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Jack Anderson
Editor

Leading Cases in Sports Law



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Series Information

Books in the *ASSER International Sports Law Series* chart and comment upon the legal and policy developments in European and international sports law. The books contain materials on interstate organisations and the international sports governing bodies, and will serve as comprehensive and relevant reference tools for all those involved in the area on a professional basis.

The Series is developed, edited and published by the ASSER International Sports Law Centre in The Hague. The Centre's mission is to provide a centre of excellence in particular by providing high-quality research, services and products to the sporting world at large (sports ministries, international—intergovernmental—organisations, sports associations and federations, the professional sports industry, etc.) on both a national and an international basis. The Centre is the co-founder and coordinator of the Hague International Sports Law Academy (HISLA), the purpose of which is the organisation of academic conferences and workshops of international excellence which are held in various parts of the world. Apart from the Series, the Centre edits and publishes *The International Sports Law Journal*.

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Editor's Introductory Remarks and Acknowledgements

In edited collections of this nature it is often the case that the editor will use the introductory remarks to pronounce, rather grandly, on the volume's underlying and unifying theme or themes. That will not happen here. The substance and form of the collective term "sports law" covers an eclectic amalgam of various applications of traditional branches of the law and, at best, it is hoped that eclecticism is encapsulated in the various contributions to this collection. If a single theme is to be found threading its way through this collection, it is one that demonstrates the breadth and depth of sports law scholarship worldwide. Put simply, this book is not just about leading sports law cases; it is about leading sports law cases as analysed by leading sports law scholars. Authors or contributions based on case law from at least nine jurisdictions spanning the common and civil law traditions are represented—Australia; Belgium; Canada; England and Wales; Scotland; South Africa; Sweden; New Zealand; and the United States. Moreover, the case law ranges from the superior courts of the United States, the United Kingdom and the European Union (EU) to what can now be called sport's very own international court of justice—the Court of Arbitration for Sport.

Two points need to be made before briefly introducing the contents of this collection.

The first is directed towards the contributors and it is simply to express my thanks to them for their professionalism and patience in filing their contributions. The quality of this book is due to them alone, and has nothing to do with my editing skills. In fact, to paraphrase Denning MR's celebrated maxim in *Enderby Town FC v Football Association* (1971), "better a good writer than a bad editor"; and this book is full of good writers. Editing this collection was primarily a matter of arranging the case law into six parts reflecting what I thought were topics historically fundamental to the emergence of sports law (Parts I–III) and those which continue to prompt legal analysis of sporting practices (Parts IV–VI). Further, the book's chapters have also been edited into such a way that they can be read in a self-contained manner for ease of dedicated study. Each chapter contains a reference list of its own and cross-referencing within and between chapters has been kept to a minimum.

The second point is directed at you, the reader. No doubt many of you will be perplexed as to why certain cases have made it into this collection, and others have

not. There are some prosaic reasons as to why this book is limited to twenty or so cases—such as deadlines, word count, author availability and the wish to avoid an overlap with other texts from the ASSER International Sports Law Series and notably *CAS and Football: Landmark Cases*, edited by Alexander Wild and published in 2012 by TMC Asser Press and Springer. Those explanations aside, the rationale for the selected cases in this volume is otherwise straightforward: I wanted them to be included because I think they best portray the domestic, regional, inter- and supra-national dimensions to sports law. If you think that there is a case or arbitral award that should have been included, or, better still, one that should be included in (I hope) a second volume—and in particular, but not limited to, a jurisdiction such as Germany, France, Spain, Italy, Russia, China or Brazil—then please contact me and engage with the debate on my blog at <http://blogs.qub.ac.uk/sportslaw>. In any event, all comments are welcome at jack.anderson@qub.ac.uk, including any ideas on the contents of a second volume and especially from the younger generation of sports law academics, scholars and practitioners!

I write these remarks as the London 2012 Olympic Games come to a close. In his remarks at the opening ceremony to the Games, the President of the International Olympic Committee, Jacques Rogge said, “In a sense, the Olympic Games are coming home tonight. This great, sports-loving country is widely recognised as the birthplace of modern sport.” Many sports can indeed trace their origins as codified pursuits to the Victorian era. How and why this happened and, more particularly, what the law contributed to the development of modern sport is central to this book's first chapter on *Abbot v Weekly* (1665).

So as Association Football and other sports emerged in codified and league form in the 1860s; so on the other side of the Atlantic (on St. Patrick's Day in 1871), the National Association of Professional Baseball Players was founded and professional league baseball was born. The “ensuing colorful days” of early baseball were breathlessly recounted in 1972 by Mr. Justice Blackmun in the US Supreme Court decision of *Flood v Kuhn*. In that decision, the long-standing exemption of professional baseball from US antitrust laws, established in *Federal Baseball Club v National League* in 1922, was recognised plainly as an “aberration”, in the light of the Supreme Court's subsequent findings that other interstate professional sports were not similarly exempt, but, nevertheless, it was held an established aberration with which the US Congress acquiesced, and which the US Supreme Court reiterated was entitled to the benefit of stare decisis. The second chapter contains a brilliant analysis of the root cause of this aberration by one of the US's leading sports law scholars, Professor Roger Abrams.

The leading EU sports law scholar, Professor Richard Parrish, follows with a case synthesis on *Walrave and Koch* when for the first time the Court of Justice of the European Union (“CJEU”) donned a sports jersey and did so in the most unlikely of settings—on a pace making bike for cycling races. Parrish demonstrates that the principles established by the CJEU in *Walrave and Koch* were indeed pathfinders in the development of EU sports law. The final chapter in the first part of this book is by Professor Ian Blackshaw who gives an analysis of proceedings that were fundamental to the contemporary authority of the Court of Arbitration for Sport (“CAS”).

Professor Blackshaw's analysis is important in revealing that although CAS can now be seen in terms of a world supreme court for sport, it must not be forgotten that a limited means of appeal from CAS to the Swiss Supreme Court remains and that in this supervisory role, the Supreme Court of that country can have an important say in the operation and administration of key aspects of contemporary sport.

Returning to the opening ceremony of the London Olympics of 2012, the Olympic flame was brought to the host stadium by David Beckham on a speed boat along the Thames. "Becks" encapsulates the commercial spirit of modern football, both on and off the field of play. What Part II of this book illustrates is how much footballers such as Beckham owe to Mr. George Eastham and Mr. Jean-Marc Bosman and their stories are well told respectively Simon Boyes and Professor Stefaan Van den Bogaert. In many ways, the chapter on *Bosman* is this book's fulcrum. The chapter illustrates that, thanks to the CJEU's ruling in *Bosman*, the contractual servitude of football's past has been replaced by the contractual mobility of its present. Moreover, Van den Bogaert illustrates that *Bosman* was a serious but necessary breach of the administrative autonomy of sport, and not just football, and one that has led subsequently to various legislative and policy making initiatives domestically, at an EU level, and even internationally.

Part III of this book contains three very different approaches to when the private business of sport becomes the public business of law. The first by Chris Davies on *Finnigan v NZRFU* reviews the role that sporting boycotts played in the international campaign against the apartheid regime in South Africa and especially in the 1980s. Michael Beloff QC's piece reflects on the rather odd refusal by the Court of Appeal in England and Wales to the permit the judicial review of the decisions of sports bodies, including those in receipt of large amounts of public money. Professor Stephen Weatherill's contribution on *Meca Medina* grasps with EU law's reach "beyond the touchline". Characteristic of all three pieces is the sports body's initial reluctance, even refusal, to acknowledge that the ordinary courts were an appropriate palladium to discuss or provide a remedy for disputes of a specifically sporting nature. Further, all three cases demonstrate that the private self-regulatory bubble in which sport operated for much of the twentieth century has well and truly burst. As Professor Weatherill has said on numerous occasions; so far as the law is concerned, sport is special but not *that* special.

Continuing on the theme of the London Olympics, the Games finally saw the demise of one of the most shameful world records in athletics when in their gold medal winning performance at London, the US women's 4 × 100 m relay team broke one of the oldest records in world athletics set by the East German women's team in Canberra in 1985. In the mid-1980s, the old GDR state-sponsored doping programme of athletes was at its height, and when followed by the Ben Johnson affair in 1988 at the Seoul Olympics and a decade thereafter of doping-related scandal at the Tour de France, the sporting world finally acted and founded the World Anti-doping Agency. Part IV of this book opens with Hazel Hartley's reflections on the Diane Modhal affair and thus provides an insightful commentary on the challenges faced by individual athletes, sports governing bodies and the courts in a high profile anti-doping dispute in the pre-WADA era. Post-*Modahl*, we

see the emergence of CAS as the ultimate arbitrator of doping-related disputes. CAS and the procedures surrounding doping control were both tested to their limits in *CAS 98/211 B v FINA* where an Irish swimmer presented a robust legal defence to accusations there was, well, too much whiskey in the jar. Neville Cox gives an expert review of this award, which was CAS's first public hearing, as does John O'Leary on the Tim Montgomery award where we see the emergence of the "comfortable satisfaction" standard of proof in anti-doping decisions. Finally, David McArdle uses the *Pechstein v ISU* proceedings to comment authoritatively on blood profiling as a means of identifying dope cheating in sport.

Part V of this book contains the good, the bad and the commercial. Professor Steve Cornelius recounts through interviews and case analysis one of the most inspirational athletes and stories in sport—that of double amputee, Paralympian and, now, Olympian, Oscar Pistorious. Pistorious' will to compete and to get the best out of himself at every turn contrasts starkly with the behaviour of the defendants in *R v Amir and Butt* on which Simon Gardiner, at [Chap. 18](#), highlights the elemental threat to the integrity of sport presented by "spot-fixing" gambles. [Chapters 16 and 17](#) by, respectively, Lefevere and Veermesch's and Lindholm and Kaburakis, consider two decisions of the EU courts on the exploitation of sports broadcasting rights. Lefevere and Veermesch's chapter captures the lucrative nature and fundamental importance of TV revenues to the financial stability of modern sport and especially football; while Lindholm and Kaburakis, in their review of the Karen Murphy proceedings at the CJEU, contend that the competition law aspects of *Murphy* have been understated in subsequent commentary. TV money has long been central to the operation of major league sport in the United States but so also has the manner in which the various franchises within US major league sport have sought to organise themselves as a collective in order to maximise the commoditisation of their "product". The latter is reviewed comprehensively in substance and in context by Professor Matt Mitten in his observations on the recent US Supreme Court decision in *America Needle*.

Violence (amongst spectators, between players and towards animals) is central to Part VI. Geoff Pearson illustrates that there is more, much more, to the policing and prosecution of football spectator-related violence than a dry technical review of the hybrid standard of proof for certain statutory offences enunciated by the English Court of Appeal in *Gough and Smith*. Similarly, Mark James subjects the Court of Appeal's approach to player on player violence in *Barnes* to detailed scrutiny in a manner which places the debate in its full context and outside its narrow application of the relevant parts of the Offences against the Person Act 1861. Laura Donnellan then reviews the various challenges to the Hunting Act 2004's ban on the hunting with dogs of certain wild mammals, including foxes and hares in England and Wales. In this, Donnellan analyses Lord Bingham's assertion in the House of Lords that "whatever one's view of the 2004 Act, it must be seen as the latest link in a long chain of statutes devoted to what was seen as social reform. It may be doubted if any country has done more than this to try and prevent the causing of unnecessary suffering to animals."

The final chapter has echoes in the aforementioned speech by IOC President Rogge at the opening ceremony of the London Games. In that speech, Rogge noted proudly that all 204 participating countries included female competitors for the first time and that this was a “major boost for gender equality.” Rogge could make this claim because a few minutes earlier two extraordinary women had just filed past alongside the flag of Saudi Arabia, which until then had been one of the few countries not to select female athletes—its Ministry for Education still bans physical education for girls. Nevertheless, on reading Hilary Findlay’s review of the *Sagen* proceedings prior to the Vancouver Winter Olympics of 2010 and the history of the IOC with regard to the inclusion of women in sport more generally, Rogge’s self-congratulatory tone grates. Findlay also concludes, in a manner which neatly closes the collection as a whole, that the IOC, although ostensibly a private actor, has rapidly developed a powerful global administrative capacity and one which has on occasion placed itself outside the norms and jurisdiction of domestic law and courts. The manner in which sports law regulates the activities of the IOC, WADA and large sports organisations such as FIFA, possibly as part of the debate on global administrative law more generally, will be central to the immediate evolution of sports law both practically and theoretically.

In conclusion, I would like to use this introduction to acknowledge my colleagues at the School of Law, Queen’s University Belfast for their personal and professional support and in particular Professor Gordon Anthony, a supporter of the Manchester Red Devils franchise now playing out of the New York Stock Exchange, and Professor Sally Wheeler, a supporter of Aston Villa, of which little more need be said. I am also extremely grateful to all at the T.M.C. Asser Instituut and Asser Press. Rob Siekmann who was involved in the initial commissioning stages of this book and later the ever efficient and ever pleasant Karen Jones and also Marjolijn Bastiaans, responsible for production and, of course, the Director and Publisher at TMC Asser Press, Philip van Tongeren.

Finally and as stated earlier, these introductory remarks were written as the London 2012 Olympic Games drew to a close. On one of the last nights of the men’s diving competition I watched with my son (aged 4 and three quarters) and daughter (aged 2 going on 16). After one of Tom Daley’s slightly less than perfect dives my daughter piped up, “good but a bit splashy”. As analysis goes, I thought it concise but incisive. On reading this volume, I hope you will feel the same about its analysis of leading cases in sports law.

Thanks to Teresa, Daniel and Katherine, Mum and Dad.

Belfast, August 2012

Jack Anderson

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