the FA with such information or fails to be present and available for the whole of the specified 60-minute time slot will be deemed to have missed a test.
10 See the 'Drug Policies' section of the FA's website, www.thefa.com.
11 See n 9. Additionally, section 33 of the FA's Doping Control Regulations & Procedural Guidelines 2009 provides that a player who is serving a doping-related suspension must, at the request of the FA, provide details of his whereabouts so that he may be tested during the period of suspension.
12 See section 11.5.4 of the 2009 IST together with the explanatory note.
13 S. Nakrani, "Ferdinand supports plan for stricter drug testing", The Guardian, 14 November 2008.
14 The ATP has two player representatives on its board of directors. It also has an 11-man player council.
15 K. Eason, "Andy Murray criticises new anti-doping rules", The Times, 6 February 2009.
16 See note to section 11.4.1 of the 2009 IST.
17 Section 11.4.3 of the 2009 IST.
18 N. Harman "Roger Federer defends strict new doping rules", The Times, 7 February 2009.
19 Ibid.
20 UK Sport also permits athletes to provide last minute updates by telephone and by email. See www.100percentme.co.uk.
21 See sections 11.3.5.d. and 11.4.3.e. of the 2009 IST.
22 N. Harman, "Roger Federer defends strict new doping rules", The Times, 7 February 2009.
23 M. Slater, "Anger grows over anti-doping code", www.bbc.co.uk, 4 February 2009.
24 K. Eason "Andy Murray criticises new anti-doping rules", The Times, 6 February 2009.
25 "WADA Rejects Tennis' Claim that Whereabouts Rule is Unworkable", Sportcal, 18 June 2008.
26 "WADA hits back in doping rule row", www.bbc.co.uk, 6 February 2009.
27 EC Directive 2003/88.
28 M. Slater, "Legal threat to anti-doping code", www.bbc.co.uk, 22 January 2009.
29 C. Murray, "Belgian Legal Challenge 'Won't Undermine Whereabouts Rules'", Sportcal, 23 January 2009.
30 M. Slater, "Legal threat to anti-doping code", www.bbc.co.uk, 22 January 2009.
31 See www.wada-ama.org.
32 D. Cooper, "Athletic Privacy", The Lawyer, 14 August 2008.
33 D. Cooper and M. Young, "The dope debate", Legal Week, 2 October 2008.
34 C. Murray, "Belgian Legal Challenge 'Won't Undermine Whereabouts Rules'", Sportcal, 23 January 2009.
35 Section 1.0 of the ISPPPI.
36 Section 4.2 of the ISPPPI.
37 "Athletes Group Complains to Commission over New Doping Rules", Sportcal, 12 December 2008.
38 EC Directive 2003/88.
39 Article 7(1), 2003/88/EC.
40 See the comments of WADA spokesman Frederic Donze in "Whereabouts doping rule to be challenged in court in Belgium", The Telegraph, 22 January 2009.
41 N. Harman, "The Net Post: not getting caught with their trousers down", The Times, 9 February 2009.

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Sports Law Foreign Update

The Foreign Update of the Sport and Law Journal monitors developments in the field of sports law abroad, in accordance with the following structure:

1. General

Conferences, meetings, lectures, courses, etc.

EU Sport Forum (Biarritz 27/27 November 2008)

In late November 2008, the European Commission organised the first EU Sport Forum since the adoption of the White Paper on Sport which has been featured in previous issues of this Journal *([2007] 2 Sport and the Law Journal p. 76)*. The Forum took place in close association with the informal meeting of EU sports ministers under the French Presidency of the EU (which will be returned to below under Item 9, below p. 000). This year's event was organised along several themes linked to the implementation of the White paper, of which two sessions took the form of high-level panel debates.

The choice of topics (the financing of sport, the specificity of sport, social dialogue in sport and education and training) corresponded with the political agenda as well as with the preferences expressed by European stakeholders in sport, within the EU-structured dialogue on sport. An active exchange of views with representatives from a variety of sporting and sports-related organisations during these two days contributed towards ensuring the success of the event and has assisted the Commission in identifying future priorities for EU-level debates on sport (www.europa.eu of 30/11/2009).

Obituaries

José Torres

This former light0heavyweight champion, who has died at the age of 72, enjoyed a post-competition life as a reporter, analyst and administrator. He was the first writer to chart the emergence of the teenage Mike Tyson in the mid-1980s. They had shared the same mentor in the shape of legendary New York trainer Gus D'Amato. However, Tyson, who initially regarded Mr. Torres as a trusted friend and confidant, fell out with the latter over his uninhibited, and unauthorised, biography Fine and Fear. In it, Torres asked the former heavyweight champion what he considered to be the finest punch of his career, to which it was reported the latter saw fit to reply that it was the one which he administered to his then girlfriend, the actress Robin Givens. A native of Puerto Rico, Torres tirelessly championed the cause of his Hispanic community in New York. He also served as Chairman of the New York State Boxing Commission in the 1980s, as well as being a presiding supervisor for the World Boxing Organisation *(The Daily Telegraph of 12/2/2009, p. 31)*.

Sir Hugh Laddie

The former High Court judge, who had died aged 62, was a specialist in intellectual property law. Never the most conventional of judicial figures, he caused considerable controversy in the field of EU law when presiding over the dispute between English Premiership club Arsenal and a street trader over the use of the club's logo on his merchandise. It will be recalled from a previous issue of this Journal *([2003] 3 Sport and the Law Journal p. 83)* that the North London side had sued the trader in question, Mr. Reed for having infringed its intellectual property rights under the Trade Marks Act 1994. In April 2001, Laddie J had ruled against the club, ruling that Mr. Reed's use of the signs and logos registered as trade marks did constitute use indicating the origin of goods – i.e. did not amount to "trade mark use" – on the grounds that the general public merely interpreted the signs and logos used by him as badges of support, loyalty and affection. However, Arsenal FC then sought refuge in EU law, which compelled Laddie to refer the matter to the European Court of Justice (ECJ) for a preliminary ruling on the interpretation of the EU Trade Mark Directive. The ECJ found for the club *(Case C-206/01, Arsenal Football Club plc v. Reed)*, ruling that the use which Mr. Reed had made of the trade mark in question was such as to endanger its guarantee of origin, making it immaterial that in the context of that use the sign in question was perceived as a badge of support, loyalty or affiliation to the trade mark holder.

It was therefore expected that, in accordance with the relevant EU law, the High Court would have applied this ruling in the underlying case. Not so Laddie J, who decided that the European Court had "exceeded its jurisdiction" by making findings of fact which reversed the national court on those findings, and that therefore, contrary to the ECJ's view, the action should be awarded to the street trader. However, in May 2003 the Court of Appeal overturned this ruling. It held that the ECJ had not, in fact, disregarded the trial judge's findings of fact, and that he should have followed its preliminary ruling, thus awarding the action to the North London club *(Sport and the Law Journal loc. cit.)*.

Lawyers in sport

[None]

1. General

Digest of other sports law journals

Latest issues of the International Sports Law Review (ISLR)

The main article featured in Issue 4/2008, by A. Miller, is entitled "London 2012: Meeting the Challenge of Brand protection". In it, the author argues that the London (Olympics) 2012 brand is a key element in delivering successful Olympic and "Paralympic" Games. The London Organising Committee of these Games seeks to encourage public support and inclusiveness by educating rather than by litigating. However, it is prepared to use its special statutory rights to maintain the value of the brand against infringement and ambush. The Comment section consists of a contribution by A. Heath-Saunders, entitled "An End to the Country-by-Country Selling of TV Rights within the European Union?". Following an action brought by the English Football Premier League regarding the use of imported television decoder cards, the High Court has referred to the European Court of Justice (ECJ) several questions, the answers to which could have serious consequences for the selling of television rights to sporting events on a country-by-country basis. The author summarises the issues raised and the questions referred.

In the Opinion section, Kris Lines ("Six Degrees of Sport Participation: Are the Olympics the Common denominator for All Sports?") examines various attempts to define the term "sport" made by the UK Sports Council and the European White Paper on Sport (see below). He goes on to suggest that, by themselves, all these definitions are inadequate, mainly because of the lack of detail and the inability to identify which sporting activities are included and which are not. In conclusion, the author suggests that this problem can be overcome by creating a central "List of Sporting Activities", using the International Olympic Committee as the apex of the model. The issue further contains a number of sports law reports, including one which has international repercussions, to wit Dwain Chambers v. British Olympic Association.

Issue 1/2009 features as its principal article a paper by the distinguished sports lawyer Michael Beloff QC, entitled "The Court of Arbitration for Sport (CAS) and the Beijing Olympics". This focuses on the outcome of the opening, by the CAS, of an office in Beijing in order to resolve all legal disputes which might arise during last year's Olympics.

Sport and international relations

US to send badminton team to Iran

Relations between the US and Iran have been fraught in recent years, particularly after the latter was included in the "Axis of Evil" under the US presidency of George W. Bush. In early February 2009, it was learned that the new US administration under President Barack Obama was to despatch a women's badminton team to Iran. It was hoped that this would ease relations by engaging with the Iranian people through educational and cultural exchanges. The announcement of the trip came amid a wide-ranging review of US policy towards the Islamic Republic – even though it must be conceded that the previous US administration had also made efforts to reach out to Iran by unofficial means *(Associated Press, www.findlaw.com of 2/2/2009).*

Angola hopes that football can improve international image and tourism

Over the past few decades, the West African nation of Angola has experienced the trauma of civil war which has destroyed most of its infrastructure. This has naturally had an adverse effect on its international image and therefore also on its opportunities for tourism, even though the country is blessed with a warm – rather than excessively hot – climate and inviting sandy beaches. However, the signs are that Angola is starting to recover from this period of strife. Since the civil war ended some years ago, the country has become one of the world's fastest-growing economies, buttressed by record oil prices – Angola rivals Nigeria as sub-Saharan Africa's largest oil producer – and billions of dollars of foreign investment aimed at rebuilding roads and bridges, as well as improving communications.

The Angolan authorities are now seeking to erase completely its international image as a war-torn region by announcing a £700 million makeover in preparation for hosting the 2010 African Nations Cup. The largest investments will include four new stadiums, in Benguela, Lubango, Cabinda and the capital Luanda, at a cost of some £420 million. They are to be constructed by China's Shanghai Urban Construction Group. In addition, the Angolan authorities are investing £280 million in the rebuilding of old airport, and new hotels are being constructed to accommodate some of the thousands of spectators expected during this competition, which is to take place next January *(The Guardian of 3/2/2009, p. 12).*

1. General

Palestinian troubles have sporting implications

The Middle East is another troubled region which has been the scene of much bloodshed for the past half-century, the most recent expression of which has been the bombing of the Palestinian Gaza strip. Several prominent people have publicly expressed their sympathy with the people of that embattled area. One of these was the Sevilla striker Frédéric Kanouté, who lifted his shirt over his head after scoring in a Copa del Rey match to display a black T-shirt bearing the word "Palestine" in several languages *(The Guardian of 9/1/2009, p. S2).*

Initially this gesture was met with a yellow card from the referee. However, the Spanish Competition Committee subsequently fined the striker the sum of €3,000 over this incident. Mr. Kanouté pronounced himself calm with his conscience over this development, in the belief that he did what he had to do. He did, however, receive thanks and praise from various quarters for this gesture, not only from fans but also from the Palestine embassy in Spain *(www.goal.com/en).*

It was also to be expected that the teams representing Israel on the sporting field would equally be the target of protests at the events in Gaza. This happened to an Israeli basketball team in Turkey, who had to flee to the locker room as hundreds of fist-pumping and chanting local fans expressed their opposition to the violence in Gaza. Around 1,500 police officers failed to evacuate the Ataturk arena in the capital Ankara, causing the authorities to postpone the European Cup fixture between Bnei Hasharon of Israel and Turk Telecom. During the fracas, fans had chanted "God is Great" and "Killer Israel". At least one spectator hurled his shoe at Israeli players, but police used riot shields to protect them as they left the court. The Turkish players also headed for the locker room. Earlier, a pro-Islamic group had set an Israeli flag on fire outside the arena *(Associated Press, www.findlaw.com of 6/1/2009).*

The consequences of the Palestine troubles even touched the relatively un-political reaches of the English Football Conference (minor league). In mid-December 2008, it was reported that Imraan Ladak, the chairman of Conference side Kettering Town announced that he was to return a business award given to him by Lloyds TSB after the bank terminated the banking facilities of the club's shirt sponsors, Interpal, a charitable organisation which distributes aid in the Palestinian territories. They were informed that they must find alternative banking after Lloyds reportedly instructed the Islamic Bank of Britain (IBB) to close the charity's account. The charity was given no explanation for this move, although it is believed that its back ground – being under investigation by the UK Charity Commission for "indirect" links to the Palestinian militant organisation Hamas – is at the root of the affair. Mr. Ladak explained his decision to return the award in the following terms:

> ***"Lloyds TSB's plans can only result in escalating the horrific suffering of innocent children, supported by those with racially motivated agendas. I no longer trust that Lloyds TSB follow the equal opportunities and anti-racist principles the Asian Jewel Awards are based upon"*** *(The Daily Telegraph of 16/12/2008, p. S10).*

It should be added that the London-based organisation had already been investigated by the UK Charity Commission in 1996 and 2003 over allegations of supporting Hamas, and that neither investigation found any evidence to support the allegation. However, Lloyds TSB denied that they had ordered the IBB to close the charity's account, stating that it would never direct nor consider it appropriate to "direct another institution" on the way in which it should deal with its own customers *(Ibid).*

(For the security implications of the Gaza crisis, see below p. 000).

Iran protest at "insulting" wrestling film

As far as its director, cast and seasoned critics are concerned, it is a tale of sporting redemption reminiscent of the Rocky Balboa character played by Sylvester Stallone, to wit, an ageing wrestler down on his luck staging a most improbable comeback for one last stirring victory. However, this was definitely not the view taken by Iran's notoriously susceptible media, who perceived it as the latest in a long line of alleged insults and anti-Iranian prejudice suffered at the hands of Hollywood.

The new target in the Islamic republic's long-standing grievance about its negative portrayal in popular western cinema is The Wrestler, a film directed by Darren Aronofsky and starring Mickey Rourke, which was released in December 2008. Iranian newspapers and websites have alerted readers to the "anti-Iranian film" by highlighting a scene in which Rourke's character, Randy "the Ram" Robinson, violently breaks a pole bearing an Iranian flag across his knee, after his opponent attempts to use it in order to lock him into a stranglehold.

Maybe in order not to offend the country's clerical rulers, no mention has been made of the screen name of Rourke's antagonist, the Ayatollah, played by Ernest Miller. However, the Miller character's wrestling attire, a

1. General

skimpy leotard in the pattern of an Iranian flag with the alef character – representing the first letter of the word Allah – imprinted front and back on his loins, has been condemned by Borna News, a state-run website. The pole-breaking scene arises against the explicitly nationalistic backdrop of an animated crowd chanting, "USA, USA". It is intended to represent the final triumph for Rourke's character, who comes out of retirement following a heart attack for one last confrontation with the Ayatollah, a rival from his wrestling heyday (The Guardian of 13/12/2008, p. 23).

While there is virtually no chance of The Wrestler being given official screening permission in Iran, many Iranians have become familiar with it through promotional trailers shown on broadcaster, Voice of America's Persian-language satellite television channel. The political undercurrents were initially unnoticed by western reviewers, some of whom have hailed the production – which won the golden lion award at this year's Venice film festival – as marking a return to form for Rourke, who is also seen striking up a love affair with a stripper. However, Farda, a fundamentalist website, said it contained anti-Iranian sentiments similar to those allegedly exhibited in the film, The Stoning of Soraya M, released this year about a woman stoned to death under Iran's sharia legal code, after being convicted of adultery.

Several months ago, President Mahmoud Ahmadinejad's government accused Hollywood of "psychological warfare" over the depiction of Iranians in 300, a commercially successful film distributed by Warner Brothers about the battle between Greeks and Persians, at Thermopylae in 480BC. Iran's representative to the United Nations Educational, Scientific and Cultural Organisation, filed a complaint accusing the film of racial stereotyping. Other Hollywood productions to have provoked outrage include the 2004 film, Alexander, directed by Oliver Stone, which was slammed for its sympathetic depiction of Alexander the Great, a figure reviled by many Iranians for the destruction of Persepolis, the seat of Persian imperial greatness, after his defeat of Emperor Darius III in 330 BC *(Ibid)*.

Other issues

[None]

2. Criminal Law

Corruption in sport

Where does sponsoring end and corruption begin? German court decision and commentary

As a token of his wishes for a joyful Yuletide, Professor Claasen, who chaired the Board of Energie Baden-Württemberg AG (EnBW), a leading supplier of electricity, had provided the Prime Minister, as well as four other Ministers, of the Baden-Württemberg state, with greeting cards, to which were attached tokens for tickets to the 2006 Football World Cup, which was staged in Germany. EnBW was the main sponsor of the tournament, having pledged the sum of €25.6 million, as well as being the only sponsor from the Baden-Württemberg state. The officials in question having accepted these gratuities, they were indicted by the criminal authorities under Section 331 of the German Criminal Code for unwarranted acceptance of benefits (Vorteilsannahme). This case was decided at first instance and on appeal, eventually landing before the Federal Supreme Court (Bundesgerichtshof – BGH). The latter confirmed the decisions reached at the previous instances – i.e. acquittal for the ministers in question *(Case 1 StR 260/08, of 14/10/2008, [2008] Neue Juristische Wochenschrift p. 3580)*.

The author Gerson Trüg makes a trenchant criticism of this decision. He challenges it mainly because it fails to recognise the distinction between sponsoring and unlawful agreements concluded with public officials. The main reason for this is that the officials in question did not accept the tickets offered as part of their representational function, in the absence of a concrete relationship between the office assumed by the officials and the event to which the tickets gave access. He proposes that more attention will need to be paid to the nature of this relationship in the future *([2009] 4 Neue Juristische Wochenschrift p. 196)*.

First steps taken to tackle sporting corruption on a global scale

In mid-December 2008, it was announced that the world's foremost sporting authorities had made the first moves towards the establishment of a global body aimed at combating sports betting corruption, which they have identified as a greater threat to sporting integrity than doping. So serious is the concern about the corruption caused by match-fixing and gambling in sport that the Sports Rights Owners Coalition (SROC), which includes the most prominent representatives of football, rugby and cricket, met in Brussels in order to issue a report to the European Union (EU) aimed at protecting the future of sport.

Central to this plan is a worldwide anti-corruption agency which will be entitled to use state powers of investigation, compel bookmakers to observe strict licensing rules, and ultimately to have the power to exclude nations which fail to comply with the rules from tournaments such as the World Cup. In the words of one advisor:

> ***"The meeting in Brussels saw the international sports community unite to urge politicians to apply the same focus to tackling betting corruption as they have to doping. Just as the fight against doping turned the corner when every country's government signed up to take action, a similar approach is needed with sports betting. This means that an approach similar to that taken by the World Anti-Doping Agency is needed. Match-fixing is worse than doping because it is cheating to lose, rather than cheating to win"*** *(The Sunday Telegraph of 7/12/2008, p. S1)*.

What has particularly concentrated the minds of those involved in the fight against corruption is the manner in which the internet has enabled access to foreign bookmakers who do not come within national jurisdiction. Thus, for example, the English Football Association was recently compelled to discontinue their investigation into alleged match-fixing in a Football league game played in early October, when they failed to obtain crucial information from any Asian bookmakers on which extraordinary betting patterns had been observed *(Ibid)*. This is obviously a problem which this future body will need to tackle as a matter of urgency.

More legal consequences of Italian football corruption scandal

One of the more unsavoury episodes in the long and colourful history of Italian football has undoubtedly been the corrupt match-fixing practices engaged in by the representatives of a number of leading clubs, and which were laid bare during the prolonged investigation by the Italian public authorities in the course of 2006. It was reported that oOne of the main protagonists of this affair was undoubtedly Luciano Moggi, the former Chief Executive of Turin side Juventus. It will be recalled from a previous issue of this Journal *([2006] 2 Sport and the Law Journal p. 34)* that Mr. Moggi was banned from football for five years by the Italian sporting courts. He subsequently also received an 18-month suspended sentence for unlawful activity involving the now-defunct GEA player agency, which was operated by his son.

2. Criminal Law

It has now emerged that more legal tribulations await the former Juventus official. In the first instance, it was reported that he is currently under trial with 23 other defendants on charges which include sporting fraud and criminal association. Then, in February 2009, he was ordered to stand trial for allegedly defaming arch-rivals Internazionale Milan for an interview which he gave to leading Italian newspaper La Repubblica in July 2006, at the height of the scandal. In this interview, Mr. Moggi listed several cases where he considered that Internazionale should be held accountable on the same level as Juventus was – from an alleged passport scandal involving player Alvaro recoba to an elleged meeting between former Inter president Giacinto Facchetti and referee/selector Paolo Bergamo. Moggi's lawyer, Marcello Melandri, pronounced himself "surprised" at this development, on the basis that his client had been cleared in relation to a similar interview with the newspaper Libero *(Associated Press, www.findlaw.com of 24/2/2009)*. The outcome of this case was not yet known at the time of writing.

Cricket corruption scandal – an update

It is heartening to note that the number of cases in which allegations of match-fixing and other corrupt activity have been made at the top level of this sport has dwindled considerably – undoubtedly as a result of the various stringent precautions taken and enforced by the International Cricket Council (ICC), the sport's world governing body, and the activities of its Anti-Corruption Unit (ACU). However, some of the scandals unearthed by the investigations conducted over the past decade into this matter continue to produce certain consequences.

Thus it will be recalled from the previous issue of this Journal *([2008] 1 Sport and the Law Journal p. 49)* that some eyebrows were raised in official circles when the news broke that former Pakistan Test bowler Mushtaq Ahmed had been appointed spin bowling coach to the national England team. The main reason for this was that Mr. Ahmed had been featured in the momentous Qayyum Report into match-fixing in 2000, which concluded that he had brought the name of the Pakistan team into disrepute by his association with various gamblers. He was fined the sum of £3,700 and censured. This caused the ICC to raise objections to Mushtaq's appointment, and to demand that the latter be subjected to certain conditions *(The Sunday Telegraph of 14/12/2008, p. S7)*.

In the event, agreement was reached between the England and Wales Cricket Board (ECB) and the ICC as regards the nature of these conditions. The ECB will ensure that Mushtaq abides by the ICC Code of Conduct and attends a refresher course organised by the ACU. The body also reserved the right to study his mobile telephone bills. In the meantime, the former Pakistan bowler insists that he had never associated with gamblers – although he has stopped short of denying that he had been involved in match-fixing when asked directly *(Daily Mail of 24/1/2009, p. 106)*.

Tennis corruption scandal – an update

There appears to be a certain parallelism between cricket and tennis in this regard – the scandal erupts, measures are taken by the international governing body in co-operation with its national counterparts, and the number of allegations diminishes accordingly. This does not guarantee, however, that no further manifestations of malpractice will recur.

Thus the issue of match-fixing in tennis appeared to resurface in early February 2009, when it was learned that Betfair, the on-line betting agency, had mounted an investigation into a first-round tie at the ATP Tour event in Zagreb, Croatia. The company waited 24 hours before paying out wagers placed on the surprise first-round defeat (4-6, 6-4, 6-2) of Argentina's 68-ranked Guillermo Canas by Croatian wild-card entrant Antonio Veic. Certain irregular betting patterns were recorded, which saw Mr. Canas drift from odds-on favourite to 6-1 outsider, despite having won the first set. Betfair only agreed to pay out after it had established that the odds changed only after Mr. Canas had treatment on his shoulder after the first set *(Daily Mail of 5/2/2009, p. 75)*. Although the Argentinian player was therefore cleared, it nevertheless showed the need for constant vigilance in this area.

World Cup 2012 corruption claim leads to murder (South Africa)

Large-scale sporting tournaments often involve corruption, both real and alleged. However, it is rare for such allegations to lead to fatalities – as seems to have been the case when, early in the New Year, a South African who accused officials of corruption in the construction of a 2010 World Cup stadium was found to have been shot dead. Jimmy Mohlala, a member of the local organising committee for the tournament, was killed at his home in the North-Eastern city of Nelspruit. It had earlier been alleged that members of the ruling African national Congress (ANC) wanted Mr. Mohlala dismissed for reporting a colleague over corruption claims concerning the building of the Mbombela stadium *(The Daily Telegraph of 6/1/2009, p.15)*.

2. Criminal Law

(For more implications of the 2010 World Cup tournament, see under Item 5, below p. 000)

Article on alleged corruption by FC Porto

In "Portugal: football by the whistle" *([2008] 4 ISLR 66, in [2009] 9 European Current Law p. 23)* the author, Jose Manuel Meirim, reports on the disciplinary measures which have been taken against Porto Football Club as a result of allegations of corruption made against them, and the dispute over the question whether the Portuguese club should be allowed to compete in the European Champions League.

Australian racing corruption issues

The Melbourne Cup is one of the most prestigious events on the international racing calendar. However, the last such event, held in December 2008, was marred by an investigation into the runner-up, Bauer, which stormed home over the final furlong. The enquiry focused on the treatment undergone by the horse while quarantined during the week before the race took place. It was not, however, drug-related *(The Guardian of 3/12/2008, p. S11)*. In the event, the investigators found that the horse had received electro-shockwave treatment, which is banned under local racing laws. However, the stewards decided not to deprive the horse of its second place and prize money because the trainer, Luca Cumani, was unaware of the rule and had only agreed to the therapy after a local veterinary surgeon, appointed by the club which operates the race, had recommended the treatment *(www.chinadaily.com.cn)*.

Two months later, it was learned that Fine Cotton, a thoroughbred at the centre of one of Australia's most notorious racing scandals, had died. In August 1984, a horse disguised as Fine Cotton won a 0.93-mile event at Eagle Farm, a Brisbane race track. Fine Cotton was an average performer, and a syndicated had replaced him by a stronger horse called Bold Personality, which won by a nose after a sizeable betting plunge. The schemers had painted Bold Personality to make it resemble Fine Cotton, but the ploy was eventually uncovered because of the large number of bets placed on Fine Cotton to win. The involvement of several high-profile Sydney bookmakers, who were found to have prior knowledge of the substitution, made the event into a national scandal. It was reported that the horse's trainer was also found to have been aware of the substitution *(Associated Press, www.findlaw.com of 20/2/2009)*.

Spanish football corruption claims investigated

In mid-January 2009, it was announced that Ramon Calderon had resigned as president of top Spanish side Real Madrid. This news came in the wake of reports featured in leading sports newspaper La Marca in which it was alleged that his budget at real was approved only because his directors admitted non-members into the assembly, denying access to some 200 properly accredited ones. Mr. Calderon won the assembly vote – during which some of the 1,215 members present called for his resignation – by 47 votes *(The Daily Telegraph of 17/1/2009, p. S7)*. Mr. Calderon, however, dismissed claims of his involvement in the scandal, insisting that he walked away from the club with a "clear conscience" *(The Guardian of 17/1/2009, p. S5)*.

Shortly afterwards, the head of the Spanish football federation called for an inquiry into allegations made by a player at second division club Tenerife that he had been bribed into losing a key fixture. It was reported that Jesus Mora Nieto, known as Jesuli, alleged that he had received around €6,000 in order to ensure that Tenerife lost a match on the final day of the season, thus ensuring that opponents Malaga won promotion to the First Division *(The Daily Telegraph of 2/12/2009, p. S9)*. The outcome of this case was not yet known at the time of writing.

Hooliganism and related issues

Hooligans once again disrupt Australian open (tennis)

It will be recalled from a previous issue of this Journal *([2007] 1 Sport and the Law Journal p. 22)* that the 2007 Australian Open, one of the Grand Slam tournaments, suffered disruption because of running battles between Serbian and Croatian supporters. The following year, police officers used pepper spray as they attempted to remove "abusive" fans from one of the outside courts – the protagonists this time being a group of Greek fans who had been "chanting abusively" at Chilean player Fernando Gonzalez. It was later suggested by witnesses that some of the women and children in the crowd had inadvertently been dosed with the pepper spray. As a result, the police announced that, in order to dispel crowd trouble at this year's Open, police would restrict themselves to pepper foam, of which it is said that it enables the police to target an individual more directly. It was also announced that a zero-tolerance policy would be applied to troublemakers, with penalties including on-the-spot fines for troublemakers *(The Guardian of 19/1/2009, p. S11)*.

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Unfortunately, it would seem that these warnings had little effect on a number of spectators. In one of the first games to be played, between Bosnian-born Amer Delic and Frenchman Paul-Henri Mathieu, boisterous Bosnian and Serbian fans traded ethnic chants across the court. In fact, the first match in which Delic had been involved, against Taylor Dent, had also given rise to complaints that Bosnian fans had heckled and taunted his opponent. In the Delic-Mathieu match, however, fans focused less on the game and more on each other, exchanging slurs which Mr. Delic refused to translate. It was reported that Serbian fans had entered Court 13, where Delic was playing, after a Serbian competitor had finished a match on a nearby court *(Associated Press, www.findlaw.com of 21/1/2009).*

This misbehaviour gave rise to fears that the worst was yet to come, since Serbian Janko Tipsarevic was matched against Croatian Marin Cilic in the next round. Fearing that historic Balkan tensions between the rival supporters might give rise to violence, Mr. Tipsarevic had requested tournament organisers to move his game from the outside courts – where spectators are able to wander around as they please – to one of the more tightly supervised show courts. Initially, it looked as though the player's forebodings would be borne out. Both groups, although located well away from each other, chanted slogans and shouted obscenities in their own languages. Nevertheless, the threat of violence was not realised, with the police keeping a close eye on the fans throughout *(The Daily Telegraph of 22/1/2009, p. S13)*. Later, however, violence between the two factions erupted in bar, causing several "fans" to be ejected from the grounds *(The Daily Telegraph of 24/1/2009, p. S14).*

However, two days later another potentially explosive fixture, between Mr. Delic and Serbian No. 3 seed Novak Dojkovic was on the agenda – and this time matters took a more violent turn. First insults, then punches and even chairs were thrown when groups of Serbs and Bosnians confronted each other. Two men were arrested and another 30 removed from the grounds after the fighting, in which one woman was knocked out after being struck on the head by a chair *(The Guardian of 24/1/2009, p. 19)*. The Serbian champion came in for considerable criticism afterwards it was reported that when he was invited four times to condemn the violence of his supporters, and refused to do so on each occasion, citing the need to "focus on my tennis" as the reason. He is known to be a strong supporter of Serbia's claims to Kosovo, whence his father's side of the family originate, and last year released a video message which was shown at a mass rally in Belgrade. Accordingly, it is difficult to believe that he was so focused on the game as not to be aware of the wider issues *(Daily Mail of 24/1/2009, p. 107).*

The only other manifestation of crowd misbehaviour came in the form of a streaker, who dashed onto the court whilst Venus and Serena Williams were involved in a doubles match against Ayumi Morita (Japan) and Martina Muller (Germany). He was met by security guards as he left, arrested and banned from the event *(Associated Press, www.findlaw.com of 23/1/2009).*

Super Bowl celebrations give rise to violence (US)

When Pittsburgh beat the Arizona Cardinals 27-23 in this year's Super Bowl, American Football's showpiece event, the authorities were on full alert for any trouble that might ensue at the winners' victory parade in Pittsburgh. The main reason for this was the spate of violence that occurred in the immediate aftermath of the game. City police announced that over 80 people were arrested as crowds threw bottles at police, set small fires, broke shop windows and overturned cars. Much of the violence had occurred in the Oakland neighbourhood, which is home to the University of Pittsburgh's main campus. Many of those arrested turned out to be students, and the University's Chancellor, Mark Nordenberg, immediately announced that any students found to have been involved in the violence would face disciplinary action and could even be expelled *(Associated Press, www.findlaw.com of 4/2/2009).*

Manchester United fans attacked after Internazionale match (Italy)

In late February 2009, Internazionale Milan and Manchester United were pitted against each other in the UEFA Champions League. Following the first leg of the fixture, played in Milan, three United supporters were attacked by four Inter "fans". The incident occurred shortly after midnight, close to the stadium, on a road connecting the latter with the nearest metro station. The United fans were taken to San Carlo hospital for treatment. One suffered a broken nose, another a cut on the head. All three were later discharged. The Inter "fans" succeeded in escaping in a car before police were able to apprehend them. No motive was given for the attack *(Associated Press, www.findlaw.com of 25/2/2009).*

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German court decision on travel restrictions imposed on hooligans

It will be recalled from a previous issue of this Journal *([2005] 1 Sport and the Law Journal p. 27)* that several countries, including Britain and Germany, adopted a number of measures in order to prevent known hooligans from travelling to Portugal for the 2004 European Football Championships. In the case of Germany, this took the form of restrictions on the validity of the passport and the identity card of the persons affected, as well as the requirement that they should present themselves at police headquarters whenever Germany were involved in a fixture. One person thus affected applied for judicial review of these restrictions.

The Administrative Court of Bremen *(Decision of 2/9/2008, Case 1A161/06, [2009] 1 Die Offentliche Verwaltung p. 99)* awarded the application in part. It held that the passport restrictions were disproportionate, since the result sought could be achieved just as effectively by restrictions affecting the person's identity card. The latter were justified, and not merely because Germany's reputation abroad was in jeopardy. A more important consideration was that the actions of the person in question, when taking place in the context of a large crowd of people, constituted a threat to the internal or external security of the Federal Republic of Germany.

Security increased following New Zealand bottle-throwing incident (cricket)

During a Twenty20 international between New Zealand and India in late February 2009, play was halted briefly near the end of the match when a plastic bottle was thrown onto the field near an Indian fielder. The visiting team raised the issue with the match referee and the New Zealand Cricket chief executive, Justin Vaughan. The latter insisted that this type of incident was "unfortunate" but did not occur very often, and that increased security would be in place for the imminent series of one-day fixtures between the two countries *(The Observer of 1/3/2009, p. S4)*.

"On-field" crime

Police investigate ice hockey incidents during local derby (US)

Ice hockey is a sport in which body contact can be extremely robust, and accordingly gives rise to occasional violence. This appears to have been the case during a local derby between Michigan Spartans (a University side) and Michigan. It was reported that one on-ice attack by Andrew Conboy, a State player appears to have been so heavy that the latter was suspended and later withdrew from the University. Another Spartans player, Corey Tropp, was also suspended but remains enrolled. In the incident. Michigan defence man Steve Kampfer was hit into the boards by Conboy, after which Tropp apparently hit him in the neck with his stick whilst his opponent was prone on the ice *(Associated Press, www.findlaw.com of 28/2/2009)*.

Later, the University of Michigan police announced that they would not be seeking criminal charges against the two players concerned. However, they intended to continue investigating a possible assault which took place in the Spartans' locker room after the match *(Associated Press, www.findlaw.com of 29/1/2009)*. The outcome of this investigation was not yet known at the time of going to press.

Death threats made against Swedish referee over Champions League penalty

During the Champions' League fixture between Atletico Madrid and Liverpool, played in mid-November 2008, Swedish referee Martin Hansson awarded a penalty kick to the visiting team in stoppage time for what he considered to be a push on Liverpool captain Steven Gerrard by Mariano Pernia. It was a highly controversial decision, and the referee later informed the newspaper Sport-Expressen that he had surrendered his mobile telephone number and notified the police after a number of threatening calls and text messages. He said

> ***"I have received death threats. It has been horrible and feels very uncomfortable. The phone rang all the time and I had a great many text messages. I am pretty used to this but now I've had enough. It has been very threatening. I feel completely fed up. I have always had my mobile phone on and my number has been on the network. Now it no longer works. I'm sad that I can't be as open as I ocne was. I have notified the police and there have been threats against my life but it is difficult for the police to prove"***
> *(The Guardian of 20/11/2009, p. S6)*.

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He added that he would not follow the example of his compatriot Anders Frisk, who resigned as referee in 2005 after receiving death threats following a Champions League fixture between Chelsea and Barcelona *(Ibid)*.

Lance Armstrong bicycle stolen (US)

The widely publicised return to competition by Lance Armstrong, the multiple Tour de France winner, had an unfortunate side effect during one of the first races in which he competed since emerging from retirement. During a stage of the Tour of California, held in February 2009, his bicycle was stolen *(The Daily Telegraph of 17/2/2009).*

The thieves took four bicycles from a truck Armstrong's Astana team had parked behind a hotel in Sacramento. The other three bicycles belonged to team members Janez Brajkovic, Steve Morabito and Yaroslav Popovych, said a spokeperson for Mr. Armstrong's team, Astana *(www.cnn.com)*. The bicycle was later recovered.

(Regarding further implications of the Lance Armstrong comeback, see below under item 15, p. 000).

Sumo wrestlers avoid jail sentence over trainee death

It will be recalled from a previous issue of this Journal *([2007] 2 Sport and the Law Journal p. 44)* that a sumo wrestling trainee had died after being beaten with a metal bar during sparring practice, after having already been hit for several hours with a beer bottle and a stick the previous day. Those responsible were arerested and tried. Two of the accused, all wrestlers themselves, were sentenced to three years imprisonment, whereas the third was issued with a sentence of two and a half years. All sentences were suspended for five years. However, the leader of the sumo training centre has still to face a separate trial *(The Guardian of 19/12/2008, p. 28)*.

To what extent is on-field violence consistent with the criminal law? Article in Danish law journal

In this contribution ("Sportsvold – Er det strafbart?" *([2009] Ugeskrift for retsvaesen p. 12 et seq)*, the author, Trine Baumbach, discusses the eternal problem posed by the extent to which the ordinary criminal law can tolerate acts of violence committed on the field of play. She accordingly draws a firm distinction between "violence" which can be brought within the scope of the rules governing the sport, and violence which cannot be regarded as a natural part of playing a sport. On the basis of the various cases decided on this issue, she infers that the courts normally will normally accept that sporting performers can sometimes get carried away in the heat of the game and commit actions which are irrelevant to the sport in question. However, this acceptance will not affect the indictable nature of the action, but will merely influence the severity of the criminal penalty applied.

Body blows, kicks, headbutts and similar actions are in principle violent acts, regardless of where or on whom they were committed. If such actions fall outside the scope of the notion of "violence", this will be because they do not bear the characteristics of violence in view of the circumstances in which they were committed, and therefore will not be described as violence within the legal meaning of the term. As is stated in the preparatory work which preceded the relevant clauses in the Criminal Code, this can be the case with "sporting performance". However, no-one can reasonably maintain that a punch in another player's stomach during a football match can be described as a sporting performance.

(With thanks to Benedikt Joergensen, of the staff at Manchester Metropolitan University, for her assistance with the translation of this text).

American football coach to be arraigned in player heat death (US)

In late January 2009, it was . It was reported that David Stinson, an American football coach employed by a Kentocky high school was scheduled for arraignment over the heat-related death of a player during practice. The count of reckless homocide was thought to be one of the first criminal charges brought against a coach for the death of an athlete. This was after a grand jury had indicted him in the death of 15-year-old Max Gilpin, who died three days after collapsing during a sweltering practice session in mid-August 2008 *(Associated Press, www.findlaw.com of 26/1/2009)*. No further details are available at the time of writing.

Legal action over "Spygate" scandal closes

The long-running saga involving accusations of technical espionage levelled against the top Formula One team McLaren has been extensively documented in previous issues of this Journal. McLaren were ultimately fined a record amount of $100 million by FIA, the world governing body in the sport, in 2007 and expelled from the manufacturers' championship after Ferrari engineer Nigel Stepney leaked a 780-page technical dossier on

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Ferrari's vehicles to Mike Coughlan, McLaren's former chief designer. However, in the meantime the Italian authorities had taken an interest in the affair, and had commenced a criminal investigation.

In late February 2009, the Italian authorities announced that they were discontinuing any legal action against Mr. Coughlan and three senior engineers. It would therefore seem that, after a number of false dawns in this affair, a line has finally been drawn over the entire imbroglio *(Associated Press, www.findlaw.com of 23/2/2009)*.

Investigation started in use of public funds to build Yankee Stadium (US)

The Yankees and the Mets are new York's leading baseball teams which have made successive requests to the city's authorities for public bonds in order to finance their increasingly expensive stadiums. Both teams have provided long lists of reasons why they need more public bonds, including construction delays, government requirements such as security and fireproofing, and design changes such as enhanced scoreboards and larger food service areas.

However, the New York Asembly has become increasingly suspicious about the use made of these public funds. Officials representing the city and the Yankees have already appeared before a committee set up by the Assembly and steered by Democrat member Richard Brodsky, but their answers have plainly left Mr. Brodsky dissatisfied. He has accused city and team officials of secret negotiations which altered property assessments aimed at making the deal legal and to provide a free luxury suite for city officials. He also claims that both the Yankees and the city have failed to provide him with records relating to the additional funding requested by the baseball team *(Associated Press, www.findlaw.com of 13/1/2009)*.

Because of these alleged shortcomings, it was reported that the committee decided to subpoena the Yankees' president, Randy Levine, as well as Seth Pinsky, the city's Industrial Development Agency chairman. These were aimed at compelling the officials concerned to appear for questioning at a hearing, and to provide the documents which the Committee requires for its investigation *(Ibid)*. The latter was still in progress at the time of writing, and it is hoped to report on its outcome in the next issue of this Journal.

Super Bowl attracts the criminal fraternity (US)

Every year, all manner of vendors flock to the American football extravaganza known as the Super Bowl in order to sell merchandise related to the National Football League (NFL). However, warnings have increasingly been issued to the masses attending the event that not all these goods are NFL-licensed, and that counterfeit jerseys could be mixed with the authentic ones – to the point where even the vendor might not be aware that they are selling fake goods. Officials seized hundreds of counterfeit jerseys at various stalls. The concern here was not only the harm caused to the economy – counterfeit goods of all stripes cost companies $250 billion per year and around 100,000 jobs in the US – but also that the proceeds therefrom often end in the wrong hands, supporting arms and drug trafficking *(Associated Press, www.findlaw.com of 30/1/2009)*.

It was reported that one of the arrests made was that of Raphael Prentice, who was later charged with distributing goods with counterfeit trade mark – a felony which carries a maximum five-year term of imprisonment. He was the first person to be arrested by the Super Bowl Counterfeit Task Force. The majority of vendors are issued with "cease and desist" orders, but not charged with any criminal offence. However, Sgt Bill Todd, of the Tampa police, said that a decision was made to arrest Mr. Prentice because of the sheer size of his operation. Federal investigators are attempting to determine the original importer of the goods. Robert McCrue, a Professor of Security Management at the John Jay College of Criminal Justice, commented that such arrests are capable of yielding valuable information *(Ibid)*.

(On the problems of hooliganism surrounding the Super Bowl, see above p. 000.)

"Off-field" crime

The Allan Stanford affair (US/Caribbean/UK)

If anyone had predicted even 15 years ago that a Texan finance mogul would be hailed as the saviour of limited-overs cricket, he/she would undoubtedly have suffered the early attentions of the men in white garb. Yet that is exactly what occurred in mid-2008, when Sir Allen Stanford signed a five-year deal with the England and Wales Cricket Board (ECB) to stage a Super Series based on the Twenty20 formula. This deal was heralded as the new dawn for English – nay world – cricket, but ever since promise has turned out to be little more than a snare and a delusion, to an extent which has jeopardised the very sport of cricket itself.

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The first warning signs that all was not well with the tycoon's finances came in late January 2009, when he announced that he had postponed making an announcement about his future plans, despite previously having stated that he would decide in the course of that month whether or not he would continue with the Stanford Super Series. Donald Peters, the Chief Executive Officer of the West Indies Cricket Board (WICB) had expressed his fear that the Super Series was in greater danger than the West Indies' Twenty20 tournament, which was also sponsored by Stanford, adding that the latter might "restructure it, but more likely throw it away altogether". It was then that rumours started to circulate about Stanford's financial difficulties. Cancellation of this fixture was fraught with all manner of financial consequences, and not only for the players involved. The ECB received a payment of $7 million from the first match, as a result of which each English county cricket club received approximately £50,000 *(The Guardian of 28/1/2009, p. S8).*

Barely two weeks later, Sir Allen's wealth was once again under pressure after it was reported that the billionaire's investment bank confirmed that his finances were under investigation by financial regulators in the US. More particularly Stanford Financial Group, a Houston-based investment firm led by the flamboyant Texan, admitted that investigators from the Financial Industry Regulatory Authority (FIRA) had visited its offices the previous month, and that officials from the Securities and Exchange Commission (SEC) were also conducting their own inquiry – which a spokesman attempted to dismiss as mere "routine investigations" *(The Guardian of 13/2/2009, p. S1)*. However, it emerged that the probes were focused on sales of certificates of deposit in the Stanford Group's affiliated off-shore bank and the consistent above-average returns which these investments yielded. They stemmed from complaints which, the Stanford group claimed, were made by disgruntled former employees *(The Daily Telegraph of 13/2/2009, p. S10).*

Matters took an infinitely more serious turn a few days later, when it was learned that the Federal Bureau of Investigation (FBI) and the United States Inland Revenue Service (USIRS) had already spent many months probing the Stanford International Bank (Houston-based) and the billionaire's bank in Antigua. Undeterred, Stanford sent an email to his staff stating that he would "fight with every breath" to continue to uphold what he described as "our good name" *(The Daily Telegraph of 16/2/2009, p. S15)*. However, it also emerged that the investigation had already compelled Stanford to dismiss staff employed by his Antiguan bank, with the Caribbean Prime Minister, Baldwin Spencer, expressing the fear that "worse was to come" *(The Guardian of 16/2/2009, p. S11)*. The next day, Stanford was placed under a temporary restraining order on charges of major fraud following a raid on his Houston company headquarters *(The Guardian of 18/2/2009, p. S1).* Not unnaturally, this caused those who held accounts with the Bank of Antigua to be gripped by panic, which took the form of a run on the bank. Queuing outside the bank's offices started at 6 am, and the initial handful of people gradually turned into a throng of several hundred, most of whom seemed determined to close their accounts. This was not the only cause for concern on the island, however, since Stanford was one of its largest employers *(The Daily Telegraph of 19/2/2009, p. S12).*

From the investigators' point of view, there remained one major problem – they had issued charges against the Texan tycoon without being certain of his whereabouts. Accordingly a global manhunt was initiated, which ended two days later when the FBI announced that he had been tracked down to Fredericksburgh, Virginia, approximately 50 miles from Washington DC. He had been found as he was driving a car in the town, surrendered easily and was described as being "very co-operative". This enabled the SEC to serve papers on the beleaguered businessman, thus rendering its proceedings against him active in what it claimed to be a financial fraud of "shocking magnitude". More particularly he was accused of encouraging investors using false information concerning the performance of his banks, including allegations that he invested the money into tradable shares when in fact it was put into real estate and private equity. However, he remained a free man since he had only been issued with civil charges and not been accused of any criminal misdemeanour *(The Guardian of 20/2/2009, p. 1)*. The following week, the first criminal charges were brought against Stanford's business empire, when it was reported that his chief investment officer was accused of obstructing the investigation. Laura Prendergast-Holt appeared before a magistrate in Houston to face accusations that she lied to SEC officers. She is one of two top-ranking employees implicated in the alleged fraud *(The Daily Telegraph of 28/2/2009, p. S23).*

Naturally, the media started to delve into the Texan financier's past, and details began to emerge about the manner in which Stanford had succeeded in working himself into a position which, in the words of a media commentator, caused Antigua to go from being a British colony to becoming a Stanford colony. As is not entirely unexpected when dealing with a Texan, the answer begins with oil. Sir Allen staged his first financial coup

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by targeting oil refinery employees who had been dismissed with sizeable redundancy packages. He persuaded them to purchase property in his father's real estate business, and used the money left over to establish a private bank. In order to pay less in taxation, he situated the bank offshore – initially in Montserrat. However, he moved one quite precipitously after the government of the UK began to scrutinise his accounts. However, whereas a British protectorate did not extend the welcoming hand, the island of Antigua, to which he moved in 1990, was anything but unwelcoming *(The Guardian of 21/2/2009, p. 18)*.

This was the era of the Birds, i.e. a father-and-son team who monopolised the office of Prime Minister in Antigua for 27 years until the younger Bird (Lester) lost at the ballot box in 2004. Vere "Papa" Bird had steered the island towards independence in 1981 and was at the time feted on the island for having thrown off the colonial yoke. Between them, the Birds began the process of realigning Antigua from an impoverished sugar-growing economy to a potentially rich haven for offshore banks, internet gambling and, to the dismay of the US and UK authorities, money laundering. Various members of the Bird family were themselves surrounded by claims of gun-running and drug trafficking involving Colombia and South Africa (when under apartheid).

Stanford's arrival in 1990 started a bond between the US businessman and the Bird dynasty based on mutual advantage. Stanford would raise $30 million to build a new hospital, which made Lester Bird look politically benevolent, and in return, the Prime Minister allowed him to be repaid directly from the island nation's social security budget. Stanford would lend the government cash to secure its debts; Bird would let Stanford acquire land around the airport at knockdown prices. Stanford also cultivated the nation's cricketing fraternity and lavished vast funds on the Stanford cricket ground *(Ibid)*.

However, this harmonious relationship has now come to an end. Shortly after the revelations about the US regulators broke, the Antiguan financial authorities appointed British accountancy firm Vantis as the receiver for the Stanford International bank. Their task is to attempt to ascertain the fate of billions of dollars invested by customers in the US and elsewhere in certificates of deposit with allegedly fictitious rates of return. Meanwhile, the Eastern Caribbean Central Bank took control of the Bank of Antigua, in order to avert a collapse following the scenes of panicked withdrawal referred to earlier. The scandal also touched the British HSBC bank, which informed a British newspaper that it had been contacted by regulators in Panama with queries as to its role as an intermediary for Stanford's banks *(The Guardian of 21/2/2009, p. 19)*.

Inevitably, the entire affair also cast serious doubts on the manner in which the various cricketing authorities had handled the matter. The Chairman of the ECB, Giles Clarke, came under pressure to make a statement, and admitted that the decision to bind the game so closely with Stanford had been a mistake. Shortly before the scandal broke, he had been re-elected to his position, but not without some vocal opposition from those who had feared that the Stanford affair might end badly. Neil Davidson, the chairman of Leicestershire CC was one such opponent. He commented:

> ***"In any normal organisation the chairman's position would be untenable in these circumstances. A lot of us felt it was a serious error of judgment by Giles Clarke to get involved with Stanford in the first place and events would seem to have vindicated that opinion"***
> *(The Guardian of 18/2/2009, p. S1)*.

To add to the ECB's embarrassment, it emerged that the world governing body of the game, the International Cricket Council (ICC), had had one brief meeting with Stanford, before he concluded his deal with the English authority, and decided at once that he was not a suitable business partner. Stanford had pitched a scheme to the ICC which involved an annual triangular tournament involving two full member teams and his All-Star side, to be played on his private ground in Antigua. The plan was that, over a five-year deal, all 10 Test-playing nations would be able to take part. It is also worth noting that the Indian board had also rejected Stanford's advances, whilst the South Africans considered the offer of a $1 million fixture, but then abandoned the plan *(The Daily Telegraph of 20/2/2009, p. S13)*. Small wonder that a former associate of Stanford's, Antiguan lawyer John Fuller, who worked closely with the Texan during his time as owner of the Caribbean Star airline, which closed in 2007, described the ECB as "naïve". He claims the latter could have avoided this embarrassment had they consulted the region's business community *(The Daily Telegraph loc. cit, at p. S22)*.

The ill-feeling resulting from the scandal also threatened to drive a wedge between the ECB and the Professional Cricketers' Association (PCA), with both sides claiming that the other wanted to press ahead with the new Stanford deal. Sean Morris, the Chief Executive of the PCA, confirmed reports that the England players had come under pressure to sign a new contract – involving the Stanford Quadrangular at Lord's – during the first Test between the West Indies and England in Antigua in early February 2009. Morris alleged that the:

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> ***"timing pressures were created firstly by Stanford and then by the MCC mailing out their ticket forms to members. I replied that I was not going to go to the players during the back-to-back Tests"***
> *(The Daily Telegraph of 23/2/2009, p. S21)*

However, the ECB contended that it was in fact the PCA which had been pushing for continued involvement with Stanford, and that they had requested that the original deal – which included four more $20 million matches in Antigua – to be adhered to. At the time of writing, the ECB were understood to be consulting their lawyers with a view to possible legal action against the PCA *(The Guardian of 23/2/2009, p. S1).*

By law, a claim could be brought against the ECB to repay the £3 million they received from the first Twenty20 encounter between England and the "Stanford Superstars", but only if the ECB had concluded the deal in the knowledge that Stanford's business interests might be suspect. Bill Morris, a non-executive director of the ECB, claimed that the Board had approved the Stanford deal subject to a "due diligence" test, which largely examined whether Stanford could deliver on his financial promises rather than on the source of the money. It is understood that the ECB did receive anecdotal warnings about Stanford before signing the agreement. However, as there was no direct evidence to prove any wrongdoing, the ECB would be more likely to be accused of poor judgment rather than of anything else. Anthony Riem, a partner in the specialist law firm PCB Litigation LLP, clarified the position in the following terms:

> ***"If a claim came in for the recovery of assets, the general test that the court would apply would be 'is it unconscionable for the ECB to hold that money?' It would depend on what they knew at the time. If they did hear certain things about Stanford and his dealings, there is a chance that they could be liable. But there would need to be evidence that such information was in their possession"***
> *(The Daily Telegraph of 19/2/2009, p. S10).*

It also emerged that the accountancy firm thought to be responsible for auditing Stanford's multi-billion empire operated out of a cramped office in North London. The firm in question was reported to be CAS Hewlett – described by the SEC as a "small local accounting firm". Although it was run from an office in Antigua, it was registered as operating from a converted housing block in Enfield. This turned out to be a run-down 1930s building on a parade of shops flanked by a fish and chip shop and a small letting agency. The office itself measures just 200 square feet and contained only two desks and one filing cabinet *(The Daily Telegraph of 19/2/2009, p. S12).*

In fact, it appeared that, at the time when the murky affair came to light, Stanford was taking steps to launch a British outpost of his global financial empire. Documents viewed by a leading British newspaper suggested that the ill-fated financier was preparing to open a UK base for his operations. It is not known exactly what type of financial operation would have been the focus of his London off-shoot, but it was understood that the plan was to become involved in some form of investment management activity. In September 2008, Stanford had registered two new companies – Stanford Group Holding (UK) and Stanford Group (UK), the former being the parent of the latter. According to documents registered with Companies House, the British government agency supervising corporate activity, the Texan was the only shareholder in Stamford Group UK, which had a paid-up share capital of £1 million. At the time of incorporation, US-born Louis Staley was the sole director and company secretary of both entities. He was once a registered representative with the Financial Services Authority (FSA), but his current status, according to the City regulator's register, is "inactive" *(The Daily Telegraph of 26/2/2009, p. B1).*

The fall-out from this sorry affair – not least the outcome of the aforementioned criminal investigations pending – is bound to continue for some time yet. As ever, the present writer pledged to keep his readership fully abreast of further developments.

O J Simpson jailed (US)

The extraordinary train of events in which the former American footballer and actor involved himself two years ago, and ended in a widely-publicised prosecution, has been extensively documented in earlier issues of this Journal. It will be recalled that, in September 2007, he and five others confronted two sporting memorabilia dealers and robbed them of hundreds of items. The court heard how a gun was waved at the dealers by one of the men in accompanying Simpson. The latter was subsequently caught on tape insisting that no guns had been present. Throughout the trial he insisted that he had merely been attempting to retrieve items and heirlooms stolen from him.

The judge, Jackie Glass, rejected Mr. Simpson's claims that his actions were wrong-headed rather than criminal, describing them as "much more than stupidity". She added that she was not sentencing him for what had happened previously in the criminal justice system – referring to the former star's acquittal, in 1995, on charges of murdering his wife and her lover.

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She sentenced him to a maximum term of 33 years for armed robbery and kidnapping. She rejected an application for bail pending appeal and ordered Simpson to be returned to jail immediately. His lawyers later announced that he would appeal *(The Daily Telegraph of 6/12/2008, p. 21).*

Michael Vick saga continues (US)

It will be recalled from a previous issue of this Journal ([2008] 1 Sport and the Law Journal p. 45) that it was reported that Michael Vick, the former American Football star, was sentenced to a 23-month term of imprisonment for his role in a dog-fighting conspiracy. He is currently serving this sentence, but it is anticipated that he will be able to serve the last few months at a "halfway house" in Newport News, his home town *(Associated Press, www.findlaw.com of 30/1/2009)*. In the meantime, the full horror of the plight suffered by Vick's canine victims has come to light.

One of these had to be put down because his health had deteriorated to an irretrievable extent. The others are gradually returning to normal life, in spite of the hardships suffered before they were rescued from Vick's Bad Newz Kennels in 2007. There they were chained in dark and humid basements and electrocuted if they failed to perform. Those who received the "best" treatment earned this dubious privilege because they could fight and win. Some, like Little Red, had their teeth filed down so that they could be used as "bait dogs" for sparring with the champions without hurting them. When these dogs were first seized, the courts received advice from a group called People for Ethical Treatment of Animals, as well as other societies, that the animals should be put down because their chances of living normal lives outside a shelter or sanctuary were minimal. However, they are now being looked after by Best Friends, a "no-kill" sanctuary for abandoned pets operated by thousands of volunteers *(Associated Press, www.findlaw.com of 6/2/2009).*

In the meantime, Mr. Vick's incarceration continues to give rise to legal consequences. In late January 2009, a federal bankruptcy judge approved the appointment of brokers in order to sell some of the fallen star's assets, including several cars and boats. He also approved a plan to have his Atlanta home realised by auction *(Associated Press, www.findlaw.com of 30/2/2009).*

Basketball start pleads guilty to drunken driving charges (US)

In late December 2008, it was learned that former NBA start Charles Barkley was arrested on suspicion of drinking and driving. It appears that an officer with a law enforcement task force which targets drunken driving saw Mr. Barkley failing to halt at a Stop sign, at which he was apprehended and given a blood test. He played 16 NBA seasons for the Philadelphia 76ers, Phoenix Suns and Houston Rockets, as well as featuring in the 1992 and 1996 US Olympic teams *(Associated Press, www.findlaw.com of 31/12/2008).* It was later revealed that Barkley was "over the limit", showing a blood-alcohol level of 0.149, which is nearly twice the legal limit in Arizona, where the arrest took place *(Associated Press, www.findlaw.com of 9/1/2009).*

Later, the former basketball ace pleaded guilty to charges of drunken driving. At the time of writing, he was set to start a five-day jail sentence, pay $2,000 in fines and attend an alcohol treatment programme. Under Arizona law, he will also be compelled to install an ignition interlock device on his vehicles *(Associated Press, www.findlaw.com of 24/2/2009).*

Test batsman Gibbs appears in court on drink/driving charge (South Africa)

In early December 2008, it was revealed that South African test opener Herschelle Gibbs was to start a month-long alcohol rehabilitation programme after appearing in court on charges of drunken driving. The case was postponed until later this year. He had previously been sent home from the national squad for breaking a team curfew the day before South Africa were due to play Bangladesh in a Twenty20 international *(The Independent of 5/12/2009, p. 65)* No further details are available at the time of writing.

Three arrested in Dhoni extortion investigation (India)

In early January 2009, Indian police announced that they had arrested three people in connection with the issuing of extortion letters to the captain of the national cricketing side, Mahendra Singh Dhoni. Security was increased outside the player's family home in Eastern India after a man claiming to be an associate of Dawood Ibrahim, who is said to be the country's most wanted gangster, demanded the sum of £72,000 from the cricketer. A second letter threatened to blow up the house if assistance from the police were to be requested *(The Independent of 3/1/2009, p. S18).*

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Yet another All Black "bad boy" – Sione Lauaki (New Zealand)

In early January 2009, Sione Lauaki, a flanker for leading New Zealand rugby side Chiefs who also represents his country, was bailed on a charge of damaging three windows and a television at a motel in Auckland on New Year's Day. He was the second New Zealand back row forward to see the inside of a court over the festive period. Adam Thomson, who was capped against England in June 2008, was remanded on bail until 29 January on a charge of assaulting his girlfriend, former television presenter Joanne Holley, just before Christmas. Another back rower, Jerome Kaino, admitted a charge of drunken driving in the summer of last year. In addition, two other members of the squad which successfully toured Europe in the autumn were arrested the previous year: scrum-half Piri Weepu for disorderly behaviour in the capital Wellington and Fijian wing Sitiveni Sivivatu, who was charged eith assaulting his wife but not convicted. In addition, scrum half Jimmy Cowan has also recently been charged with more than one case of disorderly behaviour *(Daily Mail of 12/1/2009, p. 65).*

This is clearly of some concern to the New Zealand rugby authorities. They have already inserted a clause in Mr; Cowan's contract banning him from drinking alcohol; also, it has emerged that Mr. Lauaki has been in the dock before, i.e. in February 2006, when he admitted assaulting a security officer in Hamilton *(Ibid).* The latest incident will clearly compel the New Zealand rugby regulators to adopt a tougher line on players who bring the sport into disrepute.

Dokic family face £30,000 payment demand from drug dealer family (Australia)

Jelena Dokic is a tennis player whose fortunes have, to say the least, been somewhat mercurial, not least because of the irrational behaviour of her Serbian father and her uncertainties over where her true national loyalties lie. However, she seemed to be returning to some semblance of sporting form at this year's Australian Open, held in January, which enabled her to recapture the hearts of a nation which her estranged father made her abandon for her native Serbia. However, precisely at the time when her sporting fortunes were reviving, her private life has once again suffered a crisis by claims that she owes £30,000 to the family of a deceased Melbourne drug dealer.

The gangster in question is John Anthony Giannarelli, who was convicted in 2007 of importing 34,310 tablets of psuedoephedrine, worth £85,000, from Malaysia. He is alleged to have financed Ms Dokic and provided her with a Melbourne flat whilst managing her career during a low point in her life. Mr. Gianarelli died from cancer last year, having received a three-year suspended sentence and £28,000 fine. His uncle, Max Novelli, alleged that the money was needed to assist with the payment of outstanding medical expenses *(The Mail on Sunday of 25/1/2009, p. 78)*. At the time of writing, it was not known whether this payment had been met, or what action, if any, the public authorities would take.

Olympic swimmer charged with assault (Australia)

In mid-February 2009, it was learned that Olympic swimmer Nick D'Arcy had been charged with assaulting the former Commonwealth Games medallist Simon Cowley in a bar room fight. The attack left Mr. Cowley with fractures to his jaw, eye socket, cheekbone and nose. D'Arcy pleaded guilty to recklessly inflicting grievous bodily harm on Mr. Cowley. He faces up to 10 years in jail when the judge passes sentence *(Associated Press, www.findlaw.com of 20/2/2009)*. No further details are available at the time of writing.

Ice hockey international ordered to stand trial (Canada)

In mid-February 2009, it was learned that ice hockey star Guy Lafleur was ordered to stand trial on a charge of obstructing justice. At the time of writing, the trial was scheduled to take place in April 2009. A judge in Montreal dismissed the player's request to drop legal proceedings. Mr. Lafleur had originally agreed to supervise his son Mark after he was awarded bail, the elder Lafleur having to ensure that his son abide by a court-ordered curfew. It was later revealed that Mr. Lafleur drove his son to a hotel so that he could spend time with a girlfriend. Months later an arrest warrant was issued for the Montreal ice hockey icon, who has in the meantime launched a $2.8 million lawsuit against the police and the Crown. He claims that the warrant infringed his rights and humiliated him *(Associated Press, www.findlaw.com of 11/2/2009).*

Three suspects detained in handball player's death (Hungary/Austria)

In early February 2009, three Hungarians suspected of involvement in the killing of Romanian handball player Marian Cozma were arrested in Austria. The suspects – two men aged 28 and 31 and a woman aged 37 – were arrested whilst driving towards Italy. Mr. Cozma had been stabbed to death during an altercation at a disco in

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the Hungarian town of Vezprem. He had been celebrating the birthday of a team-mate's child when the altercation erupted between players and other disco frequenters. He died two hours later. Two other team members, a Croatian identified as Ivan Pesic and Serbian player Zarko Sesum, were seriously injured and taken to hospital as a result of the brawl. Austrian authorities had international arrest warrants in relation to the two men. The woman was driving the car *(Associated Press, www.findlaw.com of 9/2/2009)*. No further details are available at the time of writing.

Ex-American footballer Eller sentenced for assaulting police (US)

In early January 2009, it was learned that Carl Eller, a former defender with the Minnesota Vikings, had been prosecuted for driving through a Stop sign and narrowly missing a police car. Officers followed him home, where they allege he became aggressive. He was accordingly charged with two felonies and two gross misdemeanours. However, Mr. Eller immediately announced that he was himself suing the Minneapolis Police Department for violating his civil rights *(Associated Press, www.findlaw.com of 5/1/2009)*. He later contended that officers had intentionally hidden or destroyed video evidence *(Associated Press, www.findlaw.com of 7/1/2009)*.

The prosecutors later dropped the two felony charges, retaining only the accusation of fourth-degree assault and one count of refusing to submit to a sobriety test (Associated Press, www.findlaw.com of 26/1/2009). He was later convicted on both counts, and sentenced to 60 days' confinement to a "county workhouse", 60 days of electronic home monitoring and a $3,000 fine. The judge, Dan Mabley, held that, after Mr. Eller had stepped out of his vehicle, he failed to obey orders to show his hands and resisted arrest. He fought with the two officers and was not subdued until other officers arrived *(Associated Press, www.findlaw.com of 23/2/2009)*. The fate of Eller's lawsuit against the Minneapolis police was not known at the time of writing.

Digest of other US cases (all months quoted refer to 2009 unless stated otherwise)

Taye Biddle. In late January, it was learned that the New York Giants receiver was recovering from gunshot wounds to his hand after being shot whilst visiting his family in his home town, Decatur (Alabama). Local police sources stated that the unfortunate American footballer was shot outside a residence, was treated, and later released from hospital. They added that there was no evidence that Mr. Biddle caused or provoked the shooting. At the time of writing, no arrests had been made; nor have the police released any possible motive for the shooting *(Associated Press, www.findlaw.com of 23/1/2009)*.

David Meggett. Several months after having been charged with raping a South Carolina woman, it was reported that the former running back found himself once again in detention on charges of another sexual assault. He was arrested in mid-January and charged with raping a 21-year-old woman at her North Charleston home. The woman in question claimed that she awoke at 1 am and found a man she knew as "Mike" sitting on her bed. She further alleges that he demanded that she repay $200 she allegedly owed him and proceeded to rape her when she replied that she had no money *(Associated Press, www.findlaw.com of 14/1/2009)*.

At the time of the alleged incident, Meggett was out on bail in connection with another sexual assault charge. In September 2008, he had been charged with third-degree criminal sexual conduct after a 17-year-old North Charleston woman reported to the authorities that she had been raped by a man she new as Michael, according to police records. Both these arrests occurred whilst Mr. Meggett was serving two years' probation for a 2006 sexual battery charge in North Carolina, whose authorities had allowed Meggett to serve his sentence in South Carolina. He has in the past been acquitted of sex-related charges. In 1990, whilst playing for the Giants, he was found not guilty of soliciting sex from an undercover police officer in Baltimore. Eight years later, he was charged with assaulting a woman in a Toronto hotel room after she refused to continue having sex with him; however, that charge was dropped *(Ibid)*.

Sean Murphy. In late January, Mr. Murphy, a removal company owner, was ordered to be held on $250,000 bail after pleading not guilty to charges related to a $2 million jewellery robbery which included New York Giants Super Bowl rings. He was arraigned in Lynn District Court on charges of receiving stolen property relating to the theft which occurred at E.A. Dion Inc. at Attleboro. According to court files, the police found one of the stolen Super Bowl rings in Murphy's bedroom, jewellery in his car, and rare coins in a safe deposit box *(Associated Press, www.findlaw.com of 27/1/2009)*.

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Plaxico Burress. In mid-January, a lawyer acting for the New York Giants wide receiver said that the latter had not been involved in a 2005 shooting in the Bronx which caused police to impound his borrowed truck. He is scheduled to appear in a civil court in Pennsylvania in a dispute with the dealer over the amount which Burress should pay for damage caused to the Chevrolet Avalanche. He had borrowed the truck from the dealer, but attorney Benjamin Brafman contended that Mr. Burress had loaned it to a relative prior to the shooting which occurred in August 2005, and that Burress was with the team at a New Jersey hotel when the incident happened. He also stated that Mr. Burress had not been charged *(Associated Press, www.findlaw.com of 14/1/2009).*

Christopher Doerr. In early January, a Starkville (Mississippi) judge dismissed a rape charge against the Mississippi State tennis player. He dismissed the charge "without prejudice", which means that the prosecutors could still bring charges against the player at a later stage. Mr. Doerr had been arrested in November 2008 after the alleged assault during a party at an off-campus apartment complex *(Associated Press, www.findlaw.com of 7/1/2009).*

Anthony Spencer. The Dallas Cowboys linebacker was arrested in mid-January following a disturbance outside an Indianapolis nightclub. He was arrested in preliminary charges of public intoxication and disorderly conduct, and was later released without bail. Police reported that Mr. Spencer and another man were removed from a bar after they refused to leave at closing time, then argued with officers and ignored orders to leave. It was also alleged that Spencer had offered to pay for the nightclub to remain open past the 3 am closing time set by law, and that, having received a negative response, attempted to punch a bouncer *(Associated Press, www.findlaw.com of 12/1/2009).* No further details are available at the time of writing.

Antoine Walker. In early January, the former NBA player was charged with suspected drunken driving in Miami Beach. Police claim that he was driving a black Mercedes without any lights on when he was pulled over in the early hours of the morning. The officers apparently smelled alcohol and claimed that Mr. Walker looked sleepy and refused to take a breathalyser test. He was subsequently held on a $1,000 bond *(Associated Press, www.findlaw.com of 5/1/2009).*

J R Smith. In early January, it was reported that the Denver Nuggets guard was due to appear in a New Jersey municipal court to face a road traffic-related summons arising from a car crash which killed a friend in 2007. The previous October, a Monmouth County grand jury declined to indict Mr. Smith on vehicular homicide charges which could have carried a term of imprisonment. Police claim that Smith drove his SUV around a stalled car at a stop sign and into the path of an oncoming car in June 2007. His friend, André Bell, was killed in the crash. Since then, Smith has received two more speeding tickets and three licence suspensions *(Associated Press, www.findlaw.com of 6/1/2009).* No further details are available at the time of writing.

Sean Williams. In mid-February, the New Jersey Nets forward was arrested at Boston College for allegedly infringing a "no trespass" order. He posted $40 bail but failed to materialize for the appointed arraignment hearing. This has since been rearranged *(Associated Press, www.findlaw.com of 18/2/2009).* No further details are available at the time of writing.

Damion Fletcher/Brennan Houston. The two Southern Mississippi footballers were arrested on the same day but on separate charges. Mr. Fletcher, the school's all-time leading "rusher", was arrested for allegedly firing at least one gunshot at an apartment block. Hattiesburg Police Department alleged that Fletcher had been charged with discharging a firearm. Mr. Houston, on the other hand, was arrested for the possession of marijuana *(Associated Press, www.findlaw.com of 17/2/2009).* The outcome of this case was not yet known at the time of writing.

Abe Koroma/Maurice Evans. These two defensive linemen were charged in early February with possessing a small amount of marijuana. They were entered into a programme for first-time offenders *(Associated Press, www.findlaw.com of 3/2/2009).*

Brandon Marshall. In early March, the Denver Broncos wide receiver was arrested in Atlanta in a disorderly conduct charge which stemmed from a fight. He was taken into detention on a disorderly conduct charge in the early hours of the morning, then released on bail. Thus far no further developments have been reported in this case. However, this is not Mr. Marshall's first brush with the forces of law and order – in fact this is his fourth arrest since March 2006. Most of these resulted from various police-related incidents involving his former girlfriend, Rasheeda Wately. Since he has been suspended by the National Football League for these incidents before, Marshall can once again expect similar disciplinary measures to be taken *(Associated Press, www.findlaw.com of 2/3/2009).*

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Preston Parker. Following a third arrest in early February, the junior receiver was dismissed by his Florida State team. He was arrested and charged with driving under the influence of alcohol after Tallahassee police found him asleep in his running car in the early hours of the morning. The relevant police report indicated that Mr. Parker admitted drinking and smoking marijuana. This was his third arrest since 2006. He was suspended for the first two games of the 2008 season after being arrested several months ago in Palm Beach County on weapons and drugs charged *(Associated Press, www.findlaw.com of 2/2/2009).*

Security issues

Gaza crisis give rise to security concerns (Israel/Sweden)

The campaign waged by Israeli military forces against the Hamas organization in the Gaza strip has produced security concerns in the sporting arena. Just before the year 2008 ended, the Israel football authorities postponed all football matches two days after a missile fired by Hamas militants hit a pitch just before a practice session. Minutes before the players of the Third Division team were about to start training at Hapoel Ashkelon's ground, a rocket exploded in the penalty area *(Associated Press, www.findlaw.com of 31/12/2008).*

The crisis even gave rise to security issues abroad. In mid-February 2009, the organizers of the Sweden v Israel Davis Cup tie decided that the first-round matches, scheduled to be staged in Malmö, would be played behind closed doors in view of the anti-Israel demonstrations which were planned during the event. The decision was announced following a vote on the matter in the city's recreational committee *(Associated Press, www.findlaw.com of 18/2/2009).* This is not the first occasion on which a tie in the prestigious tennis tournament has been threatened by demonstrations in Sweden. In 1975 they played Chile against the backdrop of intense security concerns over protests against the Pinochet junta. Then – as now – the singer/songwriter Mikael Wiehe, who has written new lyrics to his 1975 song Stop the Game in order to highlight the situation in Gaza, heads the protest movement *(The Guardian of 18/2/2009, p. S8).*

England tour India despite Mumbai terrorist attacks (India/UK)

It is not only from these columns that the advised reader will be aware of the security tensions which currently attend a visit by any side touring the Indian sub-continent in the name of sport – particularly cricket, which is experiencing an unprecedented boom there. It was therefore obvious that the precautions which needed to be taken for England's intended tour of India during the winter of 2008 needed to be of the most meticulous. This was evident as soon as the party set foot on Indian soil, where they were greeted with the news that they were to be guarded by some 5,000 police officers, including 300 commandos, during the First Test, which took place in Chennai. This was a major security operation previously unseen in world cricket, which included a total lockdown at the team hotel, the clearance of roads to and from the stadium, and the use of armed guards from India's Rapid Action Force – a specialist team of riot police. More than 300 police patrolled the grounds of the team's hotel, which was only open to both teams and officials from the two cricket boards. And that was even before the occurrence of one of the worst terrorist attacks to befall the country even in these troubled times.

On 26/11/2008, there began a series of attacks in India's largest city which were to leave over 200 dead and an entire country severely traumatized. One of the most serious incidents was that in which the luxury Taj Mahal hotel, where the teams were scheduled to stay for the Second Test, was invaded and several staff members killed. Significantly, the terrorists had let it be known that they were particularly targeting British tourists *(The Daily Telegraph of 27/11/2009, p. S1)*. The first English team to be immediately affected were county side Middlesex, due to compete in the Indian Champions League in Mumbai, who were also scheduled to stay at the Taj Mahal. In fact, had they arrived there 24 hours earlier than planned they would have undoubtedly been caught up in the mayhem, particularly since, as captain Shaun Udal reflected, they would probably have been having dinner at the hotel precisely at the moment when the attacks occurred. The Champions League organizers immediately postponed the tournament when it became clear that rearranging the three matches due to be played in Mumbai was impossible at such short notice *(The Daily Telegraph of 28/11/2008, p. S5).* This also affected the other foreign teams due to play, such as Australian sides Western Australia and Victoria.

Not unexpectedly, the England team flew back to Britain the next day – even as the Indian cricketing

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authorities were doing everything in their power to salvage the tour. Lalit Modi, the most powerful figure in Indian cricket, set the agenda immediately by a series of blithe assurances that the Test series would proceed regardless *(The Daily Telegraph of 28/11/2008, p. S3)*. The Board of Control for Cricket in India (BCCI) added to the pressure by stating that they expected England to return in time for the planned warm-up game in Baroda. These machinations understandably met with a cool reaction from the England squad – although they did not help their cause when one senior player loudly informed a reporter of his acquaintance that he was "looking forward to having a pint with him at home" for Christmas *(Daily Mail of 29/11/2009, p. 118)*.

Back home, the England and ales Cricket Board (ECB) were bracing themselves for a potential confrontation with the team over its right to control the sport if security reports were to conclude that the Test series should go ahead. The BCCI had in the meantime moved the venue of the second test from Mumbai to Chennai following a request from the ECB for a venue located in Southern India. Surprisingly, the First Test was scheduled to remain in Ahmedabad, another city which had suffered terrorist violence of late. An intense week of negotiations between the Board and its players now seemed inevitable. The debate was based in part on an updated report drafted by Reg Dickason, England's security officer *(The Guardian of 29/11/2009, p. S1)*. Initially it seemed as though there was little that would induce the England players to return, judging by the following comments made by the Captain, Kevin Pietersen:

> ***"We need to put TV deals and the Future Tours programme to one side at the moment. We will not come back to this country if it's unfit and not safe to return. My life means more to me than anything else. I'm not going to force any adult with a wife and kids to do anything they don't want to do. These are grown people, older than me, with families, so I'd never tell them what to do. I might ask players to do things on a cricket field in a certain way but I'll never tell people what to do off it"***
> *(The Daily Telegraph of 29/11/2009, p. S18).*

This emphatic tone was clearly at odds with the conciliatory noises being made by the ECB who badly wanted the tour to resume – if only because of the fear that it could be liable for a large sum by way of compensation. Some voices in the media were also urging the England team to return, and even dared to suggest, as did former test bowler Mike Selvey, that they precipitate return to Britain might have been a less than admirable move. Mr. Selvey also highlighted a point made by Manoj Badale, who fronts the franchise which owns the Jaipur-based Rajasthan Royals, the Indian Premier League (IPL) champions. He reminded the players that terrorism was not restricted to India but was a "reality of modern life" and that during the IPL season terrorist attacks took place close to the Jaipur ground where the matches took place, yet the players continued to compete *(The Guardian of 1/12/2009, p. S5)*.

Gradually, it looked increasingly likely that the England team would return, subject to certain conditions and changes. The first question to be solved was whether the First Test should still be staged at Ahmedabad a city which, as was mentioned earlier, had had its own unwelcome taste of terrorist violence. In July 2008, a group calling itself the Indian Mujahideen smuggled in ammonium nitrate in dairy cartons. Nearly 50 people died and over 150 were injured in 16 explosions across the city, allegedly in retaliation for religious riots six years previously which left 2,500 dead *(The Guardian of 1/12/2009, p. S2)*. In the light of this circumstance, it was decided to move the contest to Chennai, with the Second test being switched from Mumbai to the Northern city of Mohali. In addition, Reg Dickason was dispatched to the subcontinent to prepare a safety report – even though Chennai was considered to be a relatively low-risk venue *(The Guardian of 2/12/2009, p. S6)*. Whilst awaiting Mr. Dickason's findings, the England team were promised "presidential-level" security after the Indian authorities agreed to the ECB's demands in this respect, including an emergency evacuation plan which would enable the team to leave the country rapidly in the event of a further terrorist attack. In spite of these assurances, the England camp seemed to be deeply divided on the prospect of returning, with former England all-rounder Dominic Cork openly expecting several withdrawals from the party *(The Daily Telegraph of 3/12/2009, p. S5)*.

The hesitancy shown by at least some of the players will not have been dispelled by developments in India, where a high state of alert had been placed on a number of city airports – including Chennai – because of apparent warnings of an airborne attack. However, Mr. Pietersen was able to announce that the party would return without dissenters subject to a favourable security report by Reg Dickason. Pending this outcome, they boarded a flight for Abu Dabi, in order to buy some time and allow them to make a decision on the tour before the week was out *(The Guardian of 5/12/2009, p. S9)*.

In the meantime, the team had attended a 100-minute meeting at their Abu Dabi hotel and decided to continue the tour – unconditionally for the First Test, and subject to a further Dickason security audit at Mohali for the second. The length of the meeting suggests that there were still waverers, in spite of the assurance given by

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team manager Hugh Morris that the decision was unanimous *(The Daily Telegraph of 8/12/2008, p. S1).* The First Test accordingly took place amid scenes which, according to one reporter, could have come straight from The Day of the Jackal. Rapid Action Forces ringed the perimeter of the ground, automatic weapons at the ready. There were snipers on the roof, and probably as many police officers as spectators for the toss. Security checks were stringent, with anyone carrying anything more than a wallet and a ticket failing to gain entrance – no packed lunches or water bottles, and certainly no mobile phones *(The Guardian of 12/12/2008, p. S6).*

It was gradually dawning on the world of cricket that it would have to come to terms with a new era of permanent high security. Tim May, the former Australian Test bowler who is currently the Chief Executive of the Federation of International Cricketers' Associations (FICA), called for an international security summit to examine the current conditions. He stressed that the players understood how important it was for the sport to make a stand against terrorism by continuing to compete in the subcontinent. Describing this feeling as the "overwhelming direction that was coming from the players", he continued:

> ***"That is not from a selfish point of view in terms of player wages. What we are trying to address is on a larger scale. It is imperative for cricket to continue in that region because there's (sic) a lot of countries whose survival is dependent upon such revenues. Hopefully we will get all the stakeholders together to run some sort of security summit"*** *(The Guardian of 6/12/2009, p. S12).*

However, it was also becoming clear that cricket would not be the only sport affected by the events in Mumbai. It was also announced that security concerns had played a major part in the cancellation of the Indian Masters tournament (golf) for 2009 (the other reason being that other blight on 2008, the financial crisis) *(The Guardian of 2/12/2009, p. S2)*. Nor was India the only country to be affected by the terrorist threat, as the events described in the next section will show.

Pakistan terrorist threat continues to blight cricket

It should at all times be remembered that, prior to the Mumbai and Ahmedabad attacks described in the previous section, it had hitherto been Pakistan which had represented the main security concern as far as visiting cricketing parties were concerned, as can be testified by several earlier editions of this Journal. Unfortunately this cancer has continued to eat away at this beleaguered country, with cricket not only suffering by way of side-effect, but becoming the main focus for the terrorists' violence, as the attacks on the Sri Lankan team in Lahore made abundantly clear.

Indeed, it is a sad irony of fate that, immediately prior to the Mumbai attacks described earlier, the strong possibility was mooted that Pakistan might switch their forthcoming series against India to the latter, given that the Indian authorities seemed likely to refuse permission for their team to participate in the tour. This had been prompted by the decision by the Indian government to prevent a junior hockey team from touring Pakistan in early December 2008 *(The Guardian of 18/11/2009, p. S2).* (The Pakistanis later appeared to retaliate when they denied their men's hockey team to compete in a four-nation tournament in Chandigarh, India, the following month *[The Guardian of 3/1/2009, p. S13]*. Earlier, the Pakistan Cricket Board (PCB) had considered shifting the series to England or the United Arab Emirates because of Indian security concerns (The Daily Telegraph of 14/11/2009, p. S19). In the event, India did decide to cancel the tour – a move which was bitterly criticized by former Pakistan all-rounder Imran Khan (currently heading his own political party, Tehreek-e-Insaaf). Not unreasonably, he stated that India should have applied the same criteria as they did when they urged England to return after the Mumbai attacks *(The Guardian of 19/12/2009, p. S2)*. It is estimated that the PCB lost some $40 million as a result of the cancellation *(The Daily Telegraph of 14/1/2009, p. S4).*

In spite of this major blow, the PCB could at least comfort themselves at the prospect of the impending tour by Sri Lanka, due to be played in march 2009. Indeed, just before the year ended the Pakistani cricket authority hailed Sri Lanka's confirmation of the tour as a "lifeline" for the domestic game. Even this result had been far from easy to achieve. Javed Miandad, the former Test batsman who is currently the PCB's general director of cricket, reported that diplomatic channels had to be used in order to convince the Sri Lankan government to give clearance for the tour, which was arranged after India cancelled their visit *(The Guardian of 27/12/2009, p. S11).* At the time, they could not possibly have imagined that, far from being a boon to Pakistan cricket, the Sri Lankan tour was itself to become the target of the next terrorist assault.

The First Test was due to take place in Lahore, at the Gadaffi stadium one of the subcontinent's cauldrons of cricket. The first two days passed off without mishap. The next day, in the early morning sunshine, the visiting team's coach glided out of one of the city's most luxurious hotels and edged into the morning traffic. The

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vehicle, followed by a minibus containing the match umpires, halted at the junction of Liberty Roundabout, a landmark noted for its sculptured pond. Mohammad Kalil, the driver of the bus carrying the Sri Lankans, reflected how quiet the roads were. However, by 8.30 am the hum of traffic was replaced by the boom of a rocket launcher. He reported:

> ***"As we approached the Liberty roundabout, I slowed down. Just then what seemed to be a ricket was fired at my coach, but it missed and I think flew over the top of the vehicle. Almost immediately afterwards a person ran in front of the bus and threw a grenade in our direction. But it rolled underneath the coach and did not seem to cause that much damage – I was shocked and stunned"***
> *(The Guardian of 4/3/2009, p. 6).*

In fact, the first explosion had missed the cricket convoy by some 20 ft. From the shade of the trees lining the main boulevard in the eastern part of the city, a dozen young men appeared, armed with rockets and guns. Raking the side of the coach carrying the visiting team with bullets, they were clearly intent on causing blood-soaked mayhem. The first three attackers on the scene, captured by the television cameras, calmly opened fire with AK47s – mowing down Pakistani police. They then turned their attention to the vehicle, coolly aiming at tyres, chassis and windows. The players' coach rapidly filled with shards of glass and pools of blood. Injured players hit the floor, following which the coach zigzagged its way through the ambush. In the event, it emerged that what saved their lives were the lightning reactions of Mr. Kalil, who kept his foot on the accelerator. Tragically, his colleague who was driving the umpires' minibus was killed. The entire attack had all the hallmarks of a commando-style operation. The rocket which had narrowly missed the Sri Lankan team bus slammed into a parade of shops, reducing one to cinders *(Ibid)*.

Salmaan Taseer, the Governor of the Punjab region where the atrocity took place, ordered a manhunt as police cordoned off the area. In fact, this had been the second occasion on which the centre of Lahore had been in the grip of intense police action. The previous week, the police had acted to control riots led by supporters of Nawaz Sharif following a Supreme Court order barring the former Prime Minister from standing for elected office. Ultimately, it emerged that six members of the Punjab Elite Police had been killed in the attack. President Asif Al Zardari hailed their bravery and local news media hailed them as martyrs. Barely a few hours after the attacks the Sri Lankan team were airlifted to a nearby army base, where they bordered an aeroplane for Colombo – departing from the same stadium where 13 years previously they had emerged from the stadium holding the World Cup aloft *(The Independent of 4/3/2009, p. 2)*.

As this atrocity occurred just before the issue of this Journal went to press, any description and analysis of its aftermath will not be available in these columns until the next edition. However, even at this early stage there have been accusations that the attack could have been prevented. Opposition MPs sitting in the Pakistan parliament have claimed that public officials received specific warnings that militants were planning the ambush, but were unable to prevent the assault because of the country's political crisis. More specifically a letter dated 22/1/2009, issued by a member of the criminal investigation branch to the then provincial police chief, stated that the former had "learnt" that an attack was planned on the Sri Lankan team, either at the hotel or on the journey between the hotel and the stadium. Police and administration officials were said to have met the next day in order to assess the threat, but before any action could be taken the government of Punjab province – of which Lahore is the capital, and which is controlled by the party of former Prime Minister Nawaz Sharif – was dismissed following a court ruling. The federal government, led by Asif Zardari, then installed its own administration, and the upper ranks of the police and administration were replaced *(The Guardian of 4/3/2009, p. 1)*.

Other issues

[None]

3. Contracts

Media rights agreements

[None]

Legal issues arising from transfer deals

Contract restricting footballer's freedom to transfer held illegal. Belgian Supreme Court

In the case under review, the claimant, a professional footballer, had been "purchased" by the defendant (i.e. his heirs in view of the latter's intervening demise) from his previous club. Under this contract, the player competed for a succession of clubs for the following three season. In 1998, the player and his "owner" updated their agreement, which henceforth stipulated that the player would be entirely free to transfer to any club he wished if he paid the sum of BEF 350,000 to his "owner". When the player announced that he intended to transfer to a new club, the "owner" claimed the agreed sum of BEF 350,000. The player resisted this claim on the basis that (a) the contract had an unlawful cause and therefore was null and void under the Belgian law of contracts and (b) it violated the Belgian constitution, more particularly its provisions relating to individual freedom and to fundamental economic, social and cultural rights. The Court of Appeal had dismissed this claim on grounds of considerations which related to the freedom to contract. However, the Supreme Court (Cour de Cassation) allowed the claimant's application for review *(Decision of 29/9/2008, [2008] Journal des Tribunaux p. 699).*

David Beckham in legal difficulty over proposed transfer deal (US/Italy)

The long-standing England international transferred from Real Madrid to US club Los Angeles Galaxy in 2007 for a five-year period. However, in the middle of the 2008-9 season, he was loaned by the North American side to top Italian club AC Milan for three months. It appeared that Mr. Beckham was enjoying his return to European football more than he expected, thereby indicating the possibility of a more permanent move to Italy – even though he continued to insist that he intended to honour his contract with Galaxy *(Associated Press, www.findlaw.com of 4/2/2009).* Indeed, at a certain point it was learned that Milan were urging the English player to attempt to persuade his Los Angeles employers to bring forward the date on which he could be released from his contract, which was October 2009, so that he could join the North Italian side on a permanent basis with immediate effect. Mr. Beckham might have to fund part of the financial settlement, which would need to be negotiated, but would be rewarded with a lucrative deal for at least 18 months *(The Independent of 11/2/2009, p. 57).*

This sparked off a series of negotiations which had not yet been concluded at the time of writing. Initially, Galaxy rejected the offer of $3 million proffered by Milan, this amount being considerably below their valuation, and officials representing the club prepared to travel to the US for further talks *(The Guardian of 17/2/2009, p. S4).* At the time of writing, the position remained unclear, even though the Serie A club was confident of obtaining an extension of the loan period *(The Guardian of 3/3/3009, p. S4).* More details are expected by the time the next issue of this Journal goes to press.

Employment law

Massa refuses to contemplate salary cut (Italy)

The global economic downturn is having an effect on all walks of life, including sport. Pressure has been exerted on several of its highest-paid exponents to reduce the level of their earnings accordingly – and firmly resisted by some. This includes the Ferrari Formula 1 driver Felipe Massa, believed to be earning around £8 million per year. Stefano Domenicali, the sporting director of the Italian team has recently floated the notion that teams should reduce driver salaries in order to cut expenditure in a sport acutely affected by the current economic difficulties – which has, in fact, already lost one of its prime movers, in the shape of Honda. Mr. Massa claims that driver's earnings are but a small part of the overall budget involved *(The Independent of 26/12/2009, p. 59).*

Baseball team owner renews call for salary cap (US)

The extent to which top sporting performers should have restrictions placed on their earnings by their controlling bodies has been a vexed question since professional sport began. Proponents of salary caps point out that unrestricted earnings are ultimately harmful to the sport in question because it results in a small number of teams or individuals cornering the majority of trophies, thus reducing the competitive interest. This is very much the argument put forward recently by John Henry, the owner of the successful Boston Red Sox baseball team. He claims that all team owners would support an "enlightened" salary cap and that players might agree, although he did not go into any detail. Exactly five years earlier, Mr. Henry had called for a similar restriction *(Associated Press, www.findlaw.com of 18/2/2009).*

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American footballer sued by driver (US)

In mid-January 2009, it was learned that a man who worked as a driver for Eddy Curry, the New York Knocks player, had started legal proceedings against his former employer, claiming that the latter owed him $98,000 in back pay and expenses *(Associated Press, www.findlaw.com of 13/1/2009)*. No further details are available at the time of writing.

Article on footballers' world trade union

In "Footballers of the world unite!" *([2008] GLSI 102), in [2009] 2 Irish Current Law p. 59)*, the author, Stuart Gilhooly, explains the function of FIFPRO as a world trade union which brings together the football associations of 40 countries. He notes the developments and cases discussed at the annual FIFPRO congress in Chile last year. He also recognizes the increased recognition of FIFPRO as a brand.

Sporting agencies

[None]

Sponsorship agreements

New UEFA deal casts doubt on Mastercard sponsorship

In mid-January 2009, UEFA, the European governing body for football, announced a new three-year sponsorship deal with the Unicredit bank. This has cast fresh doubt on the involvement of credit institution Mastercard with the Champions League. Although all the parties involved allege that there is no conflict between the two sponsors, the news raises the question whether Mastercard will continue its hitherto disadvantageous relationship with football. It will be recalled from a previous issue of this Journal *([2007] 3 Sport and the Law Journal p. 75)* that the company won a $90 million settlement after world governing body FIFA reneged on a pre-contract agreement over its World Cup sponsorship in 2005, signing instead with Mastercard's arch-rival Visa. Mastercard's sponsorship of UEFA expired in May of this year, and the firm has announced that it is "reviewing how this can be extended". However, at the time of writing it had not revealed whether it had entered into a pre-contract agreement with UEFA *(The Guardian of 15/1/2009, p. S2)*.

Other issues

Health club engaged in unfair trading practice. Canadian court decision

In the case under review, the claimants had signed membership agreements with the "World Health Club" under which membership fees were payable for initiation, dues deposit, processing fee, and monthly dues payments for 12 months. They joined the club intending to use its aerobics room. On their first visit to the club they were unable to use the aerobics room because it was not free. They were then contacted on a daily basis by various representatives of the club and informed that they would have individual fitness examinations. They did not wish to attend individually and informed the Club's agent that they would come together. However, the telephone calls to the claimants continued, and one of them, who was the other claimant's wife, was intimidated by them.

Consequently they decided to discontinue their membership, believing that they were entitled so to do. They received a reply in which they were told that, under the membership agreement, they had to pay the full fee for 12 months since there membership was not cancelable for the one-year period. They claimed for the amount already paid, whereas the defendants counterclaimed for the eight months' membership fee allegedly still owed. The judge, D.G. Ingram, stated that, on the face of the documentation presented to the court, the defendant would be entitled to the unpaid balance. However, he ruled that the agreement in question qualified as a "consumer transaction" under the Fair Trading Act 2000. This makes it possible for a consumer to cancel agreements tainted by unfair trade practices. The various defects of the membership agreement constituted such practices, and therefore the action was awarded to the claimants *(Johnson v. World Health Club Alberta Provincial Court dated 12/6/2008, [2008] Business Law Reports p. 316 et seq.).*

"Golden tennis couple" in court battle over management fees (US)

For a place built as much on the proceeds of sharp practice as the sand on which it stands, Las Vegas has for a long time been able to feel better about itself because of ex-tennis champion Andre Agassi, the city's most revered resident. However, a bizarre and ugly court battle between Perry Rogers, Mr. Agassi's oldest friend and long-time business partner, and Steffi Graf, Agassi's wife and fellow tennis champion, threatens to tarnish the reputation of the city's favourite citizen, with

3. Contracts

one columnist describing it as the "nastiest Las Vegas break-up in years" *(The Observer of 14/12/2009, p. 39)*.

What has stunned local observers is that Mr. Rogers has sued Graf for the relatively modest amount of $50,000, allegedly for being a few weeks behind in paying his management fee. The court action threatens to blow open the couple's finances to the world and has already revealed that Ms. Graf had an account with one investment bank worth over $20m. Mr. Agassi expressed his sorrow over this turn of events in the following terms:

> ***"I am both saddened and disappointed to learn that Perry has filed a lawsuit and sadder still that he has sued my wife, Stefanie. I remain hopeful that we will be able to resolve our business issues with minimal damage to our families and mutual friends. It's like a divorce in many ways. I still don't think I'm in a place where I can process this yet. None of it is easy. At the end of the day, you try to get through it as responsibly as possible. I certainly love my wife more than life itself and will be there for her during this time."*** *(Ibid)*.

Long-time Las Vegas observers believe that there had been simmering tensions between Graf and Rogers. They say that the former Wilmbledon champion, who became more closely involved in her husband's finances after her father was sentenced to nearly four years' imprisonment for tax evasion, was troubled by the manner in which Mr. Rogers had handled some business investments for the couple, particularly after a major land deal went sour.

To the outside world, Agassi, 38, is known as the prematurely bald tennis wonder who fought his way back near the end of his career to finish with eight Grand Slam wins and more than $30m in lifetime tennis earnings. He retired in 2006 after losing in the third round of the US Open. The tennis star had been married before to actress Brooke Shields, and everyone was thrilled when his fairytale tennis romance to fellow ace Steffi Graf resulted in marriage seven years ago. The couple have two children. However, to the good citizens of Las Vegas, Mr. Agassi is more than just a native son. He is royalty, a prince among men. He is now appreciated more for what he has done off the court than he is for his remarkable tennis career. Through his Andre Agassi Charitable Foundation, which the champion set up in 1994 with Rogers, Agassi has raised more than $70m, mainly to help disadvantaged children. Until he resigned in October, Rogers also managed all Agassi's business affairs as president of Andre Agassi Enterprises. From the end of 2002, Rogers was also Ms. Graf's manager and agent *(Ibid)*.

The businesses Rogers managed for Agassi included enterprises that have made Agassi a very rich man, even by Las Vegas standards. He continues to have a sportswear deal with Adidas, has major real estate investments in Idaho, is a partner in several restaurants and nightclubs in Las Vegas, including the nightclub Pure which is co-owned with Celine Dion, basketball star Shaquille O'Neal and Graf. Last year Agassi sold a property he owned in California for $20m. He owns two houses in the prestigious Spanish Hills neighbourhood in Las Vegas, where homes are worth up to $10m, and a third lot which has a tennis court. Last year Agassi paid property taxes of more than $10,000 on the couple's primary residence.

The relationship between Agassi and Rogers was extraordinarily close. Whereas Agassi prefers to keep out of the limelight and is seldom seen at high-profile Las Vegas events, Mr. Rogers was his public face and the two seemed to share a trust that can only come through decades of close friendship. The pair often talked of how the depth of their friendship had led to their commitment to charity and to the establishment of the charitable foundation. The first inkling of a problem came in October when Agassi and Rogers announced they were severing their business ties. At the time both insisted they had taken the decision because they did not want to lose their friendship. However, the court action which Rogers has brought against Graf now suggests otherwise *(Ibid)*.

Rossi faces court writ from former manager (Italy)

In early December 2009, it was learned that Valentino Rossi, the five-time MotoGP champion, had been issued with a court writ by his former manager, Luigino Badioli, over unpaid consultancy fees amounting to nearly €1 million. The writ came just a few months after Mr. Rossi reached a multi-million pound settlement with the Italian fiscal authorities following an investigation into undeclared earnings. Mr. Badioli, who managed Rossi over an 11-year period until 1007, claims the champion still owes him £784,000 for his role in negotiating the rider's salary at Yamaha, as well as various sponsorship deals. Mr. Rossi dismissed Badioli as his manager last year. Since then, he has allegedly refused to communicate with him, save for one letter in which his company infortmed Mr. Badioli that they were "no longer in need of your services" *(The Daily Telegraph of 5/12/2009, p. S19)*.

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Sporting injuries

Negligence and the rugby rules. Article in Irish journal

In "Bringing it down on their own heads" *([2008] ILT 191-195, in [2008] 10 Irish Current Law p. 52)* the author, Tim O'Connor, considers the application of the law of negligence to the sport of rugby and explores the proposed rule changes under the Experimental Law Variations, which allow the pulling down of mauls, and the potential liability which could be incurred by the governing bodies in the sport as a result.

Cheerleading "is a contact sport" rules Wisconsin court (US)

In the world of US sport, the performance of the cheerleaders is rated almost as earnestly as that of the competing teams. It was therefore only a matter of time before this practice reached the law courts in this most litigious of societies, and this is precisely what occurred in late January 2009. In a case closely watched cheerleading circles, the Wisconsin Supreme Court ruled that a former high school cheerleader cannot sue a team mate who failed to stop her fall her while practicing a stunt. The court also said the injured cheerleader cannot sue her school district for the alleged lack of supervision on the part of the coach. The National Cheer Safety Foundation commented that the decision is the first of its kind in the US, and could have implications for the manner in which the judiciary treat court actions related to injuries. At the least, the decision sets new standards for Wisconsin.

At issue in the case was the question whether cheerleaders qualify for immunity under a Wisconsin law which prevents participants in contact sports from suing each other for unintentional injuries. The law in question does not specify which sports qualify, and the District 4 Court of Appeals ruled last year cheerleading did not count because there was no contact between opposing teams. Many observers warned that families of cheerleaders would be compelled to take contract serious insurance policies if that decision stood. All seven members of the Supreme Court agreed to overturn that decision. In the majority opinion, Justice Annette Ziegler said cheerleading is a sport and involves a significant amount of physical contact between the cheerleaders which "at times results in a forceful interaction between the participants." Ms. Ziegler cited stunts in which cheerleaders are tossed in the air as an example of the contact involved.

Because of the increasingly difficult stunts, injuries among high school cheerleaders are a problem. Cheerleading has accounted for two-thirds of catastrophic sports injuries among high school girls in the past 25 years, according to the National Center for Catastrophic Sports Injury Research at the University of North Carolina. The department claimed that 67 out of 103 fatal, disabling or serious injuries between 1982 and 2007 involving high school females occurred in cheerleading. Its report found more than 95,000 female students and 2,100 male students take part in high school cheerleading every year.

The court made its decision in an action brought by Brittany Noffke, who was a basketball cheerleader at Holmen High School in western Wisconsin. Practising a stunt for the first time before a basketball game in 2004, Ms. Noffke fell backwards off the shoulders of another cheerleader and injured her head. She accordingly sued a 16-year-old male team mate who was supposed to be her spotter but failed to catch her. She also brought a suit against the district and its insurer, claiming that the coach was negligent for failing to supervise the stunt and not making sure they used mats in the process.

Judge Ziegler rejected Noffke's argument that the Wisconsin Legislature intended to limit the definition of contact sports to more aggressive ones such as football and hockey. She wrote that lawmakers meant to limit liability for "any recreational activity that includes physical contact between persons in a sport involving amateur teams." The decision means cheerleaders can only be sued for acting recklessly in causing injuries, the court stating that the actions by Noffke's team mate merely reflected a lack of skill or a mistake. Ziegler further ruled that the district cannot be sued for the coach's behaviour under a Wisconsin law that shields government agencies from court actions for the actions of employees. The coach had no duty to make sure a spotter was in place or to provide mats and the stunt was not a "known and compelling danger," the court said *(Associated Press, www.findlaw.com of 27/1/2009).*

Libel and defamation issues

Lacrosse slander decision appealed by Duke University (US)

In mid-January 2009, it was learned that the Duke University of North carolina were to appeal against a court ruling which allowed former men's lacrosse coach Mike Pressler to pursue an action for slander against the University and its former spokesman. The university contends that the court erred when nullifying a

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settlement between Mr. Pressler and itself. The settlement in question came after Pressler had been dismissed following a woman's false accusation that three players had raped her (in a case extensively documented in these columns, see Journals passim). Mr. Pressler's action had claimed that Duke University infringed the settlement when former spokesman John Burness twice made disparaging comments about Pressler to the media. Legal advisers acting for the University have claimed that US federal law requires arbitration in such cases, and has requested the state Court of Appeals to reverse the original decision *(Associated Press, www.findlaw.com of 14/1/2009).*

Materazzi wins damages from newspaper over Zidane incident

The vast majority of football fans will recall the infamous incident which occurred during the 2006 World Cup final, in which French star Zinedine Zidane was dismissed from the field of play following his headbutt on Italian opponent Marco Materazzi. The Inter Milan star successfully sued British newspaper The Sun in the English High Court over allegations made in the latter that he had called Mr. Zidane "the son of a terrorist whore". The amount of the damages was not disclosed, but was said to be "substantial". Previously, similar actions against the Daily Star and the Daily Mail had been settled with the payment of damages, publication of an apology, and statements read in open court *(Associated Press, www.findlaw.com of 9/2/2009)*.

Insurance

[None]

Other issues

Former girlfriend launches court action against baseball star

In mid-February 2009, it was learned that a former girlfriend of baseball star Roberto Alomar had launched an explosive court action in which she claims that the former baseball player insisted on having unprotected sex with her for four years despite having AIDS. Ilya Dall is seeking a minimum of $15 million in punitive damages from Mr. Alomar *(Associated Press, www.findlaw.com of 11/2/2009)*. No further details are available at the time of writing.

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Sports policy, legislation and organisation

Doubts over South Africa's hosting of 2010 World Cup continue

Ever since the decision was made to allow the newly emerging democracy of South Africa to host the next world tournament in what is globally the most popular sport, doubts have been cast on the nation's ability to rise to the occasion. Certainly, Sepp Blatter, the President of world governing body FIFA insists that the competition will be a tremendous success. Amid the official optimism, concerns about the country's record crime rate, slow tickets sales and restricted hotel capacity are dismissed as minor aberrations. However, as the nation struggles with debilitating levels of unemployment and crime – not to mention the allegations of sleaze and cronyism surrounding the ruling African National Congress party – World Cup euphoria seems to be notable by its absence in the troubled country.

This is not for want of popularity of the sport in South Africa. The nation's overwhelmingly black population actually adore football. For the legendary Nelson Mandela, who championed the country's bid in 2004, having the World Cup allocated to it signalled a coming of age of South Africa as a patriotic nation. However, at the grassroots level, the inhabitants of the South African townships have yet to acquire the habit of spending large amounts of cash attending football games, let alone internationals. This is partly a legacy from the apartheid era, when the authorities discouraged large gatherings of black people anywhere, not least in stadiums. However, it is a sad fact that the forthcoming world tournament is failing to capture the imagination of the people – but for entirely different reasons *(The Observer of 1/2/2009, p. 36)*.

Take, for example, a location such as Nelspruit, the site of the Mbombela stadium, which should be one of the showpiece grounds of the tournament, with all the sophisticated 21st-Century technology that goes with it. Yet the mudbrick houses only a short distance away have no electricity or running water. In addition, the air is rife with accusations of corruption, land-grabs, poverty wages and even murder. One of the inhabitants, Stephen Maseko, summed up the downbeat mood surrounding the project in the following terms:

> ***"The stadium has brought us such misery. The contractors closed the school to turn it into a dormitory for the workers. For two years our children have been forced to study in the stifling heat of flat-roof, pre-fab buildings. There is little sanitation and no sports facilities of play area. That is why I call the stadium a 'playground'. With all these constructions workers around, I cannot safely let my daughters walk to school. I have lived in the area for 19 years, but this is the worst of times. When the building work ends, there will be power and computers at the stadium, and modern toilets with separate cubicles for men and women. But we who live here still have nothing, only thousands of unemployed men"*** *(Ibid)*.

The stadium in question, which will seat 46,000, is among the smallest of 10 grounds approaching completion as part of a £800 million World Cup development programme which has been sold to the South Africans as a boost to the economy and a major attraction for as much as 450,000 football tourists. However – and here the advised reader will recognise a familiar theme featured in these columns – its legacy is bound to be confined to a few football academies and a plan – opposed by South Africa's powerful minibus taxis – to introduce modernised city bus services. During the tournament itself, the stadium will host a mere four matches at the group stage. In view of the penury surrounding the site, it is legitimate to wonder whether all the priorities are right here. And all this presupposes that the stadium will actually be completed on time. Fresh doubts on this score have emerged. Industrial unrest has beset the preparations for the tournament, and at one point 400 workers were dismissed for participating in an illegal strike. Already this means that the April 2009 deadline for completion will be missed, with a new target being set for December – a mere six months before the World Cup opens *(The Daily Telegraph of 20/2/2009, p. S6)*.

In the meantime, the first tickets went on sale. The frenzy with which they were purchased as soon as they appeared raised speculation about a flourishing black market – which may perhaps be offset by the current economic crisis. On the other hand, 15 per cent of tickets have been set aside for South Africa residents in recognition of the high poverty rates prevailing in the country. FIFA have attempted to avert any black market for such tickets, costing £10 each, by ensuring that they can only be collected at designated centres in the country *(The Daily Telegraph of 20/2/2009, p. S6)*.

Sochi Winter Games in financial trouble (Russia)

The 2014 Winter Games are due to take place in Sochi, a Russian resort close to the Black Sea. Financial constraints seem to be hampering progress towards meeting the relevant deadlines. In late February 2009, it was announced that the budget for the state company overseeing much of the work was to be reduced by two-

5. Public Law

thirds, according to a Russian official. Prime Minister Vladimir Putin urged companies to meet their commitments, whilst recognising that the country was going through a "difficult time" *(The Guardian of 25/2/2009, p. S10)*. These financial worries will not have been eased by the difficulties experienced by Russian oligarch Oleg Deripaska, whose company, Basic Element, is contracted to build the £2.4 billion Olympic Village and media centre as part of the £3.5 billion expected private sector investment in the project. Rumours that Basic Element was seeking financial help from the state-backed Vneshekonombank did not bode well for this project either *(The Guardian of 24/2/2009, p. S2).*

Tokyo pushes hard for 2016 Olympics bid (with Chicago lagging behind)

With only a few months to go before the International Olympic Committee (IOC) makes its final choice for the 2016 Games, the race between Chicago, Madrid, Rio de Janeiro and Tokyo is becoming intense, with the latter making a particularly emphatic showing. Its proposed venues for the Games have been approved by all 26 participating international sports federations, and are indicative of a "compact Games" with 95 per cent of all venues being within a 5-mile radius, and making use of many of the facilities built for the 1964 Olympics *(Associated Press, www.findlaw.com of 9/1/2009)*. The effect of the bid is also noticeable in the city itself, with the governor, Shintaro Ishihara, making a determined effort to clean up the sleazy and crime ridden areas, particularly the Kabukicho area *(The Guardian of 20/1/2009, p. 20).*

Chicago, on the other hand, seems to have been somewhat slow off the mark, having clearly failed to learn the lessons of the London bid. In its bid book, which was sent to the IOC in mid-February 2009, there is no mention of the manner in which it intends to fund the Olympic village, budgeted as $1 billion. Little more than three years before the British capital hosts the Games, neither does the latter have any funding in place for its £1billion accommodation project for the athletes. With every passing month, it seems increasingly clear that London will be calling upon the taxpayer-backed contingency fund. However, Chicago does not even have that recourse. The defeated US presidential candidate, John McCain, led a Senate Bill ruling out any federal funding for the Olympics, leaving the "Windy City" to make application to a drying well of private sector sponsorship *(The Guardian of 20/2/2009, p. S2).*

Who can afford 2015 and 2019 Rugby World Cups?

The next World Cup in the sport of Rugby Union is due to take place in 2015, and already concern is rising over the cost of staging it. Even before one penny is spent on the actual facilities and infrastructure, the successful bidder will need to find the £80 million fee which the International Rugby Board (IRB) is demanding for the right to stage the tournament. However, the Italian Rugby Federation has received a pledge from its government that it would guarantee the fee in question. Russia's governing body has received a similar promise from its government for the 2019 event, whereas the English Rugby Football Union has been informed that it only has a chance of state funding if its bid guarantees fixtures in Wales, Scotland and Northern Ireland *(The Guardian of 3/12/2009, p. S8).*

The financial prospects of staging this tournament are not helped by the news that New Zealand is expected to lose some £10 million in the process of organising the 2001 tournament. It was reported that the Chief Executive of the 2011 organising body, former Test cricketer Martin Snedden, has admitted that, as a business case, the tournament "does not stack up" *(Ibid).*

Article on new Spanish football franchise regulations

In "Follow-up on the New Franchise Regulations of the Spanish Football League", the authors, Ferran Escayola and Roberto Alvarez *([2008] ISLR 67-68, [2009] 2 European Current Law p. 49)* report on the reasons why the Spanish Football League has introduced franchise regulations which allow clubs to trade their league places with other clubs, and why clubs have thus far failed to take up this opportunity. They compare the Spanish system of closed leagues based on sporting performance with the US system of closed leagues and franchising. In addition, they explain how to negotiate transactions under the Spanish franchising system.

Beijing 2008 – the aftermath

This column has frequently had harsh words for the staging of major sportfests in terms of their cost and limited usefulness. It gives its author no pleasure at all to report that the Chinese capital is currently displaying the symptoms of suffering from the same "Olympic curse" which befell Athens and Sydney. Several months after the end of the games, new figures show the "Olympic Effect" to have been short-lived, with empty hotels, falling industrial output and eerily quiet streets. It is true that much of the pain is due to the worldwide

5. Public Law

financial crisis – and in some cases due to brave decisions by the government to keep polluting industries shut to spare the environment. However, even the largest single symbol of the modern rise of China, the "Bird's Nest" National Stadium, stands forlorn, largely unused except for a dwindling number of tourists. Attempts to induce the city's main football club to move to the ground have failed, as it is simply too big for the team's usual attendances. Instead, it charges 50 yuan – around five pounds – per person to come and stand where Usain Bolt and others touched glory in the summer *(The Daily Telegraph of 3/1/2009, p. 14).*

Henry Zhang, deputy head of the Stadium's management firm, said he was concerned about the prospect of recovering its investment, describing the situation as "Ju An Si Wei" – "Enjoy the calm but prepare for danger". In this Journal and elsewhere, it has been abundantly shown that other countries have suffered post-Olympic blues, (incidentally, a warning for this country's own planning for London 2012). The huge investment in facilities and transport comes to a sudden end, and if alternative uses cannot be found for the venues, they can take on the appearance of expensive white elephants.

This is all the more disappointing because China was forecast to avoid the fate of Australia and Greece after the Sydney and Athens Games of 2000. The amounts being spent on Beijing, though on the surface huge at between £25 billion and £40 billion, were dwarfed by sums being spent countrywide in a large and booming economy on roads, airports and new factories. Unfortunately, the figures show that in some ways the Olympics may have actually contributed to a downturn. Hotel occupancy rates have been lower than managers hoped for most of the year, something blamed on a more restrictive visa regime for foreigners and other measures aimed at tightening security *(Ibid)*.

Now, even though the Chinese economy is still supposed to be growing at a rate of nine per cent every year, hotel prices in the capital are actually falling as rooms empty. The average in November was more than seven per cent down overall, and 13 per cent for five star hotels. Many of the new luxury palaces opened specifically for the Games are less than half full. This is partly because the tourists are staying away, there having been 20 per cent fewer foreign tourists in November compared to last year. This is particulkarly the case at the St Regis, a five-star hotel in the embassy district used to hosting world leaders such as Bill Clinton and Henry Kissinger. It underwent a £18 million refurbishment before the Games, but is now, on average, two thirds empty.

It is true that many Beijingers are enjoying the increased number of "blue sky" days – days when the air meets China's own standards for pollution. A number of factories which were closed down for the Olympics have not been allowed to reopen, including concrete factories inside the fifth ring road and chemical plants that do not meet new pollution standards. However, those hoping for an Olympic dividend have been disappointed *(Ibid)*.

Another benefit which had been predicted for the nation was an increased interest in physical recreation. Even that prospect seems to have gone sour somewhat. Shortly after the Games ended, the Ministry of Education launched a winter running campaign with a view to boosting patriotism and health. Schools have been instructed to take their charges for a jog every day until the end of April. Primary school pupils must run 1 km, junior high school pupils 1.5 km and senior high and college students 2 km. However, the People's Daily newspaper – the official mouthpiece of the Communist Party – has acknowledged that the scheme has proved to be controversial, with parents and teachers as well as children complaining *(The Guardian of 21/11/2008, p. 22).*

More particularly the scheme's critics have argued that it distracts students away from their studies. They have also warned that urban schools frequently struggle to find space for sports, questioning whether they can map out a safe route for the pupils. Others have raised loftier objections, as one internet blogger has done:

> ***"It is the right of every school or even every student to choose. Asking the students of the whole country to run is a bad sign for education, whose nature is freedom"*** *(Ibid).*

According to the state news agency Xinhua, the relevant Ministry has stated that physical education plays an important part in carrying out ideological and moral education, and stressed the need for such work in the run-up to the 60th anniversary of the People's Republic this year. However, one commentator, Ya Wei, of the Da he newspaper, said that the sole fault with the campaign was that it did not go far enough, claiming that records showed that the physical condition of Chinese youth was "dropping fast" *(Ibid)*.

China takes first steps to end betting ban

One particular aspect of the recent Olympics to have eluded the control of the Chinese state will certainly have been the huge amount of illegal betting on the outcome of the individual events. When, in late November 2009, the horses thundered down the turf of the Orient Lucky City racecourse in Wuhan, there was more than glory at

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stake. For the first time on mainland China since the communists took power 60 years ago, ordinary racegoers were be able to make money on races and take home winnings. This does not take the form of actual betting on races (see below), but the move is seen as a significant step towards it – and towards enabling the government to rake in taxes on some of the huge sums spent on illicit gambling in China.

Both betting and racing were outlawed in 1949, and only riders and owners have been allowed to make money from the sport since it re-emerged in the 90s. But the authorities are reconsidering their ban on the "social evil". By one estimate, some £400 billion is spent on illegal betting in China each year.

Wang Shenshun, the deputy director of the Wuhan sports bureau, told the Changjiang Daily newspaper that the meeting was "an experiment in the commercialisation of horse racing". According to the paper, individuals and groups could now apply to join a racing club and buy shares in the horses, allowing them to make money from races. Qin Zunwen, who researches racing at the Hubei Academy of Social Sciences, said the race would also see non-cash prizes awarded to those who picked winning horses – the first time such a scheme had been approved. He added:

> ***"In the 80s people started dancing again, in the 90s the stock market became available and lottery tickets came out, and after 2000, a sports lottery appeared. Now there is demand for a horse racing lottery in China."***
> *(The Guardian of 29/11/2009, p. 20)*

Mr. Qin estimates that legalising betting could ultimately create as many as three million jobs and yield up to £40 billion in tax. A survey by his school suggested 83 per cent of Wuhan's residents thought introducing betting would have a positive social impact, while 51 per cent were "interested" or "very interested" in gambling on the races. This year, the state news agency, Xinhua, said the government was considering allowing betting, and the Orient Lucky Horse Group corporation suggested it might be seen at its track as early as next year. As regards the race featured above, the group said it had never described the event as a commercial race, but acknowledged that it was the first of a series of weekly meetings. Previously races were held once or twice a year.

Mainland China currently has two lotteries. But most Chinese gamblers use illicit channels or head to the Happy Valley racecourse in Hong Kong or to the casinos of Macau. Although they are part of China, these territories' special status means the mainland sees little of their vast profits. Two years ago, racehorses were culled after a course in Beijing closed. Its operator had believed betting would be legalised but ran out of money before his hopes were realised. Wuhan, the capital of Hubei province, was historically a centre for racing and is keen to regain that status. This autumn a commercial college in the city launched a three-year racing course which requires students to learn how to ride and to organise meetings as well as to study the theory of the sport *(Ibid)*.

Article on sports regulation in Switzerland

The International Sports Law Review (ISLR) currently has a regular feature which examines sports regulation on a country-by-country basis. In the latest edition *([2008] 4 ISLR 69-70)* the focus is on Switzerland, reporting on sports law developments in that country during the past year. In the process, the authors, Daniel Hufschmid and Tobias Giesser, consider (a) the amending legislation which introduced preventative measures against hooliganism at football matches and other sporting events, and (b) the establishment of the Antidoping Foundation for Switzerland, as well as consultation about law reform aimed at introducing stronger penalties against doping in sport *([2009] 2 European Current Law p. 45)*.

Legislators protest against American football title system (US)

In mid-January 2009, a handful of US lawmakers used a resolution commending the University of Florida's victory in the national football championship to protest against college football's much-maligned BCS system. A dozen House of Representative members voted "no" or "present" on the resolution, the latest signal from the nation's capital that many people are unhappy about the way in which the University sports authority, the NCAA, chooses its football champion. Many of the dissenters were from Utah and Texas, both of which have universities which made out a strong case to play for this year's national championship but were passed over. To quote Representative Joe Barton, a Texas Republican who has introduced legislation to force a play-off system:

> ***"A fine school with a great team deserves better than a national championship that was decided inside somebody's computer. The Gators [University of Florida] certainly could have won it on the field, but they didn't get the chance any more than Utah, Texas and USC"***
> *(Associated Press, www.findlaw.com of 23/1/2009).*

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President Barack Obama also has repeatedly criticized the Bowl Championship Series (BCS), saying he plans to "throw (his) weight around a little bit" to pressure the NCAA to adopt a playoff system. The BCS was created in 1998 by the six most powerful conferences. It features a title game between the top two teams in standings that are based on two human polls and six computer rankings. This season, Florida (12-1) met Oklahoma (12-1) in the championship game. Florida won 24-14 and ended up with a 13-1 record. However, the game was under scrutiny even before it began. Several schools which played in lesser Bowls championships claimed they deserved to compete in the championship, including undefeated Utah (13-0), Texas (12-1) and Southern California (12-1).

Representative Marion Berry (Democrat, Arkansas), who said he voted against the resolution because he thinks it is a waste of Congress's time, said "Utah has a legitimate claim but we'll never know because they couldn't play for it". A spokesman for Representative. Bobby Bright, an Alabama Democrat and Auburn University graduate, said his reasons for not supporting the measure were simpler: he simply could not bring himself to support a school that is such a bitter rival of his state's universities *(Ibid)*.

Rome under attack for considering F1 race (Italy)

As if the rape of a teenager and the racist beatings of Romanians, not to mention a crumbling infrastructure, were not enough, the city of Rome has now come under attack for daring to dream that it could actually be capable of staging a Formula One race on its streets. Monte Carlo has one, Valencia and Singapore have them and now the Italian capital is making a serious bid to host an F1 city circuit event. However, the scheme has rekindled the nation's more traditional – and less sporting – passion for regional backstabbing, with Northern politicians claiming Rome should "stick to chariot races" and leave Italian Formula One racing where it belongs, at the Monza racetrack in the North of the country.

The dissenters appear to have won over the Ferrari chairman, Luca Cordero di Montezemolo. Rome, he said, has no need for a Formula One race in order to boost its image. He commenetd that if attention was going to be paid to the city then "I think it should focus on investment in infrastructure, security and lighting", an apparent reference to the rape of a 14-year-old girl in a dimly lit suburban park in the city on Saturday. Following reports that two Romanian men carried out the rape, a hooded gang raided a nearby bar favoured by Romanians on Sunday, assaulting customers. A day later soldiers and police bulldozed illegal shacks hidden in woods on the outskirts of Rome housing up to 500 people, including illegal Romanian migrants *(The Guardian of 19/2/2009, p. 23)*.

At the time of writing, the city council is considering the Esposizione Universale Roma district as the potential site for its grand prix circuit, a series of wide, tree-lined streets built by Mussolini and dominated by the Palazzo della Civiltà Italiana, an icon of fascist architecture known as the Square Colosseum. The former Italian formula two champion Maurizio Flammini, who is supporting the bid and recruiting investors, said Bernie Ecclestone, the head Formula One racing, was "very interested" in bringing a grand prix to Rome. Flammini added the race would cost up to €130m to stage using private finance, and would attract up to 350,000 spectators over three days.

The city authorities have done their utmost to maximise the potential social benefits which stand to be gained from the venture. Thus the city council assessor for sports, Alessandro Cochi, claims that the revenue produced in Rome by the annual staging of the grand prix will mean "funds for social services, sports and culture in the city". However, the Corriere della Sera, one of Italy's leading newspapers commented that cash was needed instead to fill the thousands of potholes that plague the lives of motorists in the capital, some big enough to swallow a Ferrari. Politician Fabio Desideri, who opposes the bid, commented that holding a car race in Rome, the capital of traffic jams and craters, is a "true paradox,". Italy's Northern League party has condemned the bid as another example of Roma ladrona, or "thieving Rome". In the words of Claudio d'Amico, one of the party's MPs,

> ***"I would remind Rome's politicians that car racing in this country means Monza. Since Rome seems to have no new ideas, here is one – rebuild the Circus Maximus and hold chariot races, which will be a great success and stop you bothering the North"*** *(Ibid)*.

Mr. Flammini, on the other hand, expressed the view that the in-fighting would be shortlived. He points out that the Northern League insists that every region should pay its way. Therefore the North should be "applauding a profitable business idea which means it will have fork over less public money to the south".

Claudio Barbaro, an MP in Prime Minister Silvio Berlusconi's Freedom People party, said Montezemolo had not ruled out holding the race in Rome, claiming that he merely needed to say what he did in order to remain

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neutral. He added that it was not only the Northern League which was are against this neture, but "investors in Monza who are scared of losing sponsorship if an additional grand prix were created in Rome." *(Ibid)*.

Can Rugby Union heal Los Angeles's wounds? (US)

Jesse Owens Park is a world away from the playing fields of Rugby School, where (so the legend has it) William Webb-Ellis first picked up the ball and ran with it, in a famous act of teenage rebellion which spawned the sport that now bears the name of his alma mater. Situated in Crenshaw, one of the grittier neighbourhoods in Los Angeles, the muddy expanse of grass sits a stone's throw away from Slauson Avenue, a busy road that marks an informal dividing line between the territories of the Crips and the Bloods, the city's two most notorious gangs.

On a normal day, being of the few areas of greenery in a concrete jungle, the park provides a haven to the local homeless community, who tolerate with the 24-hour long noise from police sirens and overhead flights into nearby LAX airport. In early January 2009, however, it bore witness to a more orderly scene that would perhaps be better suited to the English Home Counties, in that 100 teenage boys and girls were seen passing oval-shaped balls backwards and forwards, during the gruelling first training session of their new rugby season. The players, all aged between 14 and 17, are part of an extraordinary sporting and social experiment. They are among thousands of youngsters, from some of America's most gang-ridden areas, who are being taught to play rugby – in an attempt to turn them away from a life of crime *(The Independent of 20/1/2009, p. 30).*

Even though the US has been a regular partipant in the World Cup, few Americans have heard of rugby union, but it was introduced to the View Park Charter School, which most of the children attend, by players from Santa Monica Rugby Club, on LA's prosperous Westside, a few years ago. Today, dozens of schools compete in the Inner City Rugby League, one of several competitions that have arisen across America to cater for teams made up of children from the country's toughest urban areas. Dave Hughes is the English-born Physical Education teacher and rugby coach. He admits that, at first, many of them found the sport confusing, but "pretty soon they grew to love it". He described them as having much ability, with some of them being "just incredible athletes, kids who can run 40 yards in 4.7 seconds, and hurdle as high as their own shoulder." *(The Independent of 20/1/2009, p. 30).*

Learning rugby, which teaches values like hard work and team-building, can help improve the students' self esteem, continues Mr Hughes, and prevent them ending up on the wrong side of the tracks. At View Park, its benefits are also being keenly felt in the classroom, as Mr. Hughes explains:

"We've got kids here who were totally uncontrollable. They used to make me want to quit my job every day. Now, you should see what rugby has done for them. It's incredible, like something has just clicked. Suddenly they want to help out, be part of a team, and have a future. Some are even getting into universities like Berkeley and UCLA on the back of their potential, because although it's only a minor sport, the coaches of the teams there are able to make sure they get offered a place." *(Ibid)*

View Park has been far from alone in advocating the positive values of rugby. At Hyde School, in one of the most disadvantaged suburbs of Washington, coaches of the rugby team made headlines this year when, in defiance of expectations, every one of the 15 players in their team secured a place at university. In LA's Hawaiian Gardens, an undefeated youth side which won the regional championships is credited with breaking down inter-racial tension, which led to an unprecedented drop in violence between black and Latino high-school students, together with a decline in graffiti in the local area.

Now inner-city rugby is starting to be taken seriously at the very highest levels of the sport in the country. Next month, View Park's team will travel to Twickenham for England's game against Italy, as guests of the RFU. The trip will be part of a week-long tour for the players – most of whom have never left California, let alone travelled overseas. They will stay at Wellington College, the Berkshire public school, play alongside the first XV and be coached by James Haskell, the England player and Old Wellingtonian.

Watching the children prepare for their trip provides frequent reminders of sport's potential to break down barriers. In normal circumstances, gang allegiance is demonstrated by the colour of clothing they and their contemporaries wear: red for the Bloods, blue for Crips. But on the field many of View Park's players wear outfits that symbolise their rejection of old divides. Some have one red sock, and one blue. Others wear blue shorts with red socks, or vice versa.

Speaking to them also reminds one how far they have come. These are the words of Darius Dawkins, View Parks softly-spoken 15-year-old scrum half:

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"I hope to benefit from the trip by learning better rugby skills, but my community and family will also benefit from it by knowing that something good has come off these streets.When I get older, it will hopefully help me become a big-time rugby player and go to a big-time rugby school."

The growth of inner-city rugby comes as American Football, which evolved from it and is now the USA's most watched sport, struggles to distance itself from associations with gang culture. Players in the NFL, the professional league, were recently banned from celebrating touchdowns and other on-field successes by making gangland gestures. Rugby also makes solid commercial sense for schools in deprived neighbourhoods, which can struggle to raise sufficient funding to provide the equipment and team of coaches necessary to run an American football programme. View Park's entire league survives on a small sponsorship deal with Evolution Capital, a finance firm in Santa Monica.

USA Rugby, the national governing body of the sport, claims that the number of schools offering the sport, particularly in disadvantaged urban areas, is increasing exponentially. According to Mark Griffin, the organisation's youth director, traditionally only a tiny number of high schools have played rugby, many of them Irish Catholic schools on the East Coast. However, thios number has roughly doubled in the last five years, and now we know of roughly 750 schools. He adds that much of that increase "has been happening in the cities".

The USA's national rugby team, which achieved prominence at the last World Cup when it scored what was later voted the try of the tournament against South Africa, is hoping to benefit eventually from the influx of young talent from the inner cities. Yet the most immediate benefits are on the streets. In the words of Stuart Krohns, the founder of the Inner City Rugby League:

"Rugby is a full contact extreme sport, and like all extreme sports, it's a release. All teenagers have angst, and rugby gives them a sense of emotional balance.It's helping these children look at life differently because they are playing a sport that originated overseas, and to start seeing themselves as part of a global community. And in this day and age that has to be a very valuable thing." *(Ibid)*

The sport of rugby has often been decried as elitist and even "colonialist". However, the present writer cannot be alone in wishing this particular venture every possible success for the future.

Outrage over New York State cuts in high school sports (US)

Concern has been rising recently at the effects of the current economic recession on New York State's high school athletes. In mid-February 2009, it was learned that the group which oversees public high school athletics in New York State recently approved shaved-down budget schedules for the next school year as a cost-cutting measure, the latest to take the step nationwide. Cuts vary by sport in New York: baseball teams which play 24 regular-season games will move down to 20, and American football teams will be reduced from 10 games to 9 or 8, depending on the regional officials' decision.

The New York State Public High School Athletic Association says the shorter schedules allow schools to cut budgets without cutting programs. Critics — including coaches and pupils — claim the new policy unfairly targets student athletes. Tom Goddard, the Clarence High School varsity football coach, has already described this latest development as "a terrible thing to do to the kids". Unfortunately. trimming games to save money is not a new idea. A school district outside Cleveland met recently to discuss no lesser move than the abandonment of all sports, even though the school board in suburban Richmond Heights delayed its vote until April. Early in this decade, Oklahoma schools shortened sporting seasons in order to save money. Mississippi last year voted to cut schedules by 10 percent – except for the beloved money maker, American football. Schools in Idaho are considering a reduction, though officials there noted there is some opposition. And while a season-reducing proposal was rejected in Maine last month, officials set rules which will result in fewer teams qualifying for playoffs *(Associated Press, www.findlaw.com of 10/2/2009)*.

In response to the furore unleashed by the news, New York athletic officials stated that incremental cuts to all programs will save sports with fewer participants, like gymnastics and bowling, from the budget knife, as well as modified sports programs for seventh- and eighth-graders. The measure was passed by a majority vote in the last weekend of January. By hitting every sport — boys and girls — the cuts also avoid violating any provisions of the 1972 Federal Title IX law to prevent discrimination in education spending based on gender. However, the damage caused to the sporting scene in the state's schools could be considerable. According to Pat Pozzarelli, the President of the Association:

"Losing one game in a basketball season when you're playing 18 or 20 games, that's not the end of the world. And if you do that across the board, you're going to get some savings. But if you don't do that, you can lose an entire sport."

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The cost savings might seem small — a referee here, a bus trip there — but they add up. A high school umpire in New York averages $83 a game, without travel expenses, according to association executive director Nina Van Erk. Schools need two umpires a game, so two fewer home games saves a district authority a total of $332. Van Erk estimates that schools statewide will save more than $3 million in officiating costs alone. Add to that bus trips, chaperones and scorekeepers and the savings approach $10 million among 776 schools statewide, she said. However, some parents support the restrained, universal cuts as an alternative to than the more drastic option of wiping out whole teams.

Critics concede the economy is tough, but they focus on the cost of this policy to the youngesters – even it is a question of a few basketball games. Will Reutemann, a senior on the La Salle Institute basketball team in Troy, N.Y, said that those two or three games were, for them as a team, an opportunity to "build team chemistry, and to figure out what's going to work and what's not going to work". Susan Garrigan-Piela, President of the Columbia Football Booster Club near Albany, complained that students in New York already play fewer games than their counterparts in states like Texas. She is also concerned about cuts to programmess which enable students to fill their time productively She conceded that many people were of the opinion that sports were not needed, but "the real fact is, what are you going to do with all those kids with nothing to do?"

Gary VanDerzee, football coach for Ravena-Coeymans-Selkirk High School near Albany, said the association failed to exhaust every option before turning some Friday night lights out. He said instead of "putting budgetary problems on the backs of the kids," schools could defer purchases of uniforms, balls and other equipment. He added that schools in the area could vote to set longer seasons locally. However, it is possible that those teams could be declared ineligible if they play more than the state maximum. He also said the move will put New York athletes at disadvantage when it comes to college recruiting, because students in other states will have played more games over their high school careers.

Proponets of shorter seasons stress the action is for two years. If economic indicators rise in that time, so could the number of high school games.

Environmental issues

[None]

Public health and safety issues

Winter sports claim further victims

Albrecht seriously injured but survives

It has been called "the last death-or-glory sport", and continues to command a good deal of glamour. However, a succession of high-profile crashes in recent months have focused attention on the less pleasant side of the sport of skiing, particularly in the build-up to World Championships. Daniel Albrecht, one of the world's best young skiers, should have been preparing for the World Championships in Val-d'Isère in the French Alps. He was not there. Instead, the 25-year-old Swiss, the reigning world champion in the Super Combined, remained in a coma in Innsbruck University hospital, fighting for his life after a spectacular tumble in Kitzbühel just days before the opening ceremony.

On the prospect of a championships of thrills and spills, regardless of the perils, the former British ski racer and veteran commentator Nick Fellows says:

> ***"The rewards are higher, the athletes train harder, the back-up is better, the performance is improving and the speeds are faster. Yes, it's dangerous, probably the last true death-or-glory sport in the world. Crash in F1 at 100mph and you walk away. Crash at 100mph on the slopes and it could all be over. The circuit is full of courses designed around 1900 for 40mph being raced at up to 100mph. And the downhill at Val-d'Isère for the championships is on a course that was so difficult in the 1992 Winter Olympics, they shut it. Scary for some, but that's part of the attraction"*** *(The Independent of 30/1/2009, p. 56).*

Mr. Albrecht lost control in training towards the bottom of the Streif downhill course and flew through the air for about 40 metres before landing on his back. He crashed over onto his front, then came to a stop, face down, near the finish line. After receiving medical attention at the scene, he was airlifted to hospital by helicopter. He was diagnosed with brain and lung injuries and placed into an induced coma. He subsequently suffered minor bleeds in his lungs, and pneumonia. He continued to improve, but doctors were slow to wake him from his coma because of a complication affecting his lungs. They had to remove liquid from the skiier's lungs which

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had resulted from an infection of the organ *(Associated Press, www.findlaw.com of 9/2/2009)*. His condition continued to improve afterwards *(Associated Press, www.findlaw.com of 12/2/2009)*.

However, the major question on the skiing circuit has become an acute one: has the game become more dangerous? "Yes" appears to be the consensus. But will that deter many professional expeonents of the sport? This is highly unlikely, even as one recounts other recent serious accidents. Matthias Lanzinger is a 28-year-old Austrian, a former junior world champion and European gold medallist in 2007. Instead of taking part, he had to watch his first world championships as an amputee. Last March, in a Super-G run at a World Cup event in Kvitfjell, Norway, he crashed into a gate and down a steep slope. His plight was made worse because the release mechanism on his ski binding failed to function and he sustained an open leg fracture. A helicopter journey later, he underwent surgery in Lillehammer but he then needed transferring by air again for more specialist care in Oslo. Problems with blood circulation by the time he arrived led to complications, which ended with his left leg being amputated below the knee *(The Independent, loc. cit.)*.

Other leading skiers sustain injuries

Chemmy Alcott is Britain's best skier, and the first Briton in a long time to threaten decent placings on the World Cup circuit. She was in Val-d'Isère, intending to take part in all five disciplines open to her, and hoping to give a good account especially in her favourite discipline, the giant slalom. Incidentally, she was competing with a broken ankle.

"Incidentally" is the operative word because injury, even serious injury, seems to be something that most skiers not so much ignore but accept as part and parcel of their sport, their lives, the fabric of who they are and what they do. Norway's Aksel Lund Svindal is living testimony to this approach. The poster boy of Norwegian ski racing was also present at the world championships, looking to defend the titles he won in the downhill and giant slalom in 2007. Those triumphs were achieved in February of that year, nine months before the horrific crash that nearly cost him his life. He was on a training run for the Birds of Prey downhill race in Beaver Creek, Colorado, when he crashed on landing after a jump on the run. His skis came off, and the razor edge of one of them impaled his buttock, gouging a six-inch wound that one doctor described at the time as a "laceration that went up near his rectum, his large intestine". Svindal also somersaulted into a safety fence, fracturing his jaw and breaking several bones in his face *(Ibid)*.

There were concerns that the cut was so deep Svindal's internal organs might have been damaged, so he underwent investigatory surgery to check. He was later able to joke, saying that everything was good "so they put the stuff back in there and closed it up". His recovery, no laughing matter, took a year and began with two weeks confined to bed in Vail Hospital with a view of the slopes. That only served as motivation to get back to work, Svindal claims. He said:

> ***"As a racer, you have to have a short memory. When you're up at the starting gate, and the clock is ticking, you're not going to think 'I'm going to take it easy because I crashed'. You want to be fast".*** *(Ibid)*

What nobody could have predicted was that Svindal would come back more determined and more capable than ever. Just last month he returned to World Cup action on the very slopes that almost killed him, and on consecutive days won the downhill and giant slalom races.

Ally of German chancellor faces manslaughter charge as a result of skiing death

To emphasise that the dangers of the slopes are not restricted to the competitors' limbs, it was learned in early January of this year that a leading German politician was yesterday suspected of breaking piste traffic regulations at an Austrian ski resort only seconds before he was involved in a 60mph collision with a Slovakian woman skier who died from the injuries suffered in the accident. It was reported that Dieter Althaus, the conservative Prime Minister of the east German state of Thuringia and a close ally of Chancellor Angela Merkel, was on a skiing holiday at Austria's Riesneralm resort when he collided with Beata Christiandl on New Year's Day. The mother of four was rapidly rescued by helicopter, but suffered a cardiac arrest on her way to hospital and died. Mr Althaus, 50, fractured his skull despite his ski helmet and had to be placed in an artificially-induced coma. He is being investigated for manslaughter *(The Independent of 6/1/2009, p. 22)*.

Initially, it was believed that nobody witnessed the incident. However Austrian police interviewed a skier who had been on the slopes at the time and had seen Mr Althaus and Mrs Christiandl collide. His evidence could be crucial in establishing whether either of the two skiers was to blame. Germany faces a general election this autumn in which Ms Merkel is fighting to win a second term as Chancellor. She needs the support of Mr Althaus, who faces a key regional state election himself in August. Police photographs of the scene of the accident were published in the German media the next day. They showed that the collision

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occurred close to the point where two ski runs merge to form a single downhill piste. However, the exact spot at which the two skiers ran into each other suggested that instead of turning right to join the merged downhill ski run, Mr Althaus had overshot and gone up the opposite piste, where he had collided with Mrs Christiandl coming down in the opposite direction. Der Spiegel , the leading German news magazine, asked the question whether Mr Althaus had been like a driver "going the wrong way up a one-way street" *(Ibid)*.

The magazine quoted skiers at the resort who said the conditions, weather and visibility had been good on the day of the accident. It noted that rescue organisations attributed the vast majority of skiing accidents to skiers who overestimated their abilities while underestimating their speed. Police said both skiers had been travelling at around 30mph, resulting in a 60mph collision. But they suggested that Mr Althaus had contravened resort skiing regulations and gone the wrong way up the opposite piste. Siegmund Schnabl, the head of the Riesneralm district's Alpine police force, was asked whether the politician would have had to have been travelling uphill to reach the accident site. He replied in the affirmative, and that the slope went uphill in that direction, adding that "to get down to the valley he would have had to have turned right" *(Ibid)*.

Other deaths in recent months

The Allthaus incident was the latest in a series of Alpine skiing accidents this winter. Heavy snowfalls have produced ideal conditions and attracted record numbers of skiers. Over the Christmas 2008 period, Italian police launched a manhunt for a so called "hit-and-run skier" who collided with a 51-year-old man who died from the injuries he received. For this incident, a 16-year-old Italian youth came forward and confessed to colliding with his victim days after the accident. He faces possible charges for manslaughter and failure to offer assistance. In Italy alone more than 1,000 injuries have occurred on the ski slopes this winter and more than 100 people have been fined for dangerous skiing. In Austria, 34 people died and more than 50,000 skiers had to be admitted to hospital last season *(Ibid)*.

The Alps have also claimed the lives of mountaineers during the past winter. In mid-January, four Italian climbers fell to their deaths whilst climbing one of the highest peaks in the Mont Blanc range, according to French police. Colonel Olivier Kim, of the Haute Savoie region's gendarmerie, announced that the accident occurred on the Siguille du Midi. The four bodies were found and taken to the nearby village of Chamonix *(The Guardian of 19/1/2009, p. 22)*.

Safety awareness increases

All these developments have naturally focused the mind of those indulging in winter sports on the need for greater safety awareness and protection against the relevant hazards. In the immediate aftermath of Ms. Christiandl's death, it emerged that she was not wearing a helmet, whereas the other party involved, Dieter Allthaus, was. Although the latter suffered serious head injuries, doctors later said that it was likely that the helmet saved his life. As news of the accident reached the media, ski enthusiasts took themselves off to the shops in search of protective headgear. Werner Haizmann, the President of the Association of German Sports Retailers, said that demand has increased dramatically, and estimated that sales rose by 30-50 per cent during the first days of 2009. Shops nationwide were reporting helmet shortages *(The Guardian of 8/1/2009, p. 21)*.

Shortly afterwards, the Swiss insurance firm Suva mounted a major campaign aimed at persuading skiers to slow down on the slopes in order to reduce the number of accidents. Radar guns were used to measure speeds on Swiss slopes, with some of the fastest skiers recording rates of 44 mph. This was generally considered to contribute towards the 70,000 winter sports accidents which occurred in Switzerland eaxh year, according to a company spokesperson. Edith Muller, who heads the Suva campaign, said that new skiing techniques, the way skis are produced, and the manner in which slopes are maintained are the main factors which lie behind the speed increases. She added:

> ***"People just do not know how fast they are skiing. More people ski above their ability than they used to. Before pistes were groomed as they are now, there used to be more bumps, giving people a feeling of being less in control and forcing them to slow down"***
> *(The Guardian of 14/1/2009, p. 17)*.

The top winter athletes are also showing signs of becvoming more safety-conscious. Thus during the recent World Championships, women's coaches issued a protest with race organisers for the team event, claiming that the super-G course was tpp icy and dangerous for the athletes. In the men's super-G event on the Bellevarde course in Val d'Isère, 20 out of 67 racers failed to finish. Ted Ligety of the US fell for a full 300 yards before coming to a stop, somehow escaping injury. Women's race director Atle Skaardal pledged to investigate the problem *(Associated Press, www.findlaw.com of 6/2/2009)*.

5. Public Law

Dakar rally claims more victims

This annual motor cycle race has already accounted for a number of fatalities and serious injuries, to the point where many commentators are beginning to question its safety procedures – or indeed its very continuation. Another unfortunate landmark in this series of incidents was reached in early January. This year, the race was relocated to South America. The race was barely in its second stage when it was announced that French rider Pascal Terry had been found dead, having gone missing. It was announced that he was found in heavy bushes some 20 yards from his cycle. A spokesman for the organisers said that Mr. Terry had radioed during the stage to announce that he had run out of fuel, but contacted them shortly afterwards to say that he has obtained some from another competitor. Later the same day he sent an emergency signal and a search was launched – although this was interrupted when organisers were wrongly informed that he had appeared at the finishing point for the rally's foourth stage in Neuquen *(The Independent of 8/1/2009, p. 49)*.

Later, an Argentinian police report suggested that Mr. Terry might have been saved had race organisers started a search immediately when he had failed to reach the finish of the day's racing. He was not found until the early hours on Wednesday, three days later. An autopsy revealed that the French driver had died of pulmonary oedema leading to respiratory failure. It appears that the search had not been started immediately because a person named Terry checked into the race camp. However, this turned out to be Mr. terry's brother, who was also riding in the rally *(The Daily Telegraph of 9/1/2009, p. S19)*.

Although no further lives were claimed, there were a number of serious injuries later in the race. British driver Paul Green suffered serious chest and spine injuries following a crash. His team-mate matthew Harrison was less fortunate, and remained in an induced coma for a long time (The Guardian of 10/1/2009, p. S10). Then Spanish rider Cristobal Guerrero was left in a coma after crashing 160 km into the tenth stage (The Daily Telegraphof 14/1/2009, p. S13).

Nationality, visas, immigration and related issues

UEA bars one Israeli for tennis tournament, but relents on second

The first section of this survey normally contains a fair number of instances where politics impinge on the world of sport. Sometimes, however, the political angle even has legal consequences, as was the case over the imbroglio visited upon two Israeli tennis players who were due to play in Dubai Open but ran into visa difficulties. First, this was the fate of Israel's leading female player Shahar Peer, who ironically had been the first player from that country to take part in a tournament played in an Arab nation, i.e. in Qatar. This had been regarded as a major diplomatic breakthrough, particularly since she had only just completed her national service in her native country's army. However, tensions have always been high between Israel and Arab countries, and particularly in the wake of the three-week invasion of the Gaza Strip, which sparked off massive anti-Israeli protests across the Middle East. Ms. Peer had already been subjected to protests in New Zealand for this reason *(The Guardian of 16/2/2009, p. 17)*.

The incident gave rise to an emergency meeting of the Women's Tennis Association, at which the governing body of the women's world tour discussed the possibility of cancelling the bank-sponsored Dubai event. However, the UAE refused to back down over Ms Peer, and seemed to add fuel to the fire by also denying Israeli doubles player Andy Ram a visa to play in the tournament. Larry Scott, the Chief Executive of the WTA tour, commented that the refusal on the part of the UEA to issue the visa, ostensibly on the grounds of the conflict in Gaza, clearly breached the ethos according to which all players should be treated on an equal basis. He added that the tournament would go ahead this year, but it looked certain that Dubai would be dropped from the calendar if Peer and Ram remained barred. Although the UEA does not have diplomatic relations with Israel, Mr. Scott expressed his surprise at the ban, since his organisation had been in daily contact with the UEA authorities over this issue and this did not appear to constitute a problem *(The Guardian of 17/2/2009, p. S8)*.

The UEA authorities the next day confirmed the suspicion that it was the Gaza question which was at the root of the decision to refuse a visa to Ms Peer, stating that her presence would have "antagonized out fans who have watched live television coverage of recent attacks in Gaza". There were also references to

5. Public Law

"security fears" which had been prompted by public reaction in the country to the events in Gaza *(The Guardian of 18/2/2009, p. S8)* Mr. Ram, for his part, added to the pressure by calling on the WTA and the Association of Tennis Professionals (ATP) to "take responsibility" by cancelling the tournament or imposing other penalties. It is a fact that, when the ATP sanctioned the tournament in 1993, it had received guarantees that any player who qualified would be allowed access to the country. Like the WTA, the ATP states that a sufficiently high ranking is the only criterion a player should have to satisfy. Mr. Ram, a former Australian Open champion, was listed No. 11 in the world doubles rankings *(The Independent of 18/2/2009, p. 53).*

Eventually, the UEA did relent on Mr. Ram's visa after the ATP had given it a deadline to make a decision on the matter *(Associated Press, www.findlaw.com of 19/2/2009)*. They had made it clear that there would be no tournament at all if Mr. Ram were denied access. However, the Arab nation declined to reverse the decision in relation to Ms. Peer, who described the Ram decision as a "great victory", adding that, whilst it was unfortunate that she would not be competing herself in the tournament, looked forward to competing in Dubai the following year. The UAE authorities, for their part, made it clear that Mr. Ram had merely been given "special permission" to take part, and that this decision should not imply any form of normalisation with countries with which it had no diplomatic relations" *(The Guardian of 20/2/2009, p. S8)*. The statement did not explain why Ms Peer's application had been refused *(The Independent of 20/2/2009, p. 57).*

Cuban athlete and coach "desert" to Uruguay

In mid-February 2009, it was announced that Cuban long-distance runner Agelmis Rojas and his track coach Rafael Diaz had gone missing in Uruguay, and were thought to have defected to that country. They had been on a sports exchange programme in the capital Montevideo, and the day before they were due to return home they had left behind a cell phone and "simply disappeared". Later, Adalberto Cuevas, a Cuban track coach who has lived in Montevideo for years, claimed that he had received confirmation that the two had actually defected *(Associated Press, www.findlaw.com of 11/2/2009).* No further details are available at the time of writing.

Nationality issues – the case of Darron Gibson. Article in Irish journal

In "The case of Darron Gibson: nationality, identity, identity, sport and the law" *([2008] SLA&P , in [2008] 8 Irish Current Law 105)*, the author, well-known Irish sports lawyer Jack Anderson, examines the controversy surrounding the eligibility of players born in Northern Ireland to represent the Republic of Ireland on the sporting field, he considers the historical context and the implications of the shared birthright clause contained in the 1998 Belfast Agreement. He also comments on the senior debut for the Republic of Northern Ireland-born Darron Gibson during the Euro 2008 tournament and the subsequent complaint made to world governing body FIFA by Northern Ireland's Football Association to the effect that Gibson breached FIFA eligibility regulations. He concludes by suggesting that a sporting compromise, rather than a legal decision, might be the best possible solution to the dispute.

Sporting figures in politics

Kasparov in new political campaign (Russia)

The former chess Grand Master, who has never been known as a shrinking violet in the world of public affairs (as has been attested in these columns and elsewhere), has recently joined other prominent liberal politicians in his country to launch a new anti-Kremlin movement. The organisation is called – with historical significance – Solidarity, and seeks to unite the country's dysfunctional liberal forces and encourage a popular revolution similar to that witnessed in other former Soviet countries. Mr. Kasparov defended his position by claiming that he and his cohorts had "something to say to our people and something to offer them" *(The Observer of 14/12/2008, p. 42)*.

Footballer Thuram "refused Government offer" (France)

In early February 2009, it was learned that the former French international footballer, Lilian Thuram, refused an offer the previous year from newly-elected French President Nicolas Sarkozy to become of member of the latter's Government – according to the leading French newspaper Le Monde. The legendary star stated that it had been suggested to him by both the President and Claude Guent, the Presidential Chief of Staff, that he should become Minister for Diversity. It was reported that Mr. Thuram commented that "for obvious reasons" he could only refuse *(The Independent of 4/2/2009, p. 24)*. The advised reader will make of this what he/she will.

5. Public Law

Will the "Obama factor" assist the US's World Cup bid (football)?

The election of the first non-white candidate to the highest office in US public office has undoubtedly unleashed a tide of optimism on various fronts. Such has been the pitch of expectations that this euphoria has been transferred to other areas, including the sporting arena. Thus the United States Soccer Federation now thinks the election will help persuade FIFA to award the 2018 or 2022 World Cup to the United States. According to Sunil Gulati, the president of the Federation:

> ***"Given everything that, frankly, President Obama has said, everything he stands for, everything he's talked about in terms of reaching out to the world, that trying to bring the global game to the United States and opening our borders up for a festival of 32 countries and hundreds of thousands of people from all corners of the world would be viewed in a very positive way."***
> *(Associated Press, www.findlaw.com of 3/2/2009)*

The deadline set by world governing body FIFA for initial bids passed in early February of this year. Other nations that have said they would submit proposals included England, Netherlands-Belgium-Luxembourg, Russia, Spain-Portugal, Mexico, Australia, Indonesia, Japan, Qatar, Egypt and South Korea. Next year's World Cup will be in South Africa and the 2014 tournament will be staged by Brazil. FIFA says its executive committee will decide hosts for both the 2018 and 2022 tournaments in December 2010, and FIFA president Sepp Blatter has expressed a preference for single-nation bids. All this has naturally increased the degree of optimism that the US will be the next host (Associated Press, ibid).

Other issues

[None]

6. Administrative Law

Planning law

[None]

Judicial review (other than planning decisions)

French court decision on procedural aspects of judicial review involving sporting body

[See below, under item 11 "Procedural law and Evidence"]

Rule change by rugby federation ruled ultra vires. French Supreme Administrative Court decision

In the case under review, the applicants sought the setting aside of a decision made by the Executive Committee of the National Rugby League where it amended Article 59 of the Federation rules.. Given the object of this decision, which was regulatory by nature, this dispute was not a conflict between sporting clubs and approved sporting federations for which the provisions of the Sporting Code provide a conciliation procedure before the French National Olympic and Sporting Committee. Therefore, the dispute did not have to be submitted to the latter Committee before being referred to a court of law.

As regards the substance of the action, the Supreme Administrative Court (Conseil d'Etat) held that, although the Sporting Code disposes that the National Rugby league has the power, delegated to it by the French Rugby Federation, to issue rules aimed at ensuring the proper functioning of the competitions which it organises and to guarantee their integrity, these provisions do not confer on the League or on the Federation the right to define either the manner in which the sporting clubs should be administered, or the power to amend the conditions of the prohibition imposed by Article 122(7) of the Code. By prohibiting, through the amended Article 59 referred to above, the same natural or legal person from being a member of the executive organ and/or supervisory board of more than one sporting club, the League has exceeded the powers which it derives from the delegation of powers conferred upon it (Decision of 19/1/2009, Case No, 314049 – [2009] JCP – La Semaine Juridique p. 42).

Other issues

[None]

7. Property Law

Land law

[None]

Intellectual property law

Trade mark opposition by sports clothing company partly upheld. Canadian panel decision

In this case, the applicant, Skis Rossignol, applied to register the trade mark R&Design on the basis of its proposed use in Canada in association with two categories of wares: (a) boots, shoes, slippers,; sports bags, holdall bags, backpacks, fanny packs; clothing and accessories for skiing, snowboarding, skating and tennis (the "Similar wares") and (b) in-line skates, sports balls, tennis nets, tennis shoes, bags for rackets, in-line skates, tennis bags (the "Different Wares"). The opponent to this registration, R.M.P, Athletic, alleged (a) non-compliance with s. 30(i) of the Trade Marks Act 1985, c. T-13, (b) that the applicant was not entitled to registration of the trade mark under s. 16(3) because the trade mark was capable of being confused with the R&Design trade mark previously used and applied for in Canada by the opponent in association with various items of clothing, bags, sunglasses and footwear, and (c) the trade mark was not distinctive of the applicant. The latter tendered evidence of a branding consultant analysing the evolution of the applicant's mark in an effort to establish that the mark derived from a mark which had been in use since 1975. The consultant also noted the similarities and differences between the parties' trade marks and concluded that there was no significant risk of confusion among the general public.

The panel ruled that the application be refused as regards the Similar Wares, whereas the opposition was rejected for the Different Wares. No probative value was attached to the consultant's evidence. The latter had not studied law, and none of the trade marks upon which his report was based concerned clothing. He had no prior experience in the snow sports sector. He had not conducted a market study but, instead, based his opinion on a single trade mark search. As his mandate was to analyse the evolution of the applicant's mark, he did not determine whether there were any confusingly similar trade-marks on the register, he conducted a detailed analysis of the marks to detect differences, but this was not the test knowledge by the established case law. The fact that the applicant's mark was the result of an evolutionary process did not entitle it to registration over a confusingly similar mark. The application was refused for the similar wares and allowed for the different wares *(R.M.P Athletic Locker Ltd. v. Skis Rossignol Canada Ltd, Appl. 893719 Trade Marks Opposition Board, decision of 28/3/2008).*

Maoris are given rights to "haka"

The haka is a traditional dance performed by the sides representing New Zealand at Rugby fixtures (both union and league). In mid-February 2009, it was decided by the New Zealand government that intellectual property rights to the dance should be returned to the indigenous Maori people in order to protect it against commercial exploitation. The dance, which begins with the words kamate kamate was devised by a chief of the Ngati Toa tribe in the 19th century after he escaped death at the hands of his enemies. The Government also agreed to pay £100 million to other indigenous tribes in order to settle grievances over illegal land acquisitions and treaty violations *(The Daily Telegraph of 12/2/2009, p. 18).*

To what extent are sporting events capable of legal protection? Article in international journal

In "The legal nature of premium sports events: IP or not IP – that is the question", the author, Oles Andriychuk *([2008] 3/4 ISLJ 52-69)* considers contrasting approaches to the question whether, in relation to the legal nature of sports media rights, a sporting event, or only its broadcast, is capable of copyright protection. He reviews the regulation of copyright in the European Union and sports media rights in the US and other common law jurisdictions, noting the relevant case law. He discusses the arguments for and against the availability of copyright protection for sports events and virtual and targeted advertising in a sporting context.

Other issues

[None]

8. Competition Law

National competition law

BCS complies with law, says commissioner (US)

In early January 2009, the co-ordinator of the Bowl Championship Series (BCS – American football) announced that major college football leaders considered that the post-season system was in compliance with federal anti-trust law. Speaking to reporters, John Swofford, a commissioner with the Atlantic Coast Conference, did not specifically address the Utah Attorney-General's threat of anti-trust litigation against the BCS. However, he said the BCS had carefully considered the lawfulness of its format. Earlier that week, the Utah Attorney General, Mark Shurtleff, said he was investigating the BCS for possible anti-trust violation *(Associated Press, www.findlaw.com of 8/1/2009).*

EU competition law

Is Super League salary cap contrary to EU law? Article in international journal

In "Price-fixing between horizontal competitors in the English Super League" *([2008] 3-4 ISLJ 77-83, in [2009] European Current Law p. 55)* the author, Leanne O'Leary, discusses the applicability of Article 81(1) of the EC Treaty to the salary cap which operates in the English Super League rugby league competition. She describes the structure of the League, the scope of Article 81(1) – including the notion of "undertaking" and "economic activity" as used in relation to the organisation of the League, as well as EC competition law requirements as regards horizontal competitors. She also examines the effects and objectives of the salary cap, and suggests that a challenge to the lawfulness of the salary cap under the said Article 81(1) would succeed.

EU and US competition and employment law relating to sport. Article in international journal

In "The US systems of sport governance: commercialised v. socio-cultural model competition and labor law" *([2008] 3-4 ISLJ 108-112, in [2009] 3 European Current Law 67)*, the author, Anastasios Kaburakis, examines the differences between the application of US and EU competition and employment laws to sport. He considers the key characteristics of the US and EU systems of sports governance, contrasting the so-called "socio-cultural" European model with the US commercial sports model. He further compares the application of US and EU competition laws and labour laws to sport. He also includes a table summarising the differences between US and EU sporting policy.

9. EU Law

EU law (excluding competition law)

Portuguese betting laws in principle comply with EC law. Advocate-General opinion

Portuguese legislation confers on the Santa Casa da Misericórdia de Lisboa, a centuries-old non-profit-making organisation which has the object of financing causes in the public interest, the exclusive right to organise and operate lotteries, as well as off-course betting in the entire national territory. This legislation has recently extended this exclusive right to all electronic means of communication, in particular the internet. The legislation also provides for penalties in the form of administrative fines on those who organise such games in breach of that exclusive right and who advertise such games.

Bwin, an on-line betting company established in Gibraltar, and the Liga Portuguesa de Futebol Profissional were fined €74 500 and €475 000 respectively for offering mutual betting by electronic means and advertising it. Bwin and the Liga challenged this fine before the Tribunal de Pequena Instância Criminal (Criminal District Court) of Porto, which in turn expressed uncertainty as to whether the new Portuguese rules conform to Community law. This matter was therefore referred to the European Court of Justice for a preliminary ruling under Article 234 EC Treaty *(Case C-42/07, Press Release 68/08)*. In his Opinion, delivered in October 2008, Advocate General Yves Bot (sic) takes the view that the extension of the Portuguese legislation to lotteries and betting by electronic means of communication falls within Directive 98/23, which lays down a procedure for the provision of information in the field of technical standards and regulations. The legislation in question prohibits the provision or use of a service and thus constitutes a "technical regulation" within the meaning of the directive.

Since the directive requires the Member States to notify the Commission of any draft technical regulation, the Advocate General takes the view that the Portuguese draft legislation should have been notified to the Commission. He suggests that, in the event that the Portuguese Government has failed notified the legislation, it will not be applicable as against Bwin and the Liga and the national court must decline to apply it. The national court will have to determine whether the Portuguese draft legislation was notified to the Commission. Similarly, it will also have to draw the appropriate conclusions with regard to the fines imposed on the Liga and Bwin.

Next, the Advocate General examined the question whether the new Portuguese legislation is compatible with principle of the freedom to provide services. In the first place, he asserts that the aim of Community law is not to open up the market in gambling and games of chance. He argues that a Member State should be required to open up this activity to the market only if it treats games of chance and gambling as true economic activities intended to yield maximum profits. According to the Advocate General's analysis, the Portuguese legislation constitutes a restriction on the freedom to provide services since it prohibits a provider of on-line games established in a Member State other than Portugal from offering lotteries and off-course betting on the internet to consumers residing in the latter State. He points out, however, that such a restriction conforms with Community law if it fulfils certain conditions, i.e. that it is justified by an overriding reason relating to the public interest, that it is appropriate for ensuring the attainment of the aim which it pursues and that it does not exceed what is necessary for attaining it. Furthermore, and in any event, the restriction must not be applied in a discriminatory way.

As regards justification for the Portuguese legislation, the Advocate General considers that Portugal could legitimately restrict the freedom to provide lotteries and off-course betting on the internet in order to protect consumers and maintain public order. It will be for the national court to carry out a twofold test to determine whether the Portuguese legislation is appropriate for providing effective protection for consumers and for maintaining public order. First, the grant of an exclusive right to a single entity enables objectives such as those of the Portuguese legislation to be attained only if that entity is under the control of the State. It is thus for the national court to determine whether this is so for Santa Casa. Secondly, the national court must also assess whether, in the course of implementing the Portuguese legislation in question, Portugal is not manifestly distorting its purpose in seeking to obtain the maximum profit.

As regards the additional games created by the Portuguese Government in the field of lotteries and off-course betting and the accompanying advertising, the Advocate General observes that the Court has permitted a Member State to act in such a way as to draw players away from prohibited gaming activities to activities which are authorised. He goes on to state, however, that it will be for the national court to decide whether the extended range of games and the scale on which they have been advertised manifestly exceeded what was necessary in order to pursue the objectives on which Santa Casa's monopoly is based. As regards

9. EU Law

the policy of increasing the level of gaming taking place in casinos which, according to the applicants, the Portuguese authorities have pursued, the Advocate General considers that a Member State has a right to provide for different methods of organisation, which are more or less restrictive, for different games.

Finally, the Advocate General takes the view that the grant of an exclusive right to a single non-profit-making entity controlled by the Member State may constitute a measure proportionate to the attainment of the objectives of the Portuguese legislation. He also considers that the legislation in question is not discriminatory since it involves no discrimination on grounds of nationality.

Attempts to impose restrictions on major European football clubs fail – and could even be illegal under EU law

The world of sport has gradually established some kind of presence in its own right within the general system of the European Union (EU). Until relatively recently, sport merely impinged on European-wide regulation when it had a distinct economic element, as was the case with the Walrave and Koch decision – not to mention the now-famous Bosman ruling which revolutionised the world of sporting transfers. Increasingly, however, there have been demands for sport to be elevated to a status of its own, regardless of any business considerations, within the framework of EU law. However, the extent to which sport should be treated as occupying a special – and even exceptional – status in an EU context has been the subject-matter of much debate and controversy.

It has to be admitted that there has already been a certain breakthrough in this regard, since sport will achieve some form of self-sufficient recognition in the Treaty of Lisbon – assuming that this instrument is actually accepted within the near future. (There is also the White Paper on Sport adopted by the European Commission in 2007, which is also a somewhat anodyne document – see [2007] 3 Sport and the Law Journal p. 63 and elsewhere in this issue). However, demands to this effect have not been confined to general and sonorous statements of principle. We are currently witnessing the beginnings of what might become, in time, a detailed legislative framework for sporting regulation at the European level. The debate on this issue has already reached a lively and sophisticated dimension and, even though initial attempts to establish such a framework appear to have met with little success, the "genie is out of the bottle" and there is now a real prospect that this objective might be achieved within the foreseeable future – if only out of sheer necessity.

One of the main issues which has perturbed sporting policy makers – regardless of their nationality – is the extent to which certain major clubs have been able to exert complete domination over the professional team sports. This has particularly been the case in the world of football – and especially in Europe, where a handful of top sides have gradually been lifted into a competition of their own. The sheer frequency with which the same names recur on the list of trophy winners in the various European competitions has given rise to increasing concern. In the past five years, these worries have increased, since there is now a tendency for the teams of one particular country – i.e. England – to monopolise the top echelons of European football. The "big four" (i.e. Manchester United, Arsenal, Chelsea and Liverpool) are seldom out of the final stages of the European Champions League. In addition, there are some clubs – notably Manchester City – which have recently acquired extremely wealthy owners and intend to use this financial clout to the full in order to secure inclusion among this exclusive fraternity.

The initial moves in this direction, however, have been fraught with difficulty and contention, and have laid bare once again the differences in approach between the Franco-German "corporatist" approach and the Anglo-Saxon "liberal free-market" school of thought. One particular head of French sporting authority went so far as to describe the "free-market" approach as "financial doping" *(The Daily Telegraph of 24/11/2008, p. S14)*. In the autumn of 2008, France used its six-month Presidency of the European Union to argue that European regulators should wrest control over financial, training and transfer policies from national bodies, in a move which, depending on one's viewpoint, was seen as either a thinly-veiled attack on the success of the English Premier League, or a sensible policy of removing a quasi-monopoly which is not in the best long-term interests of the game. This matter was one of the main items on the agenda when the Ministers for Sport of the EU met in Biarritz in late November . An early draft of the French plans had already served notice of intent where it declared that

> ***"competitive sport in Europe can go hand in hand with healthy economic competition only if the same financial rigour is required of all participating clubs by a single body overseeing a system of self-regulation for the financial control of the clubs concerned"***
> *(The Times of 22/11/2008, p. 120).*

9. EU Law

In principle, these proposals were aimed at all sports, but, it was quite clear from the spirit, as well as the letter, of the draft that football was the principal target. However, as soon as these plans were known the British government moved to stifle any expectations in this regard, with Gerry Sutcliffe, the Minister for Sport, serving notice of opposition to his French counterpart, former Rugby international Bernard Laporte, that his preferred option was to keep regulation in this field to the national level *(Ibid)*.

As a result, the French proposals were, predictably enough, considerably diluted. The most contentious part, which consisted in the appointment of a European "super-regulator" with jurisdiction over domestic clubs and competitions, was comprehensively excised from the final statement It also emerged that the concerns expressed by the assembled ministers were inspired not only by the stranglehold exercised by English Premiership clubs, but also by the belief that much of the strength of the leading clubs was fuelled by the financial might of overseas investors and large levels of debt. It was also clear that the Premiership clubs had lobbied energetically for the Minister to oppose them. Nevertheless, the British authorities have expressed some sympathy with the issues raised by the French. Since the meeting in question, Culture Secretary Andy Burnham has written to the Premier League and other football authorities in order to solicit their observations on the matter *(The Daily Telegraph of 29/11/2009, p. S9)*.

However, this is not an issue which is confined to governmental initiatives and negotiations. It has long been known that Michel Platini, the former French international who is currently the President of the European governing body for the game, UEFA, has harboured ambitions and ideals in this direction, as has been attested in earlier issues of this Journal. He has for some time now made attempts to cap the players' salaries and place some restrictions on the leading clubs' expenditure. Sensing the climate of financial fear caused by the "credit crunch", he attempted to warn football against the kind of havoc which the latter had unleashed upon the financial world *(The Daily Telegraph of 3/12/2009, p. S7*). The UEFA chief fully placed his agenda on the table when he made an impassioned 90-minutes speech to the European Parliament in mid-February 2009, calling for the realm of sport to be given exemptions from the rigours of EU law. Making especial reference to the financial excesses indulged in by Manchester City – more particularly their spectacular but doomed attempt to sign Brazilian star Kaka, one of the world's most expensive players – he sought to prepare the ground for greater financial fair play in the following terms:

> ***"During this year's festive season, one club which had suddenly become very rich made various astronomical bids in the transfer market. Is it morally acceptable to offer such sums of money for a single player? We are currently looking at the idea of limiting, to a certain degree, a club's expenditure on staff – salary and transfer fees combined – to an as yet undecided percentage of its direct and indirect sporting revenue"***
> *(The Guardian of 19/2/2009, p. S5)*.

Obviously Mr. Platini sensed that, in the current economic climate, there was appetite for reform and that, with the European game being in the worst financial crisis in 80 years, the UEFA President had a plausible case for insisting that the governing body had a right to regulate the elite clubs' finances – including a cap on salaries and transfer fees *(Ibid)*. Whilst the precise details of UEFA's proposals remained unclear, it was understood that that it was proposing a limit of 46-63 per cent on the proportion which salaries and transfers could assume in any club's revenue. On the other hand, the European Club Association was lobbying for extra funds to be allocated to smaller clubs. Mr. Platini had expressly warned the EU against interfering with UEFA's regulatory system. On the other hand, there was a wide body of MEPs who believed that imposing a salary cap would merely serve to cause loss to smaller non-elite clubs who failed to qualify for competitions such as the Champions' League or the UEFA Cup. These were understood to have requested a two-year exemption from any new rules *(Ibid)*.

Exactly where the Platini plan goes from here is uncertain. From a purely legal viewpoint, an exemption from the normal rules of EU law as important as the one requested would require a vast raft of legislation which would carefully delineate the nature and scope of the exemption, as well as a number of amendments to both primary and derived EC laws in related fields. As matters stand, the plan remains at the stage of an impassioned speech made before the European Parliament. In fact, the sheer magnitude of the legal difficulties ahead was made clear within a few days of the Platini speech, when the world governing body for the sport, FIFA, released an academic report which it had commissioned on the subject of the "6+5" plan championed by president Sepp Blatter, under which the line-up for each club would need to include at least six locally qualified players. This too has been a proposal inspired by the desire to rein in the dominant effect produced by the major European clubs. The report in question, issued by the Institute for European Affairs, claimed that the proposed rule did not infringe the provisions of EU law on the free movement of workers

9. EU Law

(Daily Mail of 27/2/2009, p. 91). However, a spokesman for the European Commission lost no time in dismissing the plan as constituting "direct discrimination". To make matters even more complicated, the report had even outlined a loophole enabling players to circumvent the proposed rules, where it stated that the 6+5 plan "merely considers the entitlement to play for the national team concerned". Depending on one's interpretation of the term "entitlement", this could be taken to mean that players such as Mikel Arteta (Everton) or Manuel Almunia (Arsenal) could be counted among the six rather than the five *(The Guardian of 27/2/2009, p. S2).*

In the meantime, this issue has been taken up in the world of academic writing. In "FIFA quotas ruled offside?" *([2008] NLJ 1017-1019, in [2008] 11 European Current Law 44)*, the authors, Richard Williams and Alex Haffner, question the lawfulness, under EC and domestic law, of proposals to restrict football clubs on the numbers of foreign players they may field in domestic competitions. In sp doing they compare the "6+5" rule proposed by world governing body FIFA and the "home grown players" rules advocated by the European governing body UEFA. They discuss the implications of these proposals from the point of view of competition lad and anti-discrimination legislation, as well as the rules on the free movement of workers, with reference to Articles 39, 81 and 82 of the EC treaty, the Lisbon Treaty, employment legislation, and the attendant case law. They consider whether sport should be exempt from these rules because of its special nature.

In "Foreign player quotas in football teams: sporting and legal pros and cons" ([2008] 1-2 ISLJ 108-109, [2008] 11 European Current Law 46), the author, well-known writer in sports law Ian Blackshaw, discusses whether there should be an international limit on the number of foreign footballers as suggested by FIFA. He considers the question whether foreign player quotas would be in the best interests of football, and whether EC law would allow a sports governing body to take an initiative which could amount to discrimination against foreign nationals.

EU sports ministers meet in Biarritz

Reference has already been made in the previous section to the gathering of European sports ministers in late November 2008. Other than discussing the French proposal on regulating football finance discussed earlier, the meeting adopted a Declaration on a number of priority topics. The Declaration highlighted the importance of the aforementioned 2007 White Paper on Sport and underlined the need to take account of the specific characteristics of sport in EU policy-making. It puts particular focus on some of the French presidency's priorities for sport, especially in the field of education and training. The Presidency Conclusions reflect the great variety of topics on the EU agenda for sport, as well as the sound progress which had been made in implementing the White Paper in all three prioritised areas: the role of sport in society, its economic dimension and its organisation. Two-thirds of the actions envisaged in the "Pierre de Coubertin" Action Plan are currently being implemented or have already been concluded.

Action No 1, as included in the said "Pierre de Coubertin Action Plan", envisages that the Commission and the Member States should develop new physical activity guidelines before the end of 2008. In the course of the past year, therefore, a Group of Experts, consisting of 22 outstanding independent experts, has, in co-operation with the EU Working Group on Sport and Health (consisting of representatives of the Member States) been preparing a draft of the EU Physical Activity Guidelines. These were discussed by the Sports Directors of the Member States at a meeting held in Versailles on 30-31 October. The document was subsequently endorsed by the Sports Ministers of the member countries at the Biarritz meeting referred to in the previous section. The Sports Ministers also proposed that the document be submitted to the EU Council – in particular the Council formation responsible for health *(www.europa.eu of 22/11/2008)*.

It should be noted, however, that these Physical Activity Guidelines will not become a binding document. They should be perceived chiefly as a source of inspiration for Member States, regional and local authorities, sporting organisations, civic society organisations and other relevant bodies to define and implement policies which would make it easier for Europeans to be physically active as part of their daily lives *(Ibid)*.

9. EU Law

ECJ gives ruling in dispute between Turkish footballer and Spanish federation

In case C-152/08 *(Real Sociedad de Futbol SAD, Nihat Kahveci v. Consejo Superior de Deportes, real Federacion Espanola de Futbol, OJ C 285/14 of 8/11/2008)* the ECJ decided that the prohibition on all discrimination against Turkish workers duly registered as belonging to the labour market of the Member States as regards remuneration and other conditions of work, as laid down by Article 37 of the Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972, should be interpreted as precluding the application to a professional sportsman of Turkish nationality legally employed by a club established in a Member State, of a rule laid down by a sports association in that:

> ***State, according to which clubs are authorised to field in competitions organised at national level only a limited number of players from non-member States which are not parties to the Agreement on the European Economic Area.***

Academic articles on EU sports law

In "The Long Life of Bosman – a Triumph of Law over Experience *(ISSN 1748-944X)*, the author, Dennis Dixon, urges a reconsideration of the analysis of the interests of football provided by the Advocate-General in his Opinion on the European Court of Justice decision in Bosman *(Case C-415/93 [1996] CMLR 645)*. The article demonstrates to what extent the Bosman decision depended on the Advocate-General's view of the notion of "mutual interdependence" and its consequences in respect of a willingness by the larger clubs to redistribute revenue. Although it is widely recognised that the redistribution of monies has declined in real terms since the decision, the implications of this for the Bosman legacy have not been exposed. The article attempts to show that the Bosman analysis has not simply been distorted by later events, but that the Advocate-General's predictions went beyond the natural limits of adjudication. Using Fuller's theory of adjudicating polycentric problems, the author argues that it is not sufficient for the ECJ to reverse its decision in Bosman; it must refrain from replacing one set of flawed predictions by another. In this connection, it is suggested that we should consider applying the theories of judicial deference or restraint commonly raised when considering questions of proportionality in the context of human rights protection. Such an approach might render the elite less confident that an assertion of their economic rights, and thus power, will be supported by the ECJ, and thus a less intrusive role for European law on proportionality adjudication may assists social dialogue.

In "Commission clarifies permitted player restrictions" *([2008] 6 WSLR 8-9, in [2008] European Current Law 125)*, the author, Stephen Farrow, considers the implications of another key ECJ decision as regards sporting professionals, to wit the Kolpak ruling. More particularly he explains how the European Commission's clarification of the extension of Article 39 governing the free movement of workers, to professional sporting performers who are citizens of non-EU countries as laid down by the ECJ in the Kolpak decision, will assist the England and Wales Cricket Board (ECB) in restricting the number of overseas players in county cricket. He suggests that the clarification should enable the ECB to work with the Home Office to produce a list of standards which players must meet in order to be allowed to play in the United Kingdom, and considers how this will affect current Kolpak competitors.

In "The position of the players' agent in European law after the White Paper on Sport" *([2008] 1-2 ISLJ 91-93, in [2008] 11 European Current Law 45)*, the author, Steven Jellinghaus, discusses the prospects of EC law regulating the activities of sporting performers' agents, in the light of the European Commission White Paper on Sport. He examines the extent to which players' agents represent special problems and whether the EU has jurisdiction to regulate them.

In "Club ownership: the 50+1 rule and European law" *([2008] 6 WSLR 12-12, in [2009] 3 European Current Law p. 67)* the author, Jan Kupler, explains the 50 plus one rule in Germany, which requires that at least 51 per cent of shares in a German football club be held by the club membership in order to prevent external investors from owning a majority share. He notes that the rule is currently being challenged by certain club presidents who believe that it disadvantages clubs who wish to compete with the richer European clubs as they cannot achieve the same level of investment. He asks the question whether that rule is contrary to Article 56 EC treaty on the free movement of capital, or Article 81 EC Treaty on restrictive agreements.

10. Company Law

Bankruptcy (actual or threatened) of sporting clubs & bodies

[None]

Other issues

AC Milan denies Abu Dhabi report of purchase

The tendency of certain top European football teams to look to wealthy foreign owners to expand their opportunities has already been referred to earlier. At a certain point it looked as though AC Milan might also be tempted along this road. However, this has firmly been denied by the top Italian club. Both it and Club president Silvio Berlusconi's Fininvest holding company issued a joint statement in late February 2009 to the effect that the "news has no basis". The country's leading newspaper, Corriere della Sera had reported that, after failing to buy Milan playmaker, the Brazilian ace Kaka, Abu Dhabi United had switched its focus to purchasing part of the Milan side. The paper did not cite any sources, but said that the offer would be of the order of $640 million *(Associated Press, www.findlaw.com of 24/2/2009).*

11. Procedural Law and Evidence

Procedural law and Evidence

Administrative court lacks jurisdiction in skiing dispute. French Court of Appeal decision

In this case, the claimant had a bad skiing accident within the skiable area which left him paraplegic. The victim first sought to have the matter addressed by a criminal court by pressing charges and joining a civil claim (constitution de partie civile), but the examining judge (juge d'instruction) of the court to whom application was made decided that there was no case to answer. He therefore applied to the administrative court of Pau for damages against the municipality within whose responsibility the skiing area fell, on the grounds that the barrier against which he fell should have been better protected against the possibility of causing injury. The court dismissed the action, holding that the characteristics of the piste in question did not require such protection to be provided. The matter then landed before the Administrative Court of Appeal of Bordeaux. The latter did not even examine the substance of the case, since it halted proceedings at the admissibility stage. The action had been based on the legislation providing the possibility of compensation for loss caused by public works (dommages de travaux publics) and the court found that a skiing piste could not in itself be regarded as a public work. It was true that the relevant case law had recognised that the equipment and fittings accompanying the piste may present this characteristic. However, the administrative court will lack jurisdiction in the case of a dispute between a public industrial and commercial service and its users. Since the adoption of a Law in 1985, skiing pistes fell within the scope of this service, operated as they are either by a mixed public/private company (régie directe) as an industrial and commercial public service, or by a company which has concluded a contract to this effect with the relevant authority. The action was therefore held to be inadmissible (Decision of 10/6/2008, CAA of Bordeaux in Case No. 06BX02291, AJDA of 3/11/2008).

12. International Private Law

[None]

13. Fiscal Law

Fiscal law

US motor sport figures face tax proceedings

Certain prominent figures in US motor sport are currently finding themselves enmeshed in legal proceedings brought by the taxation authorities. First, Larry McClure, a co-founder of the Morgan-McClure Motorsports firm, agreed to plead guilty to charges of fiscal fraud, i.e. three counts of submitting false tax returns and two counts of obstructing the investigation. He faces a maximum jail sentence of 15 years and a fine of $250,000 on each count *(Associated Press, www.findlaw.com of 7/1/2009)*.

The following week, it was learned that Helio Castroneves was about to fight tax evasion charges in court. He has pleaded not guilty to charges of tax conspiracy and tax evasion involving some $5.5 million in income spirited away to off-shore accounts. His sister and business manager, along with his attorney, have also been charged in the case *(Associated Press, www.findlaw.com of 13/1/2009)*.

No further details of these cases are available at the time of writing.

14. Human Rights/Civil liberties

Racism in sport

Spain v England passes off without racist incident – but does the underlying problem remain?

There can be little doubt that racialist attitudes displayed towards footballers of a different ethnic origin has been a problem in Spain for a number of years, and this column has detailed some of the more notorious instances of such behaviour, more particularly the disreputable Spain v England match, played in Madrid in November 2004 to the sound of monkey chants every time a black England player touched the ball – not to mention the far from edifying comments it was reported were made by the Spanish coach against French player Thierry Henry *([2005] 1 Sport and the Law Journal p. 88 et seq.)*. There were naturally fears that some repetition of this incident could occur when Spain once again were scheduled to meet the English national team at home in a friendly fixture. Fortunately, the game passed off without any serious instance of racist chanting. This heartening development had sporting significance beyond the avoidance of any penalties by the international and European football authorities, since the match (played this time in Seville) came the day before Madrid submitted its bid to host the 2016 Olympics *(The Daily Telegraph of 7/2/2009, p. S15)*.

Nevertheless, there remained doubts in some quarters – more particularly British – that the Spanish sporting authorities were still insufficiently active in fighting the problem. Prior to the Seville game, the Spanish Football Federation (RFEF) had not deemed it necessary to organise any kind of anti-racism gesture in the shape of T-shirts, banners, or other visual displays. This in itself may not have been that serious an omission in view of the relatively civilised atmosphere which prevailed at the match itself. However, the British have accused the Spanish authorities of being slow to react, particularly after the Madrid game four years ago – indeed, for a while monkey chanting became almost fashionable at matches. Immediately after the infamous England game in 2004, the RFEF even refused to condemn the chanting. There seems to be a cultural divide at work here, i.e. the feeling in England that the Spanish do not take racism seriously enough, and the feeling in Spain that we take it far too seriously.

Nevertheless, it is undeniable that some efforts have been made by the Spanish authorities to eradicate this shameful practice – if only out of considerations of enlightened self-interest dictated by the bids, not only for the next Olympics, as is referred to above, but also for the next World Cup. One sports newspaper conducted a poll which showed that 59 per cent of those questioned admitted that Spanish sport had a problem with racialism, whereas it is fair to say that, not long ago, the reaction would have been "what racism?". This does not only concern making inappropriate noises against black footballers. It was reported that when the basket-ball team posed before the cameras with slit-eyed gestures, there was genuine disbelief that this could give rise to offence (even after a Japanese journalist living in Madrid expressly said so). And Real Madrid were recently fined £2,800 after fans, yet again, used Nazi gestures and sang songs about gas chambers *(The Guardian of 10/2/2009, p. S5)*.

Report faults diversity hiring practices in NCAA (US)

The National Collegiate Athletic Association (NCAA) is the US organisation which controls higher education sport in the US. Last year, it appeared to have taken a step backward in its efforts to promote diversity in hiring practices, according to a report released in mid-February 2009. The NCAA's ratings on this score declined in 2008 in the study by The Institute for Diversity and Ethics in Sport at the University of Central Florida. College athletics received the lowest grade of any of the sports researched. The report examined data from the NCAA and other sources on the race and gender of administrators, coaches and athletes at every college and conference and at the national governing body. According to Richard Lapchick, the author of the study:

> ***"This report documents not only a lack of overall progress in college sport but a decline in both racial and gender hiring practices in key positions. The numbers reflect a need for new strategies for more opportunities for people of colour and women. This is the worst report card for college sport in many years".***
>
> *(Associated Press, www.findlaw.com of 19/2/2009).*

The NCAA said in a statement that they "respectfully disagreed", claiming that many athletics directors and other administrators were making "the right decisions with their recent hires" and that they were encouraged by this progress. Charlotte Westerhaus, NCAA vice president for diversity and inclusion, noted that there would be nine head coaches "of colour" in the Division I Football Bowl Subdivision for 2009, the highest number ever.

College sports received a C+ for race and a B for gender for a combined C+ grade. It earned a B- and B+, respectively, in 2006-07. The WNBA (women's basketball) obtained an A+, the NBA an A, Major

14. Human Rights/Civil liberties

League Soccer a B+ and Major League Baseball a B. The report faulted a lack of diversity in leadership positions in college sports. In Divisions I, II and III, at least 88 percent of university presidents, athletic directors, head coaches, associate athletic directors, faculty athletics representatives and sports information directors are white. All the conference commissioners in Division I, excluding the historically black colleges and universities, are white.

Dan Lebowitz, director of the Sport in Society centre at Northeastern University, said the NCAA and individual colleges need to become more active in narrowing the gap between the number of minorities playing sports and those in coaching and administration. He admitted that the problem was not just about the institutional employment practices – it was about the process of attracting people to the field, about setting up programs which allow for development in the field, and practicing what one preaches and employing coaches that come from the process *(Ibid)*.

South African race law (with a difference) bans Maori rugby team

Throughout the apartheid era, the Maori were banned from South Africa with the All Blacks (sic) national New Zealand rugby team. However, they have now found a new racial obstacle in their endeavours to play there, since a law adopted since the passing of that era now prevents the country's rugby team from playing any side selected on racial lines. At the time of writing, this threatened the Maori's proposed fixture in the township of Soweto, which was intended to give the Springboks a practice match before the coming summer's Test series against the British and Irish Lions *(The Mail on Sunday of 22/2/2009, p. 81)*.

Human rights issues

[None]

Gender issues

American Football coach apologises over "ladies" comment (US)

In mid-January 2009 it was reported that the defensive line coach of the Chicago Bears, Rod Marinelli, issued an apology for brushing off reporters at the Senior Bowl the day before by saying "Goodbye ladies". The coach made the comment when approached by members of the Detroit media in Mobile, Alabama. The Association for Women in Sports Media expressed concern to the National Football League (NFL) and to the Bears. Mr. Marinelli gave the assurance that this "tone and choice of words" would not recur in response to questioning from reporters *(Associated Press, www.findlaw.com of 22/1/2009)*.

Japan has first female professional baseball player

In mid-November 2008, it was learned that a 16-year-old girl was to become Japan's first-ever professional female baseball player. Eri Yoshida was selected to play for the Kobe 9 Cruise team in the otherwise all-male four-team Western Japanese league, which starts its first season this April. She started playing the sport when she was 12 and then joined her school baseball team *(The Daily Telegraph of 20/11/2008, p. 23)*.

Iranian female football team disbands after "battle of sexes" allegations

Having your team suffer a 7-0 beating would be sufficient to endanger the future of any football manager. But it is not the scoreline that could lead to the dismissal of Alireza Mansourian, the football academy director of one of Iran's biggest clubs. It is allegations that the club's male and female players staged a battle-of-the-sexes match behind closed doors, breaching the country's strict gender segregation laws. The fixture is said to have occurred between the female and male youth teams of Esteghlal, a Tehran-based club with a mass following and under the overall authority of Iran's Islamic rulers. The allegations naturally embarrassed the management, which has denied any such match took place. Sensitivity was heightened by Esteghlal's historic success and prestige – the club has twice won the Asian championship and was once closely linked to the monarchy under the Shah, when it was known as Taj (crown). It was confiscated and renamed Esteghlal (independence) by the regime after the 1979 Islamic revolution.

The allegations prompted an internal inquiry. After a disciplinary hearing into the matter, the club announced that it had suspended and fined three officials, including the women's and youth team coaches. It also issued a public apology. The team is also being investigated by the state-run sports governing body that enforces separation of men and women in competitions and venues. If proved, it could lead to the dismissal of Mr. Mansourian, a former international who played for Iran

14. Human Rights/Civil liberties

in the 1998 World Cup finals in France. At the time of writing, he was understood to be under pressure from the club's president, Amir Vaez Ashtiani, who has called for tough action against the possible culprits.
Iranian media reported the match finished with a score of 7-0 to the male team at Esteghlal's Marghoubkar stadium. Officials insisted that the two teams came into contact only briefly because their training sessions overlapped. Mansourian said the men's team wandered on to the playing field 10 minutes before the end of the women's session but were promptly ordered off by security staff. The manager commented:

> ***"I was not present at the stadium but I heard that such an incident took place. However, on examination, I concluded that the incident did not happen in the way it is alleged. Esteghlal football club is committed to moral values and will take action against wrongdoers according to the law. Action will be quickly taken against those involved and the culprits will be legally punished."***
> *(The Guardian of 26/1/2009, p. 22).*

Football is popular among Iranian women but religious regulations force female teams to play in closed spaces away from the gaze of male spectators. Women are also barred from attending men's football matches. A 2006 decision by Iran's president, Mahmoud Ahmadinejad, to allow women access was overturned after an outcry among conservative clerics, who claimed it contravened Islamic values of feminine modesty and chastity *(Ibid)*

Later, it was learned that the women's team was formally disbanded *(The Guardian of 28/1/2009, p. 21).*

Animal rights issues

[None]

Other issues

[None]

15. Drugs legislation & related issues

General, scientific and technological developments

WADA to close testing loophole

In late February 2007, it was learned that a major loophole is about to be closed in the fight against drugs in sports. The World Anti-Doping Agency (WADA) expects, within the foreseeable future, to give its accredited drug testers instructions that will allow them to use revised methods to catch athletes using EPO, one of the most widely abused banned substances in sports. EPO abusers who thought they had slipped through the net could now be in for a surprise because some suspicious samples that couldn't previously be declared positive could now be retested. Those samples have been stored in freezers, waiting for WADA's new anti-EPO tools. Olivier Rabin, WADA's science director, has already announced that there "could be interesting cases to come"

The revised testing should help confound sporting performers who have been using so-called biosimilars, copies of the U.S.-invented drug that are being produced by the dozens in some 20 countries around the world—China, India, Brazil and elsewhere—because manufactured EPO is crucial in medicine and thus worth billions of dollars each year. Some of these copies are thought to have been slipping through doping controls. In medicine, manufactured EPO is of dramatic benefit for kidney and cancer patients suffering from anaemia, a shortage of red blood cells that transport oxygen around the body. EPO, short for erythropoietin, counters the potentially lethal condition by stimulating patients' bone marrow to produce more red cells. For athletes who cheat with EPO, more red cells mean more oxygen for their muscles, allowing them to ride, run or swim faster for longer *(Associated Press, www.findlaw.com of 27/2/2009).*

Since the 1990s, EPO has meant the difference between winners and also-rans at the Tour de France. It was among the banned drugs used by disgraced track star Marion Jones, court documents showed. A test to detect EPO in sports was first introduced for the 2000 Sydney Olympics, where Jones won three gold and two bronze medals, and scores of athletes have since been caught. EPO testing is tough because traces of the banned substance don't stay in the urine for long. Testers also have struggled with copied versions of EPO. Some copies have distinct chemical signatures that can throw off the delicately calibrated EPO test. WADA-approved labs are confronted with urine samples that testers are certain contained traces of copied EPOs but were unable to declare as positive. Such cases have increased as the market for EPO copies has flourished. Up to 80 such copies may now be in production, with at least a dozen in China alone, according to WADA-funded research by experts Iain Macdougall and Michael Ashenden.

EPO copies are offered for sale on the Internet. One particular website hosted in the Ukraine, for example, offers a Russian-made EPO copy, Epocrin, at $406 for 10 vials. Epocrin is among EPO copies that are likely difficult to declare as positive using the current approved test but should be easily sanctioned with the revised method, according to one WADA laboratory. Mr. Rabin declared himself confident that the imminent strengthening of the EPO test will "cover the field as we know it today," able to catch all EPO copies that now exist. The proposed changes will initially be circulated to laboratories, anti-doping agencies and others in coming days for discussion, so they can be approved at a May 9 meeting of the WADA executive committee. The changes will for the first time give laboratories the option of using a testing technique called SDS-Page in cases where the current EPO test fails to provide a clear-cut result.

Arne Ljungqvist, chairman of the International Olympic Committee (IOC) medical commission, called the beefed-up testing "a step in the right direction for sure." He added that the IOC has yet to consider whether to re-test samples collected at the Beijing Olympics last August using the revised method. The revised test could, however, be applied to some samples about which laboratories were previously unsure. Mr. Rabin said. Rasmus Damsgaard, a Danish anti-doping expert for the International Ski Federation, suspects that five cross country skiers whose tests came back negative from a WADA-accredited lab in Europe last year were using an EPO copy, possibly from Russia. The skiers are still competing. Mr. Damsgaard also believes that word spread among athletes that EPO copies were slipping past controls. The revisions now planned by WADA, he added, will mark a "milestone in the EPO test" *(Ibid).*

15. Drugs legislation & related issues

Doping issues and measures – international bodies

ICC agree new out-of-competition tests

In late December 2008 it was learned that cricketers will be able to be tested out of competition for the first time under a new anti-doping code announced by the world governing body, the International Cricket Council (ICC). The rules in question, which have been revised after amendments made to the World Anti-Doping Agency (WADA) Code and approved by the ICC board, entered into effect on 1 January. Hitherto, doping tests had been restricted to ICC events such as the World Cup. The governing body began testing at its events in 2002 and became a WADA signatory two years ago *(The Guardian of 30/12/2008, p. S2).*

WADA "whereabouts" rule under challenge

The practice of "out-of-competition" testing, referred to in the previous section, is now regarded as an essential component in the fight against doping. However, the rules have been tightened recently by the World Anti-Doping Agency (WADA), and these changes have caused a rising tide of opposition from various sporting quarters. Rowers have taken the lead in voicing their opposition and have joined tennis stars Andy Murray and Rafael Nadal in opposing the new regime. In mid-February 2009, 16 world and Olympic rowing medallists published an open letter which branded the new "whereabouts" rule changes as "an impracticable and unworkable regime". After trying the system for six weeks, the rowers claim that the new rules are extremely difficult to follow *(The Daily Telegraph of 20/2/2009, p. S19).*

The objections are based purely on practical grounds. Under the new rules, athletes must nominate one hour per day when they can be tested, but now this applies to all 365 days of the year, not just for five days per week – including holidays, competitions and travel, days when it can be notoriously difficult to be certain where they will be at any time. In addition, the hour nominated can henceforth only be between 6 am and 11 pm. This gives particular problems to rowers, who frequently travel to training in the early hours of the morning. Under the previous system, the hour could commence at 5 am. 6-7 am is almost impossible to meet for many rowers who have to leave home at that time. Also, rowers are not free for testing when racing or training on the water, since they could be at the far end of a lake or river. They are also unavailable when travelling, in meetings, shopping, in a university lecture or even walking the dog. The reality for the rowing community has proved to be that, training as they do up to three times per day in a team sport, they can barely find a suitable hour every day of the week. Breaks between training sessions are rarely long enough, and if a training session runs over and a tester appears, this counts as missing a test. After three misses an athlete is banned from Olympic competition for life *(Ibid).*

In the meantime, however, the dispute has assumed a more legal dimension. In late January 2009, it was announced that a group of 65 Belgian athletes, cyclists, footballers and volleyball players had applied to a court to rule on the question whether the "whereabouts" rule is in breach of European privacy laws. The challenge was brought against the Flemish regional government, which is in charge of anti-doping enforcement in the Dutch-speaking part of Belgium, but it could have much wider ramifications for WADA. It has also been announced that two further legal challenges are being prepared by FIFPRO, the umbrella group of footballers' trade unions. Kristof de Saedeleer, a lawyer who represents the Belgian group, claimed that the new rules violated Article 8 of the European Convention on Human Rights (ECHR) *(The Daily Telegraph of 23/1/2009, p. S18).* In addition, the pan-EU sporting performers' union, EU Athletes, has entered into correspondence with the European Commission, claiming that EU legislation provides for athletes to be given four weeks' holiday without intrusion *(The Guardian of 23/2/2009, p. S2).* However, WADA spokesman Frederic Donze said that the rules were the outcome of consultations and that no athletes had hitherto expressed any concerns about their privacy *(The Daily Telegraph of 23/1/2009, p. S18).*

The Director-General of WADA, David Howman, has also been pro-active in defending the new regime. He arrived in London in mid-February to meet eight bodies representing athletes from a wide range of sports, including athletics, football, cricket, tennis and rugby, which had raised concerns over the system. Mr. Howman insisted that the main problem resided in the fact that the new rules, and the importance of following them, had not been adequately explained by the relevant governing bodies. He added:

> ***"On an international level there was discontent, not so much about the new rules as the way they were introduced. They are unhappy about that and we heard the unhappiness. Does that mean there'll be a whole new consultation process and we'll start all over again? No"*** *(The Guardian of 18/2/2009, p. S8).*

15. Drugs legislation & related issues

Mr. Howman believes that the Belgian court action has little chance of success, and that the new rules were carefully drafted to ensure that they did not infringe existing laws. He added that athletes who argued that sport was a special case should be given short shrift. He defended the principle of out-of-competition testing, insisting that it was common knowledge amongst testers that it was particularly during breaks from competitions athletes took drugs *(Ibid)*. In response to proposals by football's governing bodies, FIFA and UEFA, that athletes be given a break from testing were, accordingly, dismissed by the WADA president, John Fahey *(Associated Press, www.findlaw.com of 24/2/2009)*. In addition, the President of the International Olympic Committee (IOC), Jacques Rogge, has also defended the new WADA rules, but conceded that, whilst the principle could not be challenged, the circumstances could be adapted through consultations between WADA and the athletes *(Associated Press, www.findlaw.com of 20/2/2009)*.

Article on EU anti-doping stance

In "Anti-doping in and beyond the European Commission's White Paper on Sport" *([2008] 3-4 ISLJ 30-33, in [2009] 3 European Current Law p. 84)*, the author, Jacob Kornbeck, comments on the anti-doping provisions in the European Commission's aforementioned White Paper. In so doing, he reviews the White Paper's nature, structure, rationale and proposals on the criminalisation of the trade in doping substances, the role of sporting organisations and public authorities in relation to the health hazards involved, and the need to co-ordinate the approach towards the fight against doping, noting the creation of an EU Working Group on Anti-Doping. He also considers likely future developments in the field of anti-doping measures.

Doping issues and measures – individual countries

Montgomery confesses (and other BALCO rumblings…)

On each occasion when the present writer prepares his column for this organ, he fervently hopes that the BALCO scandal, one of the most infamous episodes in the history of top sport, will be finally laid to rest. However, disappointment seems permanently to lurk around the corner, and this issue is no exception. The scandal in question, which centres round the notorious laboratory in California, has already given rise to various prosecutions and convictions, as well as disciplinary penalties imposed by the sporting authorities. One such fallen star was Tim Montgomery, a former record-holding sprinter who was banned from the sport after he had been linked to this affair – not to mention serving a 46-month sentence for his involvement in a million-dollar cheque fraud affair. Ahead of him lies a further term in prison for heroin-dealing.

As if this did not suffice, he has now openly conceded, in a television interview, that, like his former partner and mother of his son Marion Jones (see Journals passim!) he was using drugs during the Sydney Olympics in 2000. For good measure, his interview also reveals that he signed a $98,000 shoe contract with Asics whilst still at college, which was an infringement of the rules issues by the college sports governing body NCAA *(The Daily Telegraph of 25/11/2008, p. S6)*. Mr. Montgomery admitted that he took testosterone and human growth hormone prior to the Sydney Games and did not deserve the gold medal which he obtained as part of the triumphant US 4x100 metres squad. This could well cause other members of the team to return their medals, and the International Olympic Committee have backed calls for Montgomery to do likewise *(Ibid)*.

Just a few months after this revelation, a US federal judge sentenced former National Football League (NFL) player Dana Stubblefield to two years' probation for lying to investigators about his use of steroids. The judge cited Mr. Stubblefield's later co-operation with the authorities in the BALCO affair for declining to sentence him to three months' home confinement – which is what the federal probation officials recommended. He had submitted the names of players, agents and trainers whom he suspected of drug abuse to federal investigators and NFL officials. He admitted that he initially lied about using steroids after the NFL had informed him that he tested positive for the substance *(Associated Press, www.findlaw.com of 6/2/2009)*.

Doping control and privacy – a French perspective. Article in academic journal

In "Anti-doping control, enforcement and athlete privacy" *([2008] 6 WSLR 10-11, in [2008] 12 European Current Law p. 29)*, the authors, Thibault Verbiest, Jamel Hadi, and Cathie-Rosalie Joly, consider how anti=doping procedures and drug tests on athletes, in which DNA samples will be held in databases, could conflict with the French civil and public health code. They discuss the manner in which the enforcement of the tests might conflict with the inviolable nature of private property, the right to self-ownership and privacy.

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Doping issues – cycling

Kohl issued with 2-year doping ban, will co-operate (Austria)

In mid-November 2008, it was learned that Austrian rider Bernhard Kohl, who tested positive for CERA during last year's Tour de France in which he finished third overall, was to reveal to the Austrian doping authorities how he obtained the substance. This he did in the hope that the two-year ban which normally attends such a misdemeanour might be reduced accordingly *(The Daily Telegraph of 24/11/2008, p. S24).* However, this co-operation eventually availed him naught, since he had to accept a two-year ban from the Austrian authorities. This may have been because he refused to provide the name of his supplier *(Associated Press, www.findlaw.com of 21/1/2009).*

Ricco appeals against ban (Italy)

In mid-November 2008, it emerged that Italian rider Riccardo Ricco had appealed against his two-year doping ban before the Court of Arbitration for Sport (CAS). The CAS confirmed that it had received the appeal from Mr. Ricco, who was banned by the Italian Olympic Committee (CONI) for doping during the Tour de France, more particularly for CERA (an advanced version of the blood-booster EPO) after having won two stages of the 2008 Tour. He admitted taking the banned drug and was hoping for a reduced suspension. CONI reduced the ban by six months from the original two years; however, it added six months to that reduced sentence because Mr. Ricco had approached a physician who had already been banned for doping offences *(The Guardian of 18/11/2008, p. S2).*

Drug case dropped against Tom Boonen (Belgium)

One of the more notable absentees at last year's Tour de France was the top Belgian sprinter Tom Boonen, the reason being a ban which followed his positive test for cocaine during an out-of-competition test. At a certain point, however, it looked as though there could be worse to come in the shape of a criminal sentence, since he was arraigned before a criminal court at Turnhout, in North-Eastern Flanders, However, the court dropped the charges on the basis that he had already suffered sufficient punishment by his exclusion from the Tour *(Associated Press, www.findlaw.com of 3/2/2009).* It has to be added, however, that Mr. Boonen had not been banned from cycling altogether, because the test was not held under the auspices of a sporting authority. Had the prosecutors decided to press ahead with the case, he could have faced up to five years in jail *(The Daily Telegraph of 4/2/2009, p. S19).*

Lance Armstrong and doping allegations – the enigma continues (US/France)

One of the most remarkable feats ever in the world of cycling must undoubtedly be the seven successive wins recorded by Texan Lance Armstrong in the sport's most prestigious race, the Tour de France. The sheer monumentality of this achievement has almost inevitably sparked off suspicions and accusations of doping, some of which have even reached the defamation courts (Journals passim). This issue has achieved an extra tantalising dimension recently in view of the return by Mr. Armstrong to competitive cycling a few months ago. The US rider has attempted to scotch these suspicions by launching his own testing programme with the anti-doping crusader Don Catlin. In addition, he has already been subjected to a severe round of tests ever since his comeback, none of which have been positive *(The Mail on Sunday of 18/1/2009, p. 70).*

So far, so transparent. Yet there remains some lingering doubt in the mind of even the most fair-minded observer of the sport. In late January 2009, Mr. Armstrong announced that he would keep his promise to disclose precise details of the results of the doping tests he currently faces. However, he has so far failed to specify when or how they would be released. He commented:

> ***"I mean, what do you publish? Do you start publishing blood values? After the race, I saw online that Ivo Basso is publishing his blood values and if you notice you'll see he's 45, 44, 43, 41. For example, and I'm just hypothetically saying, you go to a high altitude for a month and all of a sudden it goes to 46. Not everyone on this room is going to say "it went from 41 to 46, you must have cheated" but someone is going to say, a few guys and gals are going to say, 'that's not normal'"*** *(Associated Press, www.findlaw.com of 21/1/2009).*

He added that he would be reluctant to publish readings of blood tests which might be affected by sickness, dehydration or altitude, which could be misinterpreted *(Ibid).* Shortly afterwards, it was announced that Mr. Armstrong's aforementioned plans for an independent drug-testing programme had been scrapped. Mr. Catlin said that, after months of negotiation, both sides realised that the programme was not workable. Mr. Catlin did not, however, rule out another attempt in 2010 *(The Guardian of 12/2/2009, p. S8).*

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Other cases (all months quoted refer to 2009 unless stated otherwise)

Alexandre Vinokourov. In mid-December 2008, it was learned that the International Cycling Union, the world governing body in the sport, had requested the Court of Arbitration for Sport (CAS) to prevent the Kazakh rider from returning to competitive cycling prior to this year's Tour de France. The Court said that the UCI had reopened an appeal case which seeks to keep Mr. Vinokourov off the road until July this year. The cycling body is of the opinion that the cyclist should have been banned for two years following his positive blood-doping test during the 2007 Tour, whereas the Kazakhstan cycling federation had contented itself with a one-year suspension (see [2008] 1 Sport and the Law Journal p. 71).

The UCI had lodged an appeal with the CAS to overturn this ruling and impose the standard two-year ban as recommended in the code of the World Anti-Doping Agency (WADA), but abandoned the case in May 2008 when Vinokourov announced his retirement from the sport. The governing body reactivated its appeal after learning that the rider intended to enter one-day Classic races this coming season. At the time of writing, no date had as yet been set for the hearing *(The Guardian of 23/12/2008, p. S6).*

Leonardo Piepoli. In mid-January, the Italian cyclist was banned for two years after testing positive for the prohibited substance CERA during last year's Tour de France. The anti-doping tribunal of the Italian Olympic Committee announced that the ban would take immediate effect *(Associated Press, www.findlaw.com of 26/1/2009).*

Johan Museeuw. In mid-December 2008, the Belgian former world road champion was issued with a suspended jail sentence for his involvement in a 2003 doping scandal. After several years of steadfast denial, Mr. Museeuw finally conceded that he had used performance-enhancing substances during the final year of his career. He was accordingly arraigned on charges of possessing the blood booster EPO. As a result, a court in Kortrijk (Belgium) issued him, as well as three less-known cyclists, suspended sentences of 10 months and a £2,500 fine. Previously, the former worlds champion had been banned for two years by the Belgian cycling federation, but he had hoped that this penalty would have been sufficient to elude a court sentence *(The Guardian of 17/12/2008, p. S2).*

Doping issues – athletics

Bulgarian runners banned

In early January 2009, it was learned that the Bulgarian sprinter Tezdzhan Naimova had been suspended for two years for having manipulated a doping sample, whereas the middle-distance runners Vanya Netova and Raya Stoyniva received two-year bans after testing positive for anabolic steroids. Ms. Naimova was held to have tampered with a urine sample at an out-of-competition test held by the International Association of Athletics Federations (IAAF), the world governing body in the sport, in the Bulgarian capital Sofia. Regarded as one of her nation's most promising young athletes, the 21-year-old will miss the European indoor championships in Turin and the world championships in Berlin later this year *(The Guardian of 2/1/2009, p. S2).*

IAAF challenges Russian federation bans

In what is now becoming a familiar pattern of almost inherent conflicts between world governing bodies and national sporting authorities, the International Association of Athletics Federations, in late November 2008, challenged the length and timing of the bans issued to top Russian athletes found to have committed doping infringements prior to the Beijing Olympics. The athletes include middle-distance runners Yelena Sooboleva, Svetlana Cherkasova, Yulia Fomenko and Tatyana Tomashova, as well as hammer thrower Gulfiya Khanafeyeva and the European discus champion, Darya Pishchalnikova. It was reported that they had all been found guilty of manipulating urine tests following a year-long undercover operation using DNA analysis, carried out by the world governing body in athletics *(The Daily Telegraph of 21/11/2008, p. S19).*

The absence of the athletes concerned from the Olympics as a result of a provisional ban issued against them was a major coup by the IAAF, but the world federation was astonished when the Russian athletics authority to penalise the infringements with two-year bans which were backdated to April and May 2007, which would enable the athletes in question to compete at the World Championships later this year. Accordingly, it has appealed to the Court of Arbitration for Sport (CAS) against these bans *(The Guardian of 28/11/2009, p. S2).* No date for the hearing had as yet been set at the time of writing.

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IAAF formally strips Jerome Young of more medals

In late February 2009, it was reported that the world governing body in athletics formally stripped American 400-meter runner Jerome Young of more world championship gold medals for doping. The International Association of Athletics Federations (IAAF) said that it acted after receiving official notification from USA Track & Field, the US national body governing athletics, of Mr. Young's admission of doping from 1991 through 2003. It will be recalled *([2005] 1 Sport and the Law Journal p. 82)* that the runner had been banned for life in 2004 and stripped of his Olympic gold medal from the 4x400 relay at the 2000 Games in Sydney for a positive EPO test, his second doping violation. He incurred more penalties last year after admitting to using EPO and human growth hormone as far back as 1999. His life ban was back dated to 1999 and all his competitive results since then disqualified.

As a result, the IAAF formally stripped Young of his 400-meter gold from the 2003 World Championships in Paris, as well as removing the gold from Young and the US team from the 4x400 relay at the 2003 World Indoor Championships in Birmingham, England. Mr. Young's victory at the World Athletics Final in Monaco in 2003 was also annulled. US runner Tyree Washington now goes into the record books as the 2003 world champion, while Jamaica gets the 2003 world indoor relay gold. Jamaica's Michael Blackwood became the winner of the Monaco event *(Associated Press, www.findlaw.com of 26/2/2009).*

Young and the US team had previously been stripped of the 2003 world championship relay gold owing to a doping admission by team mate Calvin Harrison. Young had tested positive for the steroid nandrolone in 1999, but was exonerated by a U.S. appeals panel in 2000. He ran in the opening and semi-final rounds of the relay in Sydney. The entire US relay team was stripped of the Sydney gold last year after Antonio Pettigrew — who did run in the final — admitted doping.

Good news – hardly any high school athletes in Texas fail steroid test (US)

Amid these reports of doom and gloom in the world of drug taking and manipulation, it is heartening to announce some positive trends. Some grounds for optimism were in evidence when it was learned that the second round of steroid testing for high school athletes in Texas found only seven positive results in nearly 19,000 tests, about the same minuscule outcome as the first round last year. These figures have been under intense scrutiny as a litmus test for the extent to which this malpractice had taken hold at the grass (!) roots level

The University Interscholastic League recently released the latest results from random tests on male and female athletes in Texas from September to December 2008. All seven athletes who tested positive were male. The initial round of testing in the nation's largest high school screening program found only four cases of steroid use in 10,000 athletes. With such tiny numbers of infringements, some state lawmakers have questioned the value of the $6 million programme. Gov. Rick Perry, a Republican, has suggested it may need to be scaled down. A spokesman for Lt. Gov. David Dewhurst, a Republican who pushed the plan through the Legislature in 2007, said the small number of positive results showed that the programme "is clearly working as a deterrent." *(Associated Press, www.findlaw.com of 26/2/2009).*

Texas, New Jersey and Illinois are the only states testing high school athletes for steroids. The Texas programme seeks to test up to 50,000 students by the end of the school year. Florida recently decided to scrap its smaller program after only one steroid user was caught in 600 tests. State officials said they could not justify the $100,000 cost in a tough economic climate. Texas state Senator Dan Patrick, a Houston Republican, had previously criticized the Texas program as a "colossal waste of taxpayer money." (Nevertheless, his office declined comment on the results released in late February 2009!). However, Don Hooton, whose 17-year-old son committed suicide while battling depression that doctors believe was brought on by steroid use, said the testing was designed to prevent drug use, not to measure how many kids were using, commenting that "they don't stop testing Olympic athletes just because most of them don't test positive".

Testing is conducted by the National Center for Drug Free Sport, which also tests athletes for the NCAA. Athletes from all sports are eligible, but testing last fall was tilted heavily toward football. Along with the seven confirmed cases of steroid use in the most recent round, 10 more students require further testing because their tests showed elevated testosterone levels, the report said .Forty-eight more were deemed "protocol violations" because the students either refused to provide a urine sample or had unexcused absences on the day they were selected for testing. Those who test positive once are suspended from competing for 30 days *(Ibid)*.

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Doping issues – swimming

The Michael Phelps affair (US)

Michael Phelps is unbeatable in the water. On dry land, however, he keeps running into trouble. Unfortunately, he embarrassed himself again just a few months after a triumphant Olympics, on this occasion having his picture snapped as he inhaled from a marijuana pipe. The photograph fell into the hands of a British tabloid, which published them, forcing Phelps into a public apology and his handlers to deal with sponsors who are surely none too pleased about the swimmer's choices away from the pool. In the statement in question, Mr. Phelps said:

> ***"I engaged in behaviour which was regrettable and demonstrated bad judgment. I'm 23 years old and despite the successes I've had in the pool, I acted in a youthful and inappropriate way, not in a manner people have come to expect from me. For this, I am sorry. I promise my fans and the public it will not happen again".***
> *(Associated Press, www.findlaw.com of 2/2/2009)*

It all sounded so familiar – and with good reason. After the 2004 Athens Games, it was reported that an underage Phelps was arrested for drunken driving, pleaded guilty and apologized to his fans, saying he would not make the same mistake again. This incident was different, to be sure, but it could have the same damaging impact on the swimmer's image and reputation, which were riding high after he won a record eight gold medals at the Beijing Games. The US Olympic Committee, in a statement, reminded Mr. Phelps that he was "a role model" who was well aware of the responsibilities and the accountability that come with setting a positive example for others, particularly young people. "In this instance, regrettably, he failed to fulfill those responsibilities. *(Ibid)*".

The British newspaper (for want of a better word) The News of the World said the picture was taken during a November house party while Phelps was visiting the University of South Carolina. During that trip, he attended one of the school's football games and received a big ovation when introduced to the crowd. While the newspaper did not specifically allege that Phelps was smoking the prohibited substance, it did mention the fact that the water pipe is generally used for that purpose and anonymously quoted a partygoer who said the Olympic champion was "out of control from the moment he got there." Phelps and his advisers did not dispute the authenticity of the picture.

The party occurred nearly three months after the Olympics while Phelps was taking a long break from training, and his actions should have no impact on the eight gold medals he won at Beijing. He has never tested positive for banned substances, and this case does not fall under any anti-doping rules. Phelps was in Tampa, Fla., during Super Bowl week to make promotional appearances on behalf of a sponsor. But he left the city before Sunday's game between the Pittsburgh Steelers and Arizona Cardinals, abandoning his original plan to be at Raymond James Stadium. He was part of a group of elite athletes who agreed to take part in a pilot testing program designed to increase the accuracy of doping tests. His spot in the programme could be at risk, according to Travis Tygart, head of the U.S. Anti-Doping Agency.

Marijuana is viewed differently from performance-enhancing drugs, according to David Howman, executive director of the World Anti-Doping Agency. An athlete is subject to WADA sanctions only for a positive test that occurs during competition periods. During the 1998 Nagano Winter Olympics, Canadian snowboarder Ross Rebagliati was stripped of his gold medal in the giant slalom after testing positive for marijuana. The athlete's victory was reinstated because the governing body for the sport did not have any rules banning the substance *(Ibid)*.

At first, it seemed as though the penalties visited upon the Olympic champion would be financial in the sense of any retribution that his many lucrative sponsors might exact for this faux pas. However, this seemed too pessimistic a diagnosis. Within days of the photos being published, two of Mr. Phelps's leading sponsors expressed support for the Olympic great. Luxury Swiss watchmaker Omega termed his actions a private matter and "non-issue." Swim wear manufacturer Speedo called the 23-year-old American a "valued member of the Speedo team." The latter gave Phelps a $1 million bonus for his record eight gold medals at the Beijing Olympics. The swimmer joined Speedo in 2001, a year after making his Olympic debut in Sydney. He dominated the Beijing Games in the company's high-tech LZR Racer suit. Omega, for its part, said it was "strongly committed" to its relationship with Mr. Phelps, calling his Beijing accomplishments "among the defining sporting achievements in the history of sport". They viewed the marijuana photo imbroglio as being part of private life and is, as far as Omega is concerned, a non-issue *(Associated Press, www.findlaw.com of 2/22009).*

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However, matters seemed to take a turn for the worse for the multiple gold medallist when it was announced that the South Carolina authorities in the county of his residence announced that they were considering a criminal charge against him. Lt. Chris Cowan stated that the investigators attached to the sheriff of Richland County were gathering information about the photograph *(Associated Press, www.findlaw.com of 3/2/2009)*. However, the University of South Carolina and Columbia police departments, within whose jurisdiction the incident occurred, stated that they would not pursue charges *(The Daily Telegraph of 4/2/2009, p. S13)*. Leon Lott, the Richland County sheriff, later confirmed that no charges would be proffered because of lack of evidence *(The Guardian of 17/2/2009, p. S2)*.

Thus far, the only penalty Mr. Phelps has incurred for the incident is a three-month ban, imposed by the national governing body USA Swimming. This sentence was accepted by the swimmer as "fair" *(Associated Press, www.findlaw.com of 6/2/2009)*.

Doping issues – baseball

Baseball doping scandal – an update

Barry Bonds affair intensifies

The reader will recall from previous issues of this Journal that Mr. Bonds, baseball's record scorer of home runs, pleaded not guilty to charges that he lied to a federal grand jury in 2003 when he denied knowingly using performance-enhancing drugs. The entire affair assumed a bizarre twist in late January 2009, when 20 federal agents raided the home of the mother-in-law of Greg Anderson, Bonds's personal trainer on Wednesday. It was reported that Madeleine Gestas and her daughter Nicole Anderson, the trainer's wife, have become the target of a tax investigation which, according to the lawyer acting for Mr. Anderson, is aimed at pressuring the trainer to testify at the Bonds trial *(Associated Press, www.findlaw.com of 29/1/2009)*.

Mark Geragos, the lawyer in question, claimed that the raid was in response to his refusal to tell prosecutors whether Anderson would testify. Geragos said he ignored a letter faxed to his Los Angeles office Monday by prosecutors which asked about Mr. Anderson's plans for the Bonds trial. The trainer had already served more than a year in prison for refusing to testify against Bonds before a federal grand jury. Mr. Geragos said that on the day after her husband was released from prison, Anderson's wife received a so-called target letter informing her that she was under investigation. He added that Mr. Anderson received a government subpoena the previous week demanding his testimony at the March 2 trial. Mr. Geragos declined to say whether Anderson would testify. If Anderson refuses, he could be sent to prison again.

Earlier, the New York Times, citing an anonymous source, reported that prosecutors were in possession of evidence linking Bonds to the use of performance-enhancing drugs other than the "cream" and the "clear" – i.e. the designer substances which have become synonymous with the Bonds case. A person who had reviewed the prosecution's evidence said that authorities detected anabolic steroids in urine samples linked to Bonds, according to the same newspaper *(Ibid)*.

The next day came the news that former major league catcher Bobby Estalella had been subpoenaed by federal prosecutors to testify at Barry Bonds' trial, ESPN.com reported Thursday. Mr. Estalella, who was on the San Francisco Giants with Bonds in 2000 and 2001, was expected to testify to first-hand knowledge that Bonds used steroids, according to the website in question, citing an unidentified source with knowledge of the evidence. The site attributed knowledge of the subpoenas to two unidentified sources. Mr. Estalella testified before a federal grand jury in November 2003. It was reported that he admitted to the grand jury that he used performance-enhancing drugs, the San Francisco Chronicle reported in December 2004.

In addition, a book entitled Game of Shadows, by two Chronicle reporters, alleges that Mr. Estalella received a drug schedule from Greg Anderson advising him to use human growth hormone, the steroids "the cream" and "the clear", and the female fertility drug Clomid. Prosecutors also intended to call Jason Giambi and his brother, Jeremy, as witnesses at Bonds's trial so that they can testify that Anderson gave them performance-enhancing drugs, according to the New York Times. The newspaper claimed that prosecutors want to use testimony from the Giambis, teammates in Oakland from 2000-01, to show that Anderson developed doping calendars for them. Then the prosecutors could argue that Anderson made similar calendars for Bonds, still according to the newspapers, citing an unidentified person briefed on the government's evidence. The newspaper further said that the person in question had spoken on condition of anonymity because he did not wish to endanger his access to sensitive information *(Associated Press, www.findlaw.com of 30/1/2009)*. The Mitchell Report on drugs in baseball, released in December 2007, stated that when the Los Angeles

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Dodgers considered signing Estalella as a free agent after the 2003 season, one team official noted in an internal conversation that Estalella was a "poster boy for the chemicals."

The following week, prosecutors released documents intended as evidence before the Court showing that Mr. Bonds tested positive for three types of steroids, and that his personal trainer once told his business manager in the Giants' clubhouse how he injected the baseball star with performance-enhancing drugs "all over the place".

Prosecutors initially planned to use those 2000-2003 test results and other evidence to try to prove the former star lied when he told a federal grand jury in December 2003 that he never knowingly used steroids. Bonds's legal team immediately moved to have that evidence suppressed by the judge. It became increasingly clear that Greg Anderson appeared to be at the heart of the government's case. However, Anderson's lawyer, Mark Geragos, said that his client would again refuse to discuss Bonds if prosecutors call him to testify. Also among the claimed evidence made public were a positive test for amphetamines in 2006 in a urine sample Bonds gave to Major League Baseball, doping calendars Anderson maintained with the initials "BB" and a handwritten note seized from his house labelled "Barry" which appeared to be a laundry list of steroids and planned blood tests, and a list of current and former major leaguers, including Jason Giambi, who were expected to testify at the trial *(Associated Press, www.findlaw.com of 5/2/2009)*.

However, the prosecutors suffered a setback when the judge ruled that prosecutors would not be allowed to show jurors the three positive steroid tests and other key evidence at the trial next. U.S. District Judge Susan Illston said the urine samples which tested positive for steroids were inadmissible because prosecutors could not prove conclusively that they belong to Bonds. The judge also barred prosecutors from showing jurors so-called doping calendars which Greg Anderson allegedly maintained for the baseball star. She ruled that prosecutors needed direct testimony from Anderson to introduce such evidence. Anderson's attorney continued to maintain that the trainer would refuse to testify at Bonds's trial even though he was likely to be sent to prison on contempt of court charges. However, the ruling was not a complete defeat for the prosecutors. The judge said that they would be allowed to play parts of a recording that Bonds's former personal assistant, Steve Hoskins, secretly made of a conversation he had with Anderson in front of the baseball star's locker in San Francisco in March 2003. In that conversation, Anderson discussed how he was helping Bonds avoid infections by injecting him in different parts of his buttocks rather than in one spot. Bonds testified before the grand jury that no one but his doctor ever injected him. In the recording, Anderson appears to boast about injecting Bonds with a steroid designed to evade detection.

Prosecutors also have a fourth test showing Bonds used steroids that they will be allowed to show a jury. In 2003, Major League Baseball tested all its players for steroid use. The results of those tests were to remain confidential and were to be used only to determine if Major League Baseball (MLB) had a drug problem that needed to be addressed. The laboratory hired by MLB hired to conduct its testing found that Bonds tested negative for steroid use. But in 2004, federal agents seized Bonds's urine sample and had it retested for the designer drug THG, which they said turned up positive. Bonds's legal team have said that the MLB positive test jibes with the player's grand jury testimony that he took substances he later determined were designer steroids supplied by his trainer without explanation.

With two weeks to go before the trial, the judge ordered Greg Anderson to appear before the court in order to disclose whether or not he intended to testify. This stage is obviously of crucial importance, given that Anderson's testimony will determine whether or not prosecutors may use the aforesaid steroid tests as evidence. At the hearing in question, Anderson confirmed that he would not in fact testify. The prosecutors announced that they would be pressing for Anderson to be jailed once again for contempt of court *(Associated Press, www.findlaw.com of 27/2/2009)*. At the time of writing, no decision on this issue had yet been made.

The present author will naturally continue to follow developments in this legal saga with the keenest of interest.

Rodriguez admits to having tested positive for steroid abuse

The world of baseball, already reeling from the Bonds affair, suffered another blow in early February 2009 when it emerged that Alex Rodriguez, a star player with the New York Yankees, had tested positive for steroid abuse in 2003 in a series of tests carried out at the time, and the results of which had hitherto been kept secret. To make matters worse, the magazine which broke the story, Sports Illustrated, alleged that no fewer than 104 other players had met the same fate but had

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their identities kept secret. It is true that, at the time when the tests were performed, there were no penalties for a positive result, although baseball had banned steroids since 1991. The tests were part of the MLB testing programme referred to in the previous section *(The Observer of 8/2/2009, p. 37).*

Two days after the allegations were made, "A-Rod" confessed to the positive test and issued an apology. He said that he did not even know that name of the drugs he was taken, claiming that a "different culture" prevailed in those days and that he was under a great deal of pressure to prove that he was one of the all-time greats *(The Daily Telegraph of 10/2/2009, p. S20).* The following week he gave further details of his abuse, stating that his cousin repeatedly injected him with a substance from the Dominican Republic. He claimed that the drug had been introduced to him as "boli" by his cousin, who had told him that it was a product which could be obtained over the counter in Domenica *(The Independent of 19/2/2009).*

Click to enlarge

Nearly a year after Roger Clemens told Congress he did not use performance-enhancing drugs, a federal grand jury is now being asked to determine whether he should be indicted on charges of lying under oath. The grand-jury probe was confirmed in mid-January 2009 to the Associated Press agency by two people who spoke on condition of anonymity because grand jury proceedings are supposed to be secret. Earlier, the US Congress had requested the Justice Department to look into whether the seven-time Cy Young Award winner lied last year, when he testified under oath at a deposition and a public House of Representatives hearing that he never took illegal performance enhancers. That contradicted the sworn testimony of his former personal trainer, Brian McNamee, who said under oath that he injected Clemens with steroids and human growth hormone. Clemens last played in the major leagues in 2007, with the New York Yankees *(Associated Press, www.findlaw.com of 13/1/2009).*

The Justice Department brought the case to a grand jury — which is based in Washington — after an 11-month FBI inquiry. A grand jury allows prosecutors to obtain sworn testimony from witnesses and collect documents. The investigation is being led by Assistant U.S. Attorney Daniel P. Butler, the prosecutor in the D.C. Madam case. Mr. McNamee's lawyer, Richard Emery, said his client has not been called as a grand jury witness or received a subpoena. But Mr. Emery did expect McNamee to testify again, adding that they would be cooperating, that they had been in contact with the federal authorities for a year and a half, and that they looked forward to the results, "which we fully expect will show that Brian has been telling the truth all along" *(Ibid).*

It was former New York Mets clubhouse attendant Kirk Radomski, sentenced to five years' probation last year after pleaded guilty to distributing steroids and laundering money, led investigators to McNamee. The latter told federal agents and baseball investigator George Mitchell that he injected Clemens more than a dozen times with steroids and HGH from 1998-01. Clemens' repeated denials of those accusations drew Congress's attention — and the former pitcher then made more denials under oath. Clemens also filed a civil defamation suit against McNamee, a case which is currently pending in federal court in Houston.

Since the referral by Congress, federal investigators have been probing Clemens's past. Shaun Kelley, owner of a Houston training centre, said he had taken a polygraph test for FBI investigators John Longmire and Heather Young in April and that he had denied meeting Clemens or providing the pitcher or any of the pitcher's associates with illegal substances. Kelley said he employed Clemens' stepsister Bonnie Owens for about a year. Kelley said neither he nor his lawyers had been contacted by the grand jury.

It was a memorandum by Representative Henry Waxman which outlined the reasons the panel asked the Justice Department to investigate Clemens, summarizing "seven sets of assertions made by Mr. Clemens in his testimony" which appeared to be contradicted by other evidence before the committee, or implausible. Those areas included Clemens's testimony that he has "never taken steroids or HGH", that McNamee injected him with the painkiller lidocaine, that team trainers gave him pain injections; that he received many vitamin B-12 injections; that he never discussed HGH with McNamee; that he was not at the home of Jose Canseco, a team mate at the time, from June 8-10, 1998, when their Toronto Blue Jays played a series at the Florida Marlins, and that he was "never told" about Mitchell's request to speak to Clemens before issuing the report containing McNamee's allegations *(Associated Press, www.findlaw.com of 13/1/2009).*

Several days after this development, convicted steroids dealer Kirk Radomski appeared at the federal court house in Washington where a grand jury is being asked to determine whether Roger Clemens should be indicted on charges of lying to Congress. Convicted

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steroids dealer Kirk Radomski who, as was mentioned above, led federal investigators to Clemens, appeared at the federal court house in Washington where the grand jury is being asked to determine whether Roger Clemens should be indicted. A former New York Mets clubhouse attendant, Radomski was sentenced to five years' probation after pleaded guilty to distributing steroids and laundering money *(Associated Press, www.findlaw.com of 15/1/2009)*.

In a new twist to the saga two weeks later, a new book by former New York Yankees manager Joe Torre contains allegations that members of the Toronto Blue Jays used amphetamines while former pitcher Roger Clemens was with the team. The Yankee Years by Torre and Sports Illustrated journalist Tom Verducci contains allegations by Brian McNamee, Mr. Clemens's former trainer, that the Blue Jays were enveloped in the amphetamine use that was allegedly widespread in baseball at that time. McNamee also claimed former Toronto general manager Gord Ash "did not want to know if players were doping". Mr. Ash, now an assistant GM with the Milwaukee Brewers, replied to the allegations in an e-mail to the Globe and Mail:

> ***"I don't know or have reason to suspect that the Blue Jays were unique and there were no obvious issues. Our medical staff never brought any abuse to my attention. We did place a great deal of emphasis on education and were one of the few clubs to have a full-time EAP (employee assistance program) director."***
> *(Associated Press, www.findlaw.com of 2/2/2009)*

That same week, it was alleged that tests had linked Clemens's DNA to blood present in syringes which McNamee said he used to inject the pitcher with performance-enhancing drugs. Citing two unidentified sources familiar with the investigation, The Washington Post reported the same week that the DNA results are preliminary and subject to verification tests. The newspaper said Clemens voluntarily gave a DNA sample to federal authorities, according to the sources, and it still remains to be determined whether the syringes ever contained steroids or human growth hormone. The test results could prove important to the investigation into whether Clemens lied under oath to Congress last year when he denied using steroids or HGH.

Earlier, news agency Associated Press reported that, according to a person close to the case, the world-renowned UCLA Olympic doping lab (where the "clear" and the "cream" of BALCO infamy first were uncovered) had in hand the physical evidence McNamee turned over to federal prosecutors in early 2008 that his side says will link Clemens to drug use. McNamee's lawyers said last year the material included vials of testosterone and unused needles Clemens gave to McNamee. They also said they turned over needles used to inject Clemens (needles that were contained in a beer can McNamee says was removed from the trash at the pitcher's New York apartment in 2001) and gauze used to wipe blood off Clemens after a shot. At the time, Clemens' camp called it "manufactured" evidence, while the trainer's side said the items were thrown in a box by McNamee and kept for years in case he needed to "protect himself" somewhere down the line.

Two days later, it was learned that federal prosecutors had interviewed Yankees pitcher Andy Pettitte as they investigated whether his former teammate – i.e. Clemens – lied to Congress when he denied using performance-enhancing drugs. Two people familiar with the case told news agency The Associated Press that Pettitte was in Washington last week to meet with prosecutors. The people spoke on condition of anonymity because they were not authorized to discuss the ongoing investigation. The pitcher could be a crucial witness for any case against Clemens. The two trained together for years. Pettitte has acknowledged taking human growth hormone and told congressional investigators that Clemens informed him nearly a decade ago that he used HGH *(Associated Press, www.findlaw.com of 17/2/2009)*.

Miguel Tejada pleads guilty

The procession of baseball players caught up in the scandal continued remorselessly when, in mid-February 2009, it was learned that All-Star shortstop Miguel Tejada pleaded guilty to lying to the US Congress about the use of performance-enhancing drugs in professional baseball. Tejada was the American League's Most Valuable Player (MVP) in 2002 while playing for the Oakland Athletics. He now plays for the Houston Astros. The misdemeanour charge of making misrepresentations to Congress can lead to as much as a year in jail, although federal guidelines call for a lighter sentence.

Tejada's guilty plea grew out of statements he made to House of Representative investigators denying that he knew anyone in baseball who used performance-enhancing drugs. His assertions in 2005 were contradicted by evidence that he had talked to an Oakland team mate about his steroids use and later purchased what he believed was human growth hormone from that player. Charges against Tejada were detailed in documents filed in court the day after, as is related above, superstar Alex Rodriguez acknowledged

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past use of performance-enhancing drugs. The New York Yankees third baseman does not face charges. Mr. Tejada came under scrutiny after another ex-teammate, the Baltimore Orioles' Rafael Palmeiro, testified before the House committee and declared that he had never used steroids. Palmeiro was suspended by baseball later that year after testing positive for steroids. He said the positive result must have been caused by a B-12 vitamin injection given to him by Tejada *(Associated Press, www.findlaw.com of 11/2/2009).*

McGwire accused of steroid abuse

The youngest brother of former Oakland Athletic star Mark McGwire, in a recent book proposal, has claimed that he injected the former baseball star with steroids, according to Deadspin.com. Jay McGwire is circulating a manuscript titled The McGwire Family Secret: The Truth about Steroids, a slugger and Ultimate Redemption, according to the website reported in mid-January 2009. Jay McGwire, a body builder, said his brother started using steroids in 1994 and that he injected Mark with Deca-Durabolin. He claims:
"Mark is a man I think most would like to forgive because his reason wasn't nefarious—it was for survival,. My bringing the truth to surface about Mark is out of love. I want Mark to live in truth to see the light, to come to repentance so he can live in freedom — which is the only way to live."

Mark McGwire repeatedly has denied using illegal performance-enhancing drugs. It was reported that when he testified under oath before Congress in 2005, however, he declined to discuss whether he did *(Associated Press, www.findlaw.com of 23/1/2009).*

Doping issues – cricket

Mohammad Asif on various drugs charges (Pakistan)

In mid-November 2008, it was learned that Pakistan fast bowler Mohammad Asif had been detained at Dubai airport for being in possession of opium. The Pakistan Cricket Board (PCB) stated that Mr. Asif was later merely deported without charge because the quantity of the drug was very small *(The Guardian of 19/11/2009, p. S2)*. The cricketer later admitted to possessing the drug, but added that he did not know that the substance in question was opium – thinking instead that it was a "herbal dark substance" which he used for energy *(The Daily Telegraph of 12/1/2009, p. S25).*

However, that was not the only drug-related incident with which the fast bowler had to contend. In mid-February 2009, he was banned from all cricket for one year after testing positive for nandrolone during the inaugural fixture of the Indian Premier League last year. He immediately announced his intention to appeal this verdict *(The Guardian of 12/2/2009, p. S2).*

Doping issues – boxing

Mosley admits to taking EPO before de La Hoya match (US)

In early December 2008, it was claimed that US boxer Shane Mosley informed a Grand Jury in 2003 that he had injected himself with doping agent EPO as he prepared for a bout against Oscar de La Hoya. This emerged from a court transcript and doping calendars reviewed by the US newspaper New York Daily News. The transcript of the boxer's testimony was part of a file which was under a protective order before the US District Court judge Susan Illston during the Barry Bonds trial referred to earlier. Mr. Mosley has admitted using performance-enhancing drugs but denied knowledge that the drugs were banned or illegal *(The Guardian of 4/12/2008, p. S2).*

Following this revelation, the World Boxing Council (WBC) opened an investigation into the affair *(The Guardian of 17/12/2009, p. S2).*

Doping issues – other sports

Ice Hockey

In late December 2008, it emerged that New York Rangers prospect Alexei Cherepanov had engaged in blood doping for several months before dying in the course of a Russian league match in October 2008. Investigators added that, during his last year, the 19-year-old had suffered from myocarditis, a condition where insufficient levels of blood reach the heart, and should not have been playing professional ice hockey. The investigating committee added that the medical team of the Russian club may carry legal liability on the basis that a series of "gross violations" had been committed *(Associated Press, www.findlaw.com of 29/12/2008).*

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Winter Sports

In mid-February 2009, the former coach of Austria's cross-country ski team won his appeal to have his lifetime ban for involvement in the Turin Winter Olympics scandal (Journals passim) reduced to 15 years. It was reported that Emil Hoch had been banned by the International Ski Federation after being found guilty of possessing banned substances and helping athletes to take banned drugs at the 2006 Games. The Court of Arbitration for Sport (CAS) ruled that Hoch had been guilty of one, rather than two, doping violations, and that he was not the main figure behind the doping conspiracy, which justified reducing the length of the ban (Associated Press, www.findlaw.com of 10/2/2009).

16. Family Law

[None]

17. Issues specific to individual sports

Football

Extra referees move step closer

The sheer pace of the modern professional game – not to mention the enormous sums involved – have increased the pressure on match officials, to the point where doubts have been cast as to whether the existing retinue of three is sufficient to control an increasingly frenetic sport. The prospect of an additional assistant referee, to be located behind each goal line, moved considerably closer in late February 2009, when Michel Platini, the President of European governing body UEFA, stated that he was certain that this innovation would be in place for the European championships in 2012.

Mr. Platini's optimism was based on the sanction given by the International Football Association Board (IFAB) for trials of the plan to take place in a professional league next season. The Italian Cup will be the first "guinea pig" for this scheme, with the French Football Association also offering to trial the plan. Platini claims that the additional match officials could assist with decisions such as penalties and hand ball incidents. Goal line technology will also be assessed by a new report from sportswear manufacturers Adidas and the German company Cairos Technology *(The Observer of 1/3/2009, p. S6).*

Let us spray: defensive wall technology to be trialled in Argentina

One of the major difficulties for referees in today's game is assessing where the ten-yard defensive line for free kicks should be drawn – particularly in view of the frequent attempts by defensive players to flout this rule. Accordingly, the Argentinian football authorities have decided to experiment with vanishing spray in their First Division. The idea is that referees spray a line to mark the position of the wall, and the line then takes a minute to disappear. It had already been used as an experiment in the Second Division for six months *(The Independent of 11/12/2008, p. 67).*

UEFA backs Blatter under-20 plan for Olympics

In February 2009, European governing body UEFA gave its support to a proposal to lower the age limit for the Olympic football tournament, and eliminate the three over-age exemptions which each team is currently allowed. This was an idea put forward by Sepp Blatter, the President of world governing body FIFA, and follows the imbroglio at the 2008 Olympics, when some clubs refused to release players to participate in the tournament, citing a conflict with club competitions *(Associated Press, www.findlaw.com of 3/2/2009).*

Cricket

Umpire's decision no longer final – referral system trialled

According to the Laws of the game, it is "against the spirit of cricket" to dispute an umpire's decision by word, action or gesture. No longer. As from the four-Test series between England and the West Indies, in progrss at the time of writing, both teams have been able to challenge the decisions made by the on-field umpires by requesting a second opinion from the third umpire, who has the full benefit of repeated television replays.

With the landscape of international cricket developing so swiftly, this comparatively major change seems to have gone almost unnoticed. A small but significant section of the Laws has been temporarily suspended. England's Caribbean series formed part of a protracted trial for the challenge system before the world governing body in the game, the International Cricket Council (ICC) considers whether or not to make the change permanent. Every time the umpire raises his finger, the dismissed player will have the opportunity not only to stare back in disbelief, but cross his arms into a T-shape and ask for a review of the decision. Equally the fielding captain can now do more than simply shake his head in frustration if an appeal is turned down *(The Guardian of 3/2/2009, p. S9).*

The system has already been used in Sri Lanka's home series against India and also on West Indies' recent trip to New Zealand. After feedback from the players involved, it has been tinkered with by the ICC. The number of unsuccessful referrals each side are allowed per innings was cut from three to two. The idea, the ICC's chief executive, Haroon Lorgat, explained, was to reduce the number of "frivolous and unnecessary reviews".

If it proves successful in the England/West Indies series the two-trial referral process will also be used for Australia's upcoming tour of South Africa, after which the ICC is due to make a decision as to whether to make the challenge system a fixture in the game. A similar scheme was trialled in the English Friends Provident Trophy in 2007. It proved a distinct flop. After

17. Issues specific to individual sports

Hampshire's defeat in Friends Provident final, Shane Warne was one of many players to argue that TV replays were not conclusive enough to be useful, saying:

> ***"When you get the technology 100 per cent, that's when you can use referrals, until it's three-dimensional and you see it from every angle there's no point using it"*** *(Ibid)*

At present the third umpire is not allowed to use any of the tools (some would say gimmicks) available to the TV viewer such as the heat-camera Hot-Spot, or the Snickometer. Any other decision is fair game. Understandably, the umpires on the county circuit felt both underwhelmed and undermined by the trial. Not one challenge was upheld in the Friends Provident competition.

The referrals have been more effective in Tests, however. And when Rudi Koetzen overruled a Mark Benson decision in a Test between India and Sri Lanka last July, Tillakaratne Dilshan, became the first batsman in the history of first-class cricket to have successfully appealed against his own dismissal. However, to show that even the most sophisticated appeals systems can fail, in the event the Snickometer later suggested that Benson's original decision had been right, and that Dilshan had indeed edged the ball behind. All four Sri Lanka appeals in that match were upheld, with Rahul Dravid and Sachin Tendulkar given out by the third umpire. It is unsurprising that Sri Lanka were full of praise for the challenge system. Others were more sceptical. Daniel Vettori, who used the referral system against West Indies, welcomed the cut in the number of challenges available, and actually suggested teams should be allowed just one appeal *(Ibid)*.

England awarded victory in 'Darrell Hair-gate' Test against Pakistan

In February 2009, England won a Test match without even donning their whites when the International Cricket Council restored the result of the controversial "Darrell Hair-gate" match against Pakistan at the Oval in 2006 to its original status. As has been related in earlier issues of this Journal, the Test in question has been at the centre of a political wrestling match ever since umpire Hair lifted the bails and awarded the game to England as a forfeiture. In July last year, the ICC commuted the result to a draw after pressure from the Pakistan Cricket Board. But opposition from the MCC and Michael Holding, among others, has now led them to turn a full circle. "Our unanimous viewpoint has always been that the umpire's decision must stand" said Tony Lewis, who chairs the MCC's cricket committee. Pakistan were originally ruled to have forfeited the Test when they failed to emerge from the dressing-room after tea on the fourth day, having earlier been docked five runs for alleged ball-tampering *(The Daily Telegraph of 2/2/2009, p. S28)*.

Golf

John Daly suspended for six months by PGA Tour

John Daly smashed one tee shot off the top of a beer can during a pro-am. At another tournament, he returned from a rain delay with Tampa Bay Buccaneers coach Jon Gruden as his caddie. And his most memorable photo this year came in North Carolian, when he wore an orange jail suit, eyes half-closed. Now Mr. Daly has announced, on New Year's Eve 2008, that such unwelcome publicity has now caused the PGA Tour to suspend him for six months. The two-time major champion confirmed his suspension to the agency Associated Press, calling this the low point of an 18-year career during which he has made as much news off the course as he has with his prodigious game. Daly said he wanted to go public in order to inform fans and tournaments organisers that he was not abandoning them by taking his game to the European tour *(Associated Press, www.findlaw.com of 31/12/2009)*.

This is the second time the tour has suspended Daly, along with at least two other times when he agreed to sit out the final few months of a season to restore some order to his life. He has not played on the PGA Tour since he missed the cut in mid-October 2008 in Las Vegas. Ten days later, police in Winston-Salem, N.C., said he appeared intoxicated outside a Hooters restaurant, and Daly was taken to jail to "sleep it off". That led to his photo in the orange jail suit, which became an Internet sensation.

Still attempting to recover from various injuries, Daly made only five cuts in 17 starts on the tour, finishing 232nd on the money list. His world ranking has plunged to No. 736. Daly is not even sure when the suspension began, but he hopes it ends in May. He said PGA Tour commissioner Tim Finchem sent a letter to his agent, Bud Martin of SFX Sports, who passed along the news. Daly commented:

> ***"Tim and his staff have to do what they do. Truly and honestly, I wish Tim would get to know the facts better before he makes a decision. I would love to sit down and have a nice talk with him, tell him what really happened. But perception is reality in the world, and sometimes they have to do what they have to do."*** *(Ibid)*

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Mr. Martin would only say the suspension was to end in the spring, adding that it remained "confidential with the PGA Tour." He said Daly wants to use 2009 to turn his career around. Daly said he hopes to play well enough to earn sponsor exemptions on the PGA Tour when the suspension is lifted. He became an overnight sensation when he won the 1991 PGA Championship at Crooked Stick as the ninth alternate, introducing his powerful "grip it and rip it" style to golf. Four years later, he won the British Open at St. Andrews. But his career has been dragged down by two trips to alcohol rehab, four marriages, gambling losses and other off-course episodes that have made him a sideshow to some and a cult figure to others.

Asked why he was suspended, Daly pointed to four incidents during the year. After a rain delay at Innisbrook during the Florida swing, he emerged from a hospitality tent with Gruden as his caddie for the final seven holes of the round, prompting a split with swing coach Butch Harmon. While promoting a golf course in Missouri, Daly did a regional television interview wearing only blue jeans — no shirt, no shoes — while showing how to play one of the holes. Then at the Buick Open, during a pro-am event that featured Kid Rock in overalls, Daly revved up the fans by hitting one drive off the top of a beer can. However, he drew the most attention from the night in jail. Daly told the AP that his friends called police when they feared he had passed out, claiming they were unaware he sleeps with his eyes open when he's had too much to drink. Daly was put in jail under a state law called "Assistance to Intoxicated Persons."

Daly has played four times overseas since the PGA Tour suspended him, tying for 17th in the Hong Kong Open and missing the cut at all three tournaments he played in Australia. In the Australian Open, he lost his patience with a fan who put a camera in his face during the round, smashing the camera against a tree. He claims that the publicity has cost him his endorsements. His only deals are with Focus Golf Systems, which signed a 15-year agreement in 2006 to sell his golf clubs and apparel in Wal-Mart stores; and Fly Emirates, part of a deal that will pay his travel expenses when he plays the Abu Dhabi Championship, Qatar Masters and Dubai Desert Classic in January *(Ibid)*.

Basketball

D-League grants first protest in league history

In mid-January 2009, the NBA Development League granted Utah's protest of its loss to Colorado last month, the first successful challenge in the league's eight-year history. The League ordered the teams to replay the final 25.2 seconds of the game, with the score tied at 102. The Utah team protested against the 104-102 loss on 26 December after Bill Walker was incorrectly disqualified by fouls with 25.2 seconds left. It should only have been his fifth foul; a foul against team mate J.R. Giddens with 9:24 remaining in the second quarter was mistakenly credited to Walker by the 14ers' official scorer.

The replay will occur on 10/4/2009 in Utah, with the teams' regularly scheduled game to follow.
Walker and Giddens have since been recalled to the NBA by the Boston Celtics. "The Flash" will be able to use any available players if they are not reassigned for the rematch. Last season, the NBA had its first "do-over" since 1982 when Atlanta and Miami replayed the final 51.9 seconds of a Hawks victory because the official scorer ruled incorrectly that Shaquille O'Neal fouled out. The Hawks won the replay, then the regularly scheduled game *(Associated Press, www.findlaw.com of 13/1/2009)*.

Texas Tech player Knight suspended

In mid-February 2009, it was reported that the Big 12 Conference suspended Texas Tech coach Pat Knight for one match for complaining about officials during a game with rivals Texas A&M. He received a technical foul in the second half of the fixture for arguing a foul call, and complained about the officials after the game to reporters, commenting that he did not care what the Big12 thought. He had already been publicly reprimanded for being ejected after running onto the court twice to argue a foul call in a game against Nebraska *(Associated Press, www.findlaw.com of 23/2/2009)*.

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Athletics

Group demands "big changes" at USA Track and Field

In an unflinching breakdown of what went wrong with the US track team at the 2008 Beijing Games, a task force lashed out at the relay system, recommended streamlining Olympic trials and called for a more stringent policy for drug users who want to be reinstated. The 69-page report released Monday, heavy on uncomfortable details and scathing conclusions, was commissioned by Doug Logan, USA Track and Field's new chief executive officer. It is true that the Americans led all countries with 23 track and field medals in Beijing but failed to live up to expectations in many areas. Their seven gold medals were the lowest total since the 1997 world championships. The task force is called "Project 30", a nod to the goal of winning 30 medals at the 2012 London Olympics.

The nine-person panel, which included sprint great Carl Lewis and 2004 marathon bronze medalist Deena Kastor, decried an overall "lack of accountability, professionalism and cohesion" among staff, coaches and athletes. The group suggested athletes focus more on winning Olympic medals, less on things such as appearance fees and access to TVs in the Olympic village. In a blog, Mr. Logan wrote that he had read the report several times and was willing to confess that some of their findings were jarring and shocking. He added that all concerned must be "big enough to admit lapses and move to improve". To spearhead the changes, the task force called for the employment of a general manager to oversee all aspects of USATF, which long has been criticized as being too political and balkanized *(Associated Press, www.findlaw.com of 9/2/2009).*

Though not specifically asked to cover the doping issue, the task force did so anyway, saying that this was the "single most important issue to the long-term success of track and field", both domestically and internationally". It called for current anti-doping standards to be enhanced by the USATF, saying dope users should be reinstated only if they provide depositions under oath "detailing what went into their decision to cheat, how they obtained and used their drugs, and who contributed to their cheating." It also called for dopers who want to return to enter a "rehab'" program so they can learn how to compete cleanly after their suspensions.

The task force conceded the system they recommend likely would be challenged in the courts, but believes the USATF had a moral obligation to face up to this. The report stated on this subject that any legal costs would be "more than repaid by the culture shift it will help establish". Officials at the U.S. Olympic Committee said the report was a good idea, and admitted that, if the analysis was sharp, this was only because the committee "recognized what U.S. track and field athletes are capable of achieving", according to spokesman Darryl Seibel.

The task force also suggested athletes take more control over their careers, a consistent theme throughout the report. The group concluded athletes don't focus enough on winning, or achieving personal bests, at the Olympics. The 10-day Olympic trials, which include two rest days, might be part of the problem. The panel did not recommend any change in the awarding of spots to the top three finishers in each event, provided they have an Olympic qualifying standard. That leaves the U.S. team vulnerable to injuries of top athletes, such as when Tyson Gay went down during 200-meter qualifying.

However, the task force said a shorter schedule and fewer entrants was a good idea, because the meet taxes athletes emotionally, physically and financially but does not necessarily set them up for their best performance at the Olympics. It acknowledged that truncating the event could hurt ticket and TV revenue. However, the panel added:

> ***"But USATF must not lose sight of the fact that the purpose of the Olympic Trials is to select the best Olympic Team that will go on to perform at its peak at the Games themselves. Financial and other concerns should be secondary to this goal."*** *(Ibid)*

Athletes, too, must share this focus. The task force stated that they should set out a year-long plan and hold to it during an Olympic year, avoiding the temptation to cash in on success at Olympic trials by making money grabs at pre-Olympic events in Europe. It added that athletes need to make more decisions for themselves – regarding their schedules, those who coach them and whom they hire as agents, a fraternity which the panel claims had accumulated too much power in the sport. Short on sympathy, the task force said many athletes needed to be more independent and able to roll with the punches in an Olympic atmosphere, where transportation, food and coaches' access to the track are often inferior to what they are conditioned to. It lauded athletes such as Stephanie Brown-Trafton and Walter Dix for taking care of themselves. Brown-Trafton

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won the United States' first gold medal in women's discus in 76 years; Dix won bronze in the 100 and 200. On the other hand, the panel told of an athlete who complained because she could not obtain a television in her room.

The most severe criticism was levelled at the American relay effort. The men's and women's 400m teams each dropped the baton in qualifying – a debacle that punctuated the entire team's underachievement. The panel called for the American Relay Programme – which spent more than $1 million and trained 173 athletes from 2003-08 – to be disbanded immediately, saying the concept was good but the execution was not.

There was also a laundry list of other problems. The panel described a general atmosphere of confusion, politicking and anxiety that ultimately led to bad exchanges between Darvis Patton and Gay in the men's race and Torri Edwards and Lauryn Williams in the women's. This disorganization may have been best illustrated by the scene shortly before the women's relay when the runners were in the holding room, about to head to the starting line, with no idea where their bibs were. Their numbers had to be handwritten at the last second. The report continues:

> ***"One athlete was ... nearly crying when she spoke of how embarrassing it was to them. That the bib debacle transpired just moments before taking the track did not help the team's fortunes, as it was clearly a very significant distraction and cause of negativity. The same issues played out in different ways' in the men's relay."*** *(Ibid)*

The task force called for better use to be made of the USATF-run training centre in Chula Vista, California, and more reliance on developments in sports science and biomechanics, especially for long-distance runners, who generally do not take advantage of such facilities. The panel also recommended that with few exceptions, funding be focused on athletes in their early 20s – yet another in a series of harsh reality checks the sport needs to make to move forward. The panel recognised that this may be "a bitter pill to swallow for many athletes", some of whom may be winning national championships at age 27, 28 or older. But if these athletes are not winning medals or earning top-10 world rankings by that point in their careers, USATF could not afford to continue to provide additional funds to them. BASL

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(2008) SLJR 6

Causation; Motor sports; Negligence

GREEN V SUNSET & VINE PRODUCTIONS LTD

Queen's Bench Division: Ouseley, J. 13 July 2009 (Reporter SG)

Facts

The claimant (G) claimed damages for personal injury from the defendants following an accident which occurred during a car race. G was a well-known and very experienced driver of historic racing cars. He had been driving in a trophy race at the Goodwood circuit, which was owned and operated by the third defendant (X). The second defendant racing club (B) had organised the Goodwood Revival meeting at which the race occurred and once it had begun, had responsibility for the track and its immediate environs. The first defendant production company (S) had a contract with X to produce outside broadcasts for the race meeting. Among the cameras it used was a "kerb cam" which took wide angle but close up road level shots of passing cars and their wheels. One was placed on the grass just on the inside of the second apex of a certain corner on the circuit. During the trophy race, G had suffered an accident at that corner when his car clipped the kerb and spun out of control, hitting a tyre wall. He was thrown onto the track where the car ran over his legs before stopping. G suffered severe leg injuries but made a good recovery. G contended that the accident had been caused by his car's wheels hitting S's kerb cam, and that it was that impact which caused the car to veer off track, after which there was nothing he could do to stop the crash. He submitted that he had been racing in a perfectly proper manner and that S had been negligent in placing the camera at that corner or placing it there in an insecure manner. S contended that the accident had not been caused by contact between the G's car and the kerb cam but by G driving too fast around the corner, losing control as his off or right hand side wheels used the verge and crossed over the kerb, back on to the track. His own negligence, alternatively, contributed to the accident. It was S's case that the camera was approved by type and location by X and B or both, and that its positioning had involved no negligence by it or by others. However, to the extent that it was liable to G, S sought a contribution from X and B because they too were negligent, and it joined X in Part 20 proceedings. G joined X and B as defendants on the basis that each had known or ought to have known of the placing of the kerb cam at the corner, known that it was likely to be overrun there and that that was a dangerous position or manner in which to place a kerb cam. B and X agreed with S that contact between the car and the kerb cam had not caused the accident: it had been caused by the way G was driving. They further agreed with S that the kerb cam was not placed in a dangerous position and that it had created no undue hazard. Each of the parties submitted substantial expert evidence in support of their case.

Held

Judgment for defendants. On the evidence, what had probably caused G's car to do what it did was a combination of its speed and the line it took through the second apex of the corner in order to overtake the car in front, and the unsettling effect of crossing back over the reverse of the kerb. The kerb cam was not an important factor. G's driving was the principal cause of the accident. It was his error of judgment which led to him taking the line he did around the corner, in pursuit of his chosen manoeuvre at that very spot, and he was largely to blame for his own misfortune. Although no driver knew of or had any reason to suspect the presence of the kerb cam on the inside of the corner, it was not the case that G would have refused to race if he had known of it and if it had not been removed. Accordingly, S, B and X were not liable for the accident and G's injuries.

Commentary

Although Sunset & Vine (S) were found to have been negligent in failing to obtain proper approval for the kerb cam and its location, this omission crucially did not cause or contribute to the accident and therefore they were not liable. This case reinforces the basic element of liability under negligence that there is a need for claimants to prove a causal link between the negligence and subsequent damage. This could not be proved in this case.

Even if the above causal link had been established, the claim would have failed on a test of remoteness. The judge held that it was not reasonably foreseeable that the contact between a small kerb cam, which was designed to be able to be run over safely by a car, would cause such an accident.

Sport and the Law Journal Reports

(2008) SLJR 7

Boxing; Contract terms; Oral contracts; Sports agents

SPORTS NETWORK LTD V CALZAGHE

Queen's Bench Division Mr Justice Wyn Williams 16 March 2009 (Reporter SG)

Facts

The claimant promotion company (S) claimed damages for breach of contract against the defendant boxer (C). C counterclaimed for sums due to him under the contract. S had been C's manager and had promoted C for many years. In 2007 C had agreed to remain exclusively promoted by S for one further fight. Discussions took place about the terms on which C would engage in the fight. At a meeting S accepted that any bout would be co-promoted by an American company with each promoter receiving 50 per cent of the profits generated. An oral agreement was reached between S and C as to C's share of the profits. However, a dispute arose as to whether C had also agreed that S would continue to act as his promoter after the bout. S contended that an agreement was reached upon terms that it would continue to act as C's promoter for all his future bouts. S contended that C's share of the profits generated by the bout should be reduced to reflect a shortfall in the value of tickets sold by it compared to the value which it committed to sell under a side agreement with the owner of the bout venue. C contended that whilst a binding oral agreement had been concluded it encompassed only the financial terms upon which he would fight in the one remaining fight and there was no agreement concluded in relation to the promotion of any bouts undertaken after that fight.

Held

(1) On the evidence S had failed to establish the oral agreement. There was no suggestion that the oral agreement for which S contended was ever reduced to writing in advance of the bout. If an oral agreement was concluded as alleged some written record would have been created prior to the fight. In respect of every promotion by S of C from 1998 onwards there was always written evidence of the terms of the promotional agreements concluded, it was unbelievable that no written record of the alleged promotional agreement in dispute would have been created. The failure to reduce any oral agreement into writing represented a complete departure from the practice which S had adopted in the previous ten years. (2) S was not entitled to deduct sums from its share of the profits in its account with C for losses incurred by it that were unrelated to the agreement between S and C. However, S was entitled to deduct the expense of the promotion from its share of the profits generated by the fight and, accordingly, the counterclaim was reduced to that extent. (3) The contract was governed by English law and there was no express provisions as to the currency in which C was to be paid his share of the profit. Accordingly, judgment had to be given in the currency that best expressed C's loss which was sterling.

Commentary

This decision reinforces the principal of contract law that although a binding contract can exist which is oral in nature, evidentially it will be much more likely to be enforceable if it is reduced to writing. Sports Network was not able to rely on their alleged oral agreement due to this fact. Subsequent to this decision, in a separate hearing, Lord Justice Ward and Lord Justice Wall agreed the application to appeal was "hopeless and must be refused". And that there was "no prospect at all" of the Court of Appeal overturning findings of fact by Mr. Justice Wyn Williams.

(2008) SLJR 8

Personal injury; Loss of earnings; Sportspersons; Wages

COLLETT V SMITH

Court of Appeal (Civil Division) : Carnwath, L.J.; Smith, L.J.; Hughes, L.J.
17 June 2009 (Reporter SG)

Held

The appellant (S) appealed against an assessment of damages ([[2008] EWHC 1962 (QB), (2008) 105(33) L.S.G. 21) made after he admitted liability for personal injuries sustained by the respondent (C) during a football game. C had been a member of a Premiership football club's youth academy. When he was 18 years old, he was playing his first game for the club's adult reserve team when he fractured his right tibia and fibula. He never regained his former ability to play football and subsequently stopped pursuing a professional playing career. Damages were agreed in part but the court assessed the loss of future earnings.

Sport and the Law Journal Reports

The judge accepted evidence that the worst scenario was that C would have played throughout his career for a Championship club. She applied an uplift of 25 per cent to reflect the fact that C would have been playing for a club at the upper end of the Championship League rather than an average club. She relied on a survey of wages to apply a 15 per cent increase in the wages C could have expected to earn while playing in the Championship League between 2007 and 2008, and estimated the same percentage for the following year. She finally applied a 15 per cent discount to future loss of earnings to take account of the risk of injury and other contingencies. S submitted that (1) the judge had erred by treating C's chances of playing for a Championship club as a certainty, subject to the discount for all contingencies, rather than assessing the appropriate percentage chance of playing for such a club; (2) the discount applied to future loss of earnings was too low; (3) an increase of 15 per cent for the wages of Championship players applied to the period of 2008 and 2009 was excessive; (4) there was no evidence to support the 25 per cent uplift applied to the annual Championship club salary.

Held

Appeal dismissed. (1) The evidence that C would have achieved at least Championship level was very strong, as was the evidence that he would have played for a club at the upper end of that League. However, the judge had not ignored the risk that he might not have achieved that level; she had just thought that the risk was small and could most conveniently be considered together with the other risks. She had intended to take into account the risk that C's career might not have turned out as well as expected. She had also included in her assessment the risk of premature termination for whatever reason. The judge had therefore not misdirected herself or failed to make any allowance for the risk that C might not have achieved a place in an upper-end Championship club. (2) The judge had put into the balance the possibility that C might have done better than she had predicted. She had been entitled to take that view. She had not assessed C's chances of playing in the Premier League on the basis that that was the best he could hope for; rather, that that was what she thought was most likely. There were clear possibilities in both directions. A small possibility of a longer period in the Premiership would have quite a marked effect on lost earnings. A one per cent increase in C's chance of playing in the Premiership would counterbalance a four per cent chance of his not achieving a career in the Championship League. It was therefore clear that the 15 per cent overall reduction was reasonable. (3) The judge had little by way of published figures on which to rely when looking at the annual wage increases for Championship club players. She had been entitled to hold that there would have been an increase, and to do her best on the material available when assessing the amount. (4) There had been ample evidence to justify the judge's approach in applying a 25 per cent uplift to the annual Championship League club salary.

Commentary

In the original trail, both parties provided expert evidence concerning football finances. The Court of Appeal concluded that the calculation of damages at trial had been appropriate. The one clear message that comes from this case is the need for football clubs at all levels of the game to examine carefully their third party insurance liability cover. It is likely that many players have cover, which is inadequate, particularly in the light of today's judgment. This judgment highlights the earning power of today's top football stars. This litigation established that Ben Collett would have been a leading professional sportsman and his damages reflect his potential earnings. BASL