

Medico-Legal Issues In Sport: The View From The Grandstand[†]

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1. Introduction

Legal issues in sport are all too often in the news. The centre of attention is usually a dispute involving a prominent player's contract, an incident of 'ambush marketing' or a power struggle in a major sport such as rugby league. The commercial flavour of these disputes is pronounced and it is often claimed that sport and law have come to intersect quite significantly because sport is nowadays a 'business enterprise' and part of the expanding 'entertainment industry'.

In the post 'Super League' era, it is easy to overlook the important point that sport is not just about celebrities, money and power. The building blocks of sport are the athletes and their bodies, and participation in sport is encouraged widely as being good for health and personal development.

The medical profession has long recognised the link between health and sport. There has been much research and comment from a medical perspective on issues such as:

- Rule modification to make sport safer;
- The risk of transmission of infectious diseases;
- Exercise and the pregnant woman;
- The use of performance-enhancing drugs; and
- Sex status.

While the law has become increasingly involved with some of these sports medicine issues, notably performance-enhancing drugs, there has been no significant recognition in Australia of the practical and academic importance of medico-legal issues in sport *as a whole*, especially from the perspective of the legal profession.¹ This is a field warranting substantial attention and co-operation between the medical and legal professions.

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¹ Australia is not alone in this respect. The first major English legal work in the field of sports medicine and the law appeared only in mid 1999: Edward Grayson, *Ethics, Injuries and the Law in Sports Medicine* (1999). See also Simon Payne (ed), *Medicine, Sport and the Law* (1990) which has only a modest legal component.

This article identifies some areas of medico-legal interest in sport, comments on selected topical issues and speculates on their future development. In doing so, it aims to raise general awareness, and stimulate interest and debate. The overview nature of the article is reflected in the title by the words, 'the view from the grandstand'.

2. *Liability for Injury*

A. *Claims Against Sports Medicine Practitioners*

Australia has a deserved strong reputation in sports medicine and sports science. It may be that our international sporting prowess owes much to the skills of the nation's health care professionals. Sport is an area of expansion for the practice of the medical arts. Sports medicine appears to be fashionable. It can be a prominent and rewarding activity.

While sports medicine is a relatively young discipline, it has attained quickly many of the hallmarks of maturity: in particular, a network of professional bodies and specialist programs for education and qualification.

With Australian Sports Medicine Federation Ltd (which now operates under the name, Sports Medicine Australia, hereinafter SMA), the nation is served by a well-established² professional association for those interested in the many disciplines of health care in sport.

The Australian College of Sports Physicians³ is responsible for qualifying doctors as sports medicine specialists and acts as a professional body for doctors working in the field of sports medicine. A university postgraduate degree program in sports medicine leading to a fellowship is available.

A physiotherapist can formally qualify and practice as a 'sports physiotherapist', the universities offer postgraduate qualifications in sports physiotherapy and the national professional body for physiotherapy, the Australian Physiotherapy Association, houses a Sports Physiotherapy Group.

Other bodies represent various health professionals working in sports medicine such as exercise scientists,⁴ dietitians,⁵ podiatrists⁶ and psychologists.⁷

In summary, the practice of sports medicine has a significant presence in the Australian health care industry in terms of the number of people treated, public interest and institutional structures. Yet when that is considered against the backdrop of continuing concern over the level of injury litigation in the health care industry in general and what should be done about it, it is quite remarkable that

2 Australian Sports Medicine Federation Ltd was founded in 1963.

3 <<http://www.acsp.com.au/>> (23 August 2001).

4 Australian Association for Exercise and Sports Science: <<http://www.aaes.com.au/>> (23 August 2001).

5 Sports Dietitians Australia: <<http://www.ausport.gov.au/SDA/>> (23 August 2001).

6 Australian Academy of Podiatric Sports Medicine.

7 Australian Psychology Society — College of Sports Psychologists: <http://www.psychsociety.com.au/units/fr_aps_units.htm> (22 August 2001).

there has been no significant injury litigation in connection with sports medicine. There appears to be only one court case attracting mention in the legal literature. In that case a rugby league club doctor was successful in his defence of a claim that he had negligently diagnosed and treated a player's injured elbow causing the player's professional career to end prematurely.⁸

Speculation upon the reasons for this remarkable state of affairs might prove interesting. Perhaps the standards of care are very high. Is there something in the culture of sport or in the personal relationship that medical professionals have with athletes — especially at the elite level — which militates against litigation?

While the conduct of sports medicine practitioners may not be the object of litigation, there is another way in which sports medicine could play a role in sports injury claims.

B. Medical Research and Injury Litigation

Examination of reports in the literature of particular sports injury cases decided by the courts, as well as statistics concerning the number of court actions commenced,⁹ suggests a significant increase in the level of sports injury litigation over the past two decades.

Until recently, a feature of this litigation was that it was confined to incidents where, in a general sense, it might be said that events had not proceeded to plan. This encompasses cases of deliberate¹⁰ or careless¹¹ injury of one participant by another, vicarious liability of clubs for the misdeeds of their employee players,¹² failure by a referee to enforce the rules,¹³ allegation of negligent medical care,¹⁴ lack of safety for spectators¹⁵ and participants¹⁶ by venue managers or activity organisers and the failure to screen participants for health risks.¹⁷ In substance, the

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- 8 *Tyrrell v Gibbs and South Sydney Rugby League Football Club* (NSW District Court, Sinclair J, 16 Sept 1997); see Tony O'Reilly, 'Rugby League Player Fails in Claim Against Club Doctor' (1997) 7(3) *ANZSLA Newsletter* 7.
 - 9 Hayden Opie, 'Sports Associations and Their Legal Environment' in Myles McGregor-Lowndes, Keith Fletcher & A S Sievers (eds), *Legal Issues for Non-profit Associations* (1996) at 87-89.
 - 10 *McNamara v Duncan* (1979) 26 ALR 584 (battery — elbow to head in Australian Rules football).
 - 11 *Rootes v Sheton* (1967) 116 CLR 383 (negligence — waterskier, blinded by spray, pulled into stationery obstacle by boat driver); *Johnston v Frazer* (1990) 21 NSWLR 89 (negligence — jockey's careless riding caused another jockey's horse to fall).
 - 12 *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reports ¶81-246 (rugby league club vicariously liable for battery committed by employee player on opposing player).
 - 13 *Smoldon v Whitworth* (English Court of Appeal, 17 December 1996); see Hayden Opie, 'Referee Liability in Sport: Negligent Rule Enforcement and *Smoldon v Whitworth*' (1997) 5 *TLJ* 17.
 - 14 *Tyrrell v Gibbs and South Sydney Rugby League Football Club*, above n8; see O'Reilly, above n8.
 - 15 *Australian Racing Drivers Club Ltd v Metcalf* (1961) 106 CLR 177.
 - 16 *Nowak v Waverley Municipal Council* (1984) Aust Torts Reports ¶80-200 (rugby league player broke foot on raised sprinkler).
 - 17 *Watson v Haines* (1987) Aust Torts Reports ¶80-094 (schoolboy with relatively long, thin neck not removed from 'hooker' position in rugby).

sports injury cases had been concerned with what, in the field of product liability law, would be called 'production' or 'manufacturing' defects where the product causing injury did not conform to specification.

In product liability law a manufacturer can be liable also for a design defect. This occurs where the product is regarded as defective even though it conforms exactly to the specification. It is the design that is under challenge and the allegation is that the product design is inherently unsafe.

In sport, it is well known that inherent risks may arise from either participation or being a spectator. The nature and extent of the risks will vary according to the sport. The community tolerates those inherent risks because they are outweighed by a variety of benefits such as recreation, character building and improved fitness. Whereas being bumped or accidentally poked in an eye are risks inherent in basketball or netball, that behaviour is not tolerated in everyday life away from the sport. There seem to be two limits. First, excessively dangerous sports may be illegal, such as prize-fighting and duelling. Second, there is an obligation under the law of negligence upon the organisers of sporting activities (including coaches) to ensure that participants (especially novices) are acquainted with and properly prepared to encounter the inherent risks of the sport.¹⁸ Applying that approach, if a sport participant is injured by the occurrence of an inherent risk in a lawful sport after being acquainted with the risks and trained for participation, no person is legally liable for the injury — it is an accident.

In *Agar v Hyde*,¹⁹ the High Court of Australia dealt with a novel claim that has important implications for the role of preventive medicine in sport. The claim was brought by two rugby union players who, as adult teenagers, had broken their necks in separate incidents and suffered quadriplegia while playing the position of 'hooker' in interclub competition. The hooker takes the central place in the front row of a scrum. Both had suffered their injuries when the two sides of the scrum engaged. Their claim was against the international governing body of the sport of rugby union and alleged that it owed them a duty of care in negligence to amend the rules to remove unnecessary risks. This is equivalent to claiming that there is a responsibility to deal with design defects.

The High Court unanimously rejected the claim. A number of reasons were given,²⁰ but for present purposes it is sufficient to note that the court considered that a person's voluntary participation in a sport would defeat any claim where the injury was caused by an inherent risk of participation.²¹ The court appears to have

18 See, for example, *Robertson v Hobart Police and Citizens Youth Club Inc* (1984) Aust Torts Reports ¶80-629 (fall from trampoline, failure to give 12-year-old proper safety instructions for landing); *Anderson v Mount Isa Basketball Association Incorporated* (1997) Aust Torts Reports ¶81-451 (association should have given instructions to inexperienced referee on the risks and dangers of running backwards); *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* [1998] 4 VR 661 (insufficient instruction, experience and testing to engage in go-kart racing).

19 (2000) 201 CLR 552.

20 For a fuller discussion, see Hayden Opie, 'The Sport Administrator's Charter: *Agar v Hyde*' (2001) 9 *TLJ* 131.

21 The court left open the possibility that a different approach might be taken if the injured are school age children or employees: *ibid*.

believed that the plaintiffs knew what they were doing when they participated and they had to take the consequences regardless of how unfortunate. To reinforce the point, Callinan J described the sport of rugby union as a 'notoriously dangerous game'.²²

While the court's reasoning is consistent with the established approach in relation to responsibility for inherent risks, it did not explore the meaning of that expression. Had it done so the result may have been different. The incidents occurred in August 1986 and August 1987 before the introduction in 1988 of the crouch-touch-pause-engage (CTPE) sequence for scrum formation that was intended to reduce the incidence of injuries of the kind suffered by the plaintiffs. In the years preceding the injuries suffered by the plaintiffs, there had been a growing number of reports and expressions of concern in medical and scientific literature about the occurrence of spinal cord injury in rugby union, especially to players in the front row of scrums. There was debate about the mechanism of injury and the best measure for reducing the number of cases.²³ The new CTPE rule was the outcome.

Sport governing bodies routinely review their sport's rules to assess, inter alia, issues of safety. Some sports have standing committees of scientific and coaching experts for this purpose. Rule changes are often the result and that may bring changes in the inherent risks of participation. Notwithstanding the element of responsibility this suggests, in effect the High Court has held that this is a moral, not a legal, responsibility of sport governing bodies. However, it is difficult to argue that people such as the plaintiffs are in any real position to assess these emerging risks. They place their trust in the hands of those who govern the sport to be watchful and responsive to emerging scientific knowledge of the risks of participation and what can be done about them.

Unfortunately, the court's ruling means participants are largely on their own in terms of protection against 'design defects'. This runs counter to the general expansionary development of the tort of negligence over the past 70 years. Society tolerates avoidable injury less and less. Its cost in human and financial terms is too great. The trend has been to require those in positions of power and knowledge to be proactive. Not to impose some legal responsibility permits a sport's governing body to ignore emerging medical and scientific evidence of systematic injury and to cocoon the sport's rules within the traditions of bygone eras.

This is not to suggest that there should be a general legal obligation to eliminate risk from sport. Any sporting activity can be made safer by changing its nature: for instance, by outlawing tackling in the various football codes. The rule whereby participants bear the legal responsibility for injuries caused by inherent risks should remain largely intact. However, where the risk is one known or understood

22 Above n19 at 600.

23 These reports are conveniently identified in T Kew, T D Noakes, A N Kettles, R E Goedeke, D A Newton & A T Scher, 'A Retrospective Study of Spinal Cord Injuries in Cape Province Rugby Players, 1963-1989' (1991) 80 *South African Med J* 127 at 129; see also A T Scher, 'Rugby Injuries to the Cervical Spine and Spinal Cord' (1998) 17(1) *Clinics in Sports Medicine* 195.

only by a few because it is in the realm of emerging medical knowledge, it is undesirable for the sport governing body that has access to that knowledge to have no legal obligation to even consider rule changes as a protective measure.

By advocating such a limited duty of care in relation to rule change, there is no intention to suggest that the international governing body for rugby union breached its duty to the plaintiffs. That would have to be decided by a trial court after consideration of evidence such as the practicality of avoidance measures²⁴ and the state of medical and scientific knowledge at the time the injuries occurred.²⁵ It might have been that the new CTPE rule was a reasonable response to the risk and was implemented as soon as practicable.

For people involved in physical education and sports medicine, the pursuit of making sport safer is nothing new. There have always been strong practical and moral reasons for doing so. In the past there have been instances where tradition, stubbornness or ignorance have blocked proposals for rule changes that would have reduced the risk of injury without threatening the nature of a sport. Before *Agar v Hyde*, it was arguable that legal liability might occur if change was not pursued. Unfortunately, the High Court in large measure has taken away that prospect and the incentives for safe behaviour that it carried. Perhaps sport administrators may now be less likely to encourage research by sports medicine professionals into the extent and causes of injuries in their sports and to give those professionals a voice in deciding rule changes. The High Court's ruling may be a setback to the cause of injury avoidance in sport.

3. *Infectious Diseases*

The announcement in November 1991 by USA professional basketball player, Earvin 'Magic' Johnson, that he had contracted HIV drew considerable public attention to the issue of infectious diseases in sport. In January 1992, an international furore occurred when some Australian basketball players expressed their misgivings at the prospect of playing against Johnson at that year's Olympic Games in Barcelona.

Concern about infectious diseases in sport is not confined to HIV. From a medical perspective, hepatitis B and hepatitis C arguably present more serious public health problems. From a legal perspective, those three diseases produce a potent cocktail of issues including confidentiality, liability for injury, breach of contract, anti-discrimination law and restraint of trade. These issues were considered at length in a 1994 study.²⁶

24 This is part of the court's inquiry into the 'calculus of negligence' whereby the magnitude of the harm and its chance of occurrence are weighed against the cost and difficulty of avoidance measures and the call of conflicting responsibilities: see *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

25 *Roe v Minister of Health* [1954] 2 QB 66. See also *Rosenberg v Percival* (2001) 178 ALR 577 at 593.

26 Roger Magnusson & Hayden Opie, 'HIV and Hepatitis in Sport: A Legal Framework for Resolving Hard Cases' (1994) 20 *Mon LR* 214; see also Roger Magnusson & Hayden Opie, 'Legal Issues Arising from HIV and Hepatitis in Sport' (1994) 12(3) *Sport Health* 3.

An important aspect of anti-discrimination law and infectious diseases in sport is whether, and in which circumstances, a person who has an infectious disease such as HIV may be excluded from participation. Under, for instance, federal legislation, it is unlawful to exclude a person from a sporting activity on the ground of a disability.²⁷ A disability includes the presence in the body of organisms causing or capable of causing disease or illness.²⁸ However, where the person's disability is a disease, discrimination is not unlawful if it is 'reasonably necessary to protect public health'.²⁹

In the 1994 study, it was strongly recommended that sports adopt and follow a policy of infection control along the lines advocated by SMA. That policy would address issues such as the handling of blood spills (including having a 'blood-bin' rule)³⁰ and general hygiene.³¹ On the other hand, it was noted that there had been

... isolated, reported examples of HIV transmission following a collision on a soccer field which caused severe skin wounds with copious bleeding, and following a fist fight at a wedding which caused facial injuries with profuse bleeding.³²

However, the report of transmission on the soccer field has been questioned in the scientific literature.³³ The authors of the 1994 study also noted that:

... An outbreak of Hepatitis B amongst Swedish cross-country runners ... was thought to have resulted from competitors cutting and grazing themselves as they navigated untracked woodland, leaving blood adhering to the scrub which later competitors grazed against, and by communal bathing at the finish line.³⁴

Later in the 1994 study, it was stated:

[I]t is clear that the initial risk of transmission [of HIV, hepatitis B and hepatitis C] from collisions and blows occurring in combat and contact sports cannot be eliminated by 'after-the-event' procedures such as the 'blood-bin' rule. Thus, if it could be shown that blood spillage, body contact, and reciprocal blood contact

27 *Disability Discrimination Act 1992* (Cth) s28(1) (hereinafter *Disability Act*).

28 *Disability Act* s4(1).

29 *Disability Act* s48.

30 A 'blood-bin' rule requires that a bleeding player be removed from the field of play until the flow of blood is controlled and the wound is securely covered. The Australian National Council on AIDS, Hepatitis C and Related Diseases has gone further and, controversially, issued a suggested guideline advising that 'any player sent from the field under the "blood rule" on more than one occasion should not be allowed back onto the field during the remainder of the game': (2000) 19 *The ANCHARD Bulletin* 3.

31 Magnusson & Opie, *Mon LR*, above n26 at 269.

32 *Id* at 218.

33 *Ibid*.

34 *Id* at 219.

during the sport were sufficiently frequent, ... [it might be] reasonable to exclude infected players from the sport. It is suggested that the public health exception could well apply to combat sports such as wrestling, boxing and some martial arts, and possibly to rugby union and rugby league, in view of the high incidence of lacerations requiring medical attention. ... [H]owever, the risk of bloody contact between players must be distinguished from the risk of disease transmission, and the [Human Rights and Equal Opportunity] Commission might well uphold an athlete's right to participate in sport despite a theoretical risk, in the absence of stronger evidence of collision or blow-associated infection transmission. The issue is difficult to predict.³⁵

The 1994 study concluded with the observation that the application of the relevant legal doctrines would be influenced by the scientific evidence and that evidence was still emerging.³⁶

In April 1999, the validity of the exclusion of an Australian Rules football player from a prominent amateur league came before the Victorian Civil and Administrative Tribunal (hereinafter the Tribunal) in *Hall v Victorian Amateur Football Association*.³⁷ Hall was HIV positive but in 'extremely good health'.³⁸ He reported his condition to his club president who, with Hall's consent, reported it to the Victorian Amateur Football Association (hereinafter VAFA). The VAFA refused to register Hall as a player. That meant he could not play for his club in matches controlled by the VAFA. The stated reason for the refusal was Hall's HIV status. The Executive of the VAFA passed the following resolution:

That Mr Hall's application for registration be refused on the ground that the rejection is necessary in order to protect the health and safety of other registered players engaged in the competition conducted by the Association.³⁹

Hall alleged he was the victim of direct discrimination⁴⁰ on the ground of impairment⁴¹ contrary to section 65 of the *Equal Opportunity Act 1995* (Vic). Hall lodged a complaint with the Victorian Equal Opportunity Commission and it referred the complaint to the Tribunal. Section 65 provides:

35 *Id* at 259.

36 *Id* at 268.

37 (1999) EOC ¶192-997. See also Judy Bourke, 'HIV Footballer Wins Discrimination Case' (1999) 11(3) *The Sport Educator* 30; Angelo Veljanovski, '*Hall v Victorian Amateur Football Association & Anor* [1999] VCAT AD 30' (1999) 7(2) *Sport and the Law J* 66; Gaethan Cutri, 'A Testing Case for the AFL' (2000) 74(9) *Law Inst J* 61.

38 *Hall's case*, *id* at 79,360.

39 *Ibid*.

40 *Equal Opportunity Act 1995* (Vic) ss7, 8.

41 The *Equal Opportunity Act 1995* (Vic) ss7 and 8 define discrimination by reference to certain 'attributes' that are listed in s6 of the Act. 'Impairment' is listed as an 'attribute' in s6(b). In s4 of the Act, one of the categories of 'impairment' is '(b) the presence in the body of organisms that may cause disease'.

A person must not discriminate against another person —

(a) ...

(b) by excluding the other person from participating in a sporting activity.

Before the Tribunal the VAFA conceded that its refusal to register Hall was direct discrimination on the ground of impairment within the meaning of section 65. However, it relied upon section 80(1) that confers a general exception:

A person may discriminate against another person on the basis of impairment ...

if the discrimination is reasonably necessary —

(a) to protect the health or safety of any person ... or of the public generally ...

The case turned on whether the ban upon Hall was ‘reasonably necessary’ to protect other players who may play with or against him or train with him. The onus of proof in this respect rested with the VAFA.

The Tribunal knew of no other ruling that had considered the meaning in the legislation of the words ‘reasonably necessary’ and found observations upon similar words in other contexts to be unhelpful. Therefore, it interpreted the words according to the words’ purpose and their ‘nature and ordinary meaning’.⁴² The Tribunal held that:

... the conduct ... must, in all the circumstances, be reasonably necessary (that is, on a reasonable judgment) to protect the health and safety of the class which the ban is designed to protect. The test is not an absolute test. The ban need not be necessary in absolute terms, but must, on a reasonable judgment, be necessary for the specified purpose. Parliament has not used the words “reasonable” or “desirable” for the specified purpose. It has used the words “reasonably necessary”. The test is an objective one.⁴³

The Tribunal then said that the belief of the VAFA as to what was reasonably necessary, and what inquiries it had made before instituting the ban, were relevant factors.⁴⁴ However, these are subjective factors and it is difficult to understand this assertion given that the Tribunal held the test to be objective. While the Tribunal held that the VAFA had a ‘genuine belief that the ban was reasonably necessary and that such belief was based on information reasonably obtained by it’,⁴⁵ the Tribunal’s analysis does not shed light upon why it considered these subjective factors to be relevant to deciding the issue of what was ‘reasonably necessary’.

42 Above n37 at 79,361.

43 Ibid.

44 Id at 79,361–79,362.

45 Id at 79,369.

The Tribunal proposed a form of risk analysis to determine whether the ban was reasonably necessary. It stated seven questions to be answered.⁴⁶ In essence, these questions involved the Tribunal balancing the following considerations against each other:

- the definition and size of the class to be protected;
- the risk to be protected against, the likelihood of the risk occurring and the gravity of the risk if it materialises;
- the effectiveness of the ban in guarding against the risk;
- whether the ban carries with it any risk to the class to be protected;
- existing protective measures and the extent to which, if any, the ban will increase protection;
- non-discriminatory alternatives to the ban and their practicality;
- the beliefs of the VAFA referred to above.

The Tribunal concluded that the risk to other players by Hall playing football in the VAFA was 'so low'⁴⁷ that it was not reasonably necessary to ban him and held that he had been discriminated against.

Substantial epidemiological and actuarial evidence was presented to the Tribunal as to the likelihood of transmission of HIV. The focus of this evidence was on the chance of contracting HIV through a collision or other impact producing a bleeding injury. One source estimated that where a player known to be HIV infected is participating on a regular basis and if a player plays 20 games with that infected player, there is a one in 6000 chance of contracting HIV. This estimate was built on assumptions about the number of contacts per game and rates of occurrence of bleeding injuries. Other evidence placed the risk very much lower; in one case as low as one in 125 million.

Importantly, the Tribunal stated:

The calculation of statistical risk cannot be divorced from other evidence before us that there is no clearly established case of transmission of HIV occurring in consequence of playing any code of football anywhere in the world.⁴⁸

As the 1994 study mentioned above noted, and as is clear from the Tribunal's ruling, the statistical estimates are speculative. Also, notwithstanding an increasing number of cases of HIV infection worldwide, the absence of any relevant reported cases of transmission since the 1994 study weakens the strength of the case for banning infected players.

Hall argued that banning him would be detrimental to public health and safety. It would only cause other HIV positive players not to reveal their condition and discourage them from seeking assessment or treatment. Also, if the VAFA was

46 Id at 79,362.

47 Id at 79,369.

48 Id at 79,364.

permitted to ban him, Hall argued that the VAFA would be lulled into a false sense of security leading to insufficient vigilance in other measures having a significant role in preventing the spread of infection. The Tribunal rejected these arguments claiming that the evidence offered in support of them was 'highly speculative'.⁴⁹

The VAFA argued that if Hall was permitted to play, it would be faced with very onerous obligations from its insurers. Evidence from an underwriting agency as to what would be its requirements was presented.⁵⁰ Some requirements were criticised by medical witnesses and one requirement in particular was considered 'grossly unreasonable'.⁵¹ The Tribunal concluded that the requirements were based upon inadequate information and inquiry and dismissed the VAFA's argument.

Rather than ban Hall, the important consideration according to the Tribunal was that the VAFA follow its own Infectious Diseases Policy. This required the adoption of procedures recommended by SMA. Evidence suggested that the VAFA had not been sufficiently diligent in implementing its Policy. It was appropriate that the Policy's procedures be followed irrespective of whether Hall was playing and, if followed, represented the most significant manner in which the risk of infection (not just of HIV, but hepatitis as well) could be reduced.

Shortly after the Tribunal gave its ruling, the VAFA consented to orders that it register Hall as a player in its competition and that it be restrained from committing further breaches of section 65 in relation to him. Hall also applied for an order concerning the formulation and implementation of various educational programs by the VAFA. That application was referred to mediation and resolved successfully.

Hall sought the award of various damages and costs. The Tribunal delivered its ruling on 10 December 1999 and in large measure rejected these claims. Of interest was a claim for damages for loss of opportunity to play football and for loss of privacy in relation to Hall's HIV status. Hall failed to prove that he suffered a loss of opportunity to play football. He was impeded by an injury and did not train with the same regularity afterwards. Also, the team with which he usually played was promoted and it was not clear that he would have been selected to play even if not banned. As for the publicity given to Hall's HIV status, the first public mention of the case came from Ian Collins, a Commissioner of the Australian Football League (hereinafter AFL), at a sports medicine conference in Melbourne. This appears to have occurred without the prior knowledge of the VAFA. Collins had become aware of the issue because the VAFA had asked the AFL whether it had ever encountered a similar case. Without identifying Hall or the competition, Collins mentioned that a person with HIV was seeking to play football in Victoria. This prompted the news media to approach many Victorian football clubs seeking to identify the player and the competition. Later, Hall was interviewed on

49 *Id* at 79.365.

50 *Id* at 79.368.

51 *Ibid*.

television on *The Footy Show* on Channel 9. The Tribunal considered that the VFA was not responsible for the publicity and declined to award damages for loss of privacy.

Compared with the range and complexity of legal issues that the 1994 study considered relevant to the question of infectious diseases in sport, *Hall's* case raised only a narrow, albeit very important, issue. Nothing was in dispute concerning liability for injury, restraint of trade, breach of contract or other applications of anti-discrimination law.

On the present scientific evidence the decision seems correct, perhaps unsurprising. The widespread publicity and acceptance that the decision appears to have attracted may serve as a useful educational exercise.

The law has a complex, but identifiable, legal framework to deal with cases of infectious diseases in sport. However, its application is dependent on the evolving state of medical knowledge. On the medico-legal front, there is more work to be done in expanding medical understanding of the transmission risks of infectious diseases so that the law can be invoked with more certainty. Also, more work needs to be done on educating sports administrators and lawyers on the interaction of law and medicine in this area.⁵² Better past efforts in these respects may have meant that *Hall's* case need never have happened.

4. *The Pregnant Athlete*

Prior to perhaps the past two decades, it was customary for a pregnant woman to cease sport once she learned she was pregnant. However, that is no longer the case. Improved medical knowledge of the risks and benefits of physical activity for pregnant women, together with changing social attitudes, has seen pursuit of sporting activities well into pregnancy. There are numerous reports of elite female athletes participating in Olympic Games and other major international and national sports events while as much as three months' pregnant.⁵³

SMA has prepared information concerning the benefits and risks of participation in exercise and sport by the pregnant athlete.⁵⁴ These will vary according to the health of the individual athlete, the stage of pregnancy and the activity to be undertaken. As a result of such educational activities, not only are women more likely to continue with sport because they better understand the risks involved, but they are often encouraged to do so for their own health.

These advances in medical knowledge and associated social developments have created a new dimension for interaction between sports medicine and the law: liability for injury to mother and foetus and questions surrounding the human

52 For instance, it is suggested that the discussion by Cutri, above n37, of possible transmission of HIV in a sporting context inadequately considers the medical evidence, overstates the risk and is alarmist.

53 Stephen Cauchi, 'Netball Body to Ban Pregnant Women' *The Age* (Melbourne) (19 June 2001).

54 Sports Medicine Australia, *Women in Sport Fact Sheet No 2 'Exercise in Pregnancy'* (2000).

rights of pregnant women. The practical relevance of such issues is to be seen in recent moves to ban pregnant women from Australia's major women's sport, netball.⁵⁵

The medical management of the pregnant athlete may involve:

- Providing her with sufficient information about the desirability of exercise for health and the associated risks;
- Monitoring the health of the pregnant athlete (diagnosis) as the pregnancy progresses;
- Recommending that she refrain from certain activities at certain stages of the pregnancy.

Each of these factors has a corresponding legal dimension:

- There may be a failure to provide information about risks, the woman then participates in exercise or sport and the woman or foetus is injured;
- An error in assessing the woman's health may be made, the woman is cleared to participate and the woman or foetus is injured;
- A woman does not accept advice against participating — can she be excluded from participation and who might be liable to the foetus should it be injured?

An injury to the woman in either of the first two sets of circumstances could be expected to involve a relatively conventional instance of alleged liability in negligence arising from the doctor/patient relationship. Injury to the foetus raises more unusual or problematic issues.

Subject to the comments below about a mother's possible liability, it is clearly established that a foetus injured in the womb and subsequently born alive has legal rights against the person who injured it if the circumstances of the injury's infliction are wrongful.⁵⁶ Practically, such a legal claim is often initiated by a parent on the child's behalf in order to meet the immediate need to pay for medical expenses and additional costs incurred in caring for a disabled person. Alternatively, upon reaching adult age, the injured person may initiate the claim.⁵⁷

There has been no reported case in Australia where such a claim has arisen out of a sports context. However, as a matter of legal principle, claims in certain circumstances might be open. They could be against:

55 Above n53. See also: *Gardner v National Netball League Pty Ltd* (Federal Magistrates Court of Australia, McInnis FM, 18 July 2001) and Caroline Overington, 'Risk "Very Low" for Pregnant Players' *The Age* (Melbourne) (2nd August 2001).

56 *Watt v Rama* [1972] VR 353; *X v Pal* (1991) 23 NSWLR 26.

57 Usually this must occur within three (for example, *Limitation Act* 1969 (NSW) subs11(3) & s52) or six years (for example, *Limitation of Actions Act* 1958 (Vic) subss3(2) & 23(1)) of attaining adulthood.

- The mother's doctor;
- The organisers of the sports event at which the foetus is injured (this might include the sports association, the mother's club or the mother's coach);
- A fellow participant at the event who caused the injury (this might include the umpires or referees).

Also, any claim would face the potentially difficult hurdle of establishing a causal link between the incident on the sports field and the harm suffered by the foetus — harm that may not necessarily be identified until some considerable time after birth.

In exploring the basis of these potential claims, it must be recognised that there is an absence of specific precedents to act as a guide, and even the possible application of higher principles must be viewed with a degree of uncertainty as to the outcome. However, the exercise is not one of pointless speculation. Recent events in the women's sport of netball, supported by interest from basketball, cricket and hockey, demonstrate that concern over potential liability for injury to the unborn can lead to bans on the participation of pregnant women calculated to produce confrontation with the nation's anti-discrimination laws.

The mother's doctor could be liable for not providing sufficient information to the mother about the risks of participation or for making a negligent recommendation for the mother to participate should either result in injury to the foetus. The occasion for legal responsibility arises from the doctor/patient relationship involving the treatment of the mother.⁵⁸ In any event, it is established that the doctor owes a duty to take reasonable care for the safety of the foetus.⁵⁹ Interesting questions might arise if the doctor recommended strongly against participation but the mother indicated her intention to ignore that recommendation. For instance, is the doctor at liberty to report these matters to the other parent or some regulatory authority? This question raises complex general issues of confidentiality and the rights of the unborn that go beyond the scope of this paper. However, the doctor's advice to the mother and her response will usually be confidential communications. Whether the doctor can break the confidence and rely on the 'public interest' exception is problematic.⁶⁰ This might require weighing up the public interest in protecting the strength of doctor/patient confidentiality against the interest in the health and welfare of the foetus. While the common law has accorded rights to claim compensation for injury caused by third parties should the foetus be born alive, the courts have been reluctant to

58 A failure to provide a pregnant woman with sufficient information to enable her to minimise risks to her foetus from participation in sport is analogous to the duty of care owed by a doctor to the sexual partner of a patient when the patient exhibits symptoms of HIV. That duty requires the doctor to counsel the patient to be tested for HIV: see *BT v Oei* (NSW Supreme Court. Bell J. 5 November 1999).

59 *X v Pal*, above n56 at 43–44 (Clarke JA).

60 For discussion of the principles governing this exception to confidentiality generally and in connection with revealing a patient's infectious disease status, see Magnusson & Opie, *Mon LR*, above n26 at 244–249.

intervene in the course of a pregnancy⁶¹ and, as discussed below, are yet to hold a mother generally liable for causing injury to her unborn child. Thus, there would seem little purpose in the doctor breaking the confidence, and a public interest exception might therefore not be recognised.

The organisers of a sporting activity who are aware or ought to be aware of a woman's pregnancy could be liable to the foetus (if subsequently born alive) for failing to provide sufficient information to the mother about the risks of participation thereby endangering the foetus. The basis of this claim is the duty of care falling on organisers of sporting events to warn participants of risks of the activity. This is especially so for novice participants. While there is no reported court ruling on the issue, the duty's existence would be uncontroversial in many instances. For instance, SMA guidelines recommend against any woman participating in scuba diving, novice downhill skiing, ice skating or horse riding if she knows or suspects she is pregnant.⁶² An organiser of such activities might be expected to bring the content of this recommendation to the attention of female participants of child-bearing age. On the other hand, a risk to a pregnant woman may be so obvious that a warning is unnecessary.

As discussed above, participation in sport carries with it inherent risks of injury, especially in combat, contact and collision sports. The legal consequences of those risks fall on the participants. Nevertheless, all participants have established legal duties under the law relating to battery and negligence to avoid injuries to others. Again, given the existence of these legal obligations and the established position generally in relation to liability for causing injury to unborn children, there would seem to be no reason why a fellow participant in the sport with mothers could not be liable to an injured foetus subsequently born alive. It may be that even to participate in a sport with a woman who is pregnant may amount to negligence if the foreseeable and inherent physical contacts of the sport represent a danger to the foetus, although this is likely to be exceptional.

61 In addition to an entrenched absence of legal personality accorded to a foetus at common law, this reluctance is evident in a number of respects: a husband has no right on behalf of the unborn child to prevent his wife who is pregnant by him from having an abortion (*In the Marriage of F* (1989) 96 FLR 118; *C v S and Another* [1988] QB 135); a court has no authority to make an unborn child a ward of the court (*Re F (in utero)* [1988] 2 All ER 193); it is unlawful to force a mother to undergo a Caesarean section against her will even though it was necessary to save her own and her foetus' health and life from real danger (*St George's Healthcare NHS Trust v S* [1998] 3 All ER 673 at 692); and it is unlawful to forcibly detain a woman to prevent her sniffing glue and causing serious harm to her foetus (*Winnipeg Child and Family Services (Northwest Area) v G* [1997] 3 SCR 925).

62 Sports Medicine Australia, Guidelines, *Participation of the Pregnant Athlete in Contact and Collision Sports* (July 2001) at 3: <<http://www.ausport.gov.au/sma/images/torode.pdf>>

Difficult questions may arise if it is claimed on behalf of the injured foetus subsequently born alive that the organisers should have excluded the pregnant athlete, or fellow participants should have imposed a boycott. Both actions could amount to illegal discrimination on the basis of pregnancy.⁶³ It might be an answer to a negligence claim to say that the organisers and fellow participants behaved reasonably by obeying anti-discrimination laws. However, sometimes the standard of reasonable care dictates breaching the law⁶⁴ and there is no guarantee that organisers or participants could safely stand behind the screen of compliance with anti-discrimination law. It is to be hoped that appropriate entreaties and information about risks directed to the pregnant woman would remove danger in those cases that might otherwise invite negligence liability.

A claim might be brought against the mother by:

- The child upon reaching adulthood;
- The other parent on behalf of the child, pointedly so if relations between the parents have soured; or
- Any other person sued by or on behalf of the child where such person seeks contribution from the mother (any such claim for contribution is dependent upon the mother owing her unborn child a duty of care).

Whether a mother might owe her unborn child a duty of care in relation to participating in physical activities like sport is controversial. The starting point for most commentaries is the decision of the New South Wales Court of Appeal in *Lynch v Lynch*.⁶⁵ Upon the basis of this authority it has been asserted or implied a number of times that a mother owes her unborn child a duty of care when participating in sport. The following is an example:

In the case of *Lynch v Lynch* (1991) a child successfully sued her mother for pre-natal injury claiming that the action of her mother was negligent. This case arose out of a motor vehicle accident, but the same argument may be used where a child is born with injuries resulting from the mother's involvement in sport. The court said that a child can sue because there is a duty of care owed to the unborn child.

63 See, for example, *Sex Discrimination Act* 1984 (Cth) s7 (although not all sporting activities may fall within the Act's scope — provision of services and facilities (s22) and clubs (s25) are the sections most likely to be applicable); *Anti-Discrimination Act* 1975 (NSW) Part 3; *Equal Opportunity Act* 1995 (Vic) ss6(h), 7, 8, 65. The *Equal Opportunity Act* 1995 (Vic) s80(2) permits discrimination on the basis of pregnancy where reasonably necessary to protect the health or safety of any person including the mother. While at common law a foetus is not a 'person' until born, it could be argued that banning the mother is for her own safety (aside from the safety of her foetus or because they are one).

64 It has been suggested in the context of the relationship between negligence and compliance with the road traffic rules that, '[c]ircumstances may be conceived in which obedience to the regulations may as a matter of prudence be the very worst course to take, for example, where to disobey may avoid injury or save life': *Tucker v McCann* [1948] VR 222 (FC) at 225 (Herring CJ).

65 (1991) 25 NSWLR 411.

and that pre-natal neglect or carelessness causing injury can breach this duty. There is no parental immunity. This means that a pregnant woman is personally responsible for her health and that of her unborn child.⁶⁶

While the Court of Appeal held a mother liable for the injury she caused to her foetus in a motor vehicle accident, to state that the same argument may be used in relation to sport (with the implication that it would succeed) overstates the position. The Court was invited to decide in favour of the defendant mother on grounds of public policy on the basis that if she was not exempt from the duty, it would place her every act or omission between conception and birth under public scrutiny and analysis.⁶⁷ In particular, the possibility of the mother being held liable for injury to the foetus by 'engaging in competitive sports, or in dangerous activities such as absailing [sic]'⁶⁸ was mentioned.

The Court carefully avoided making any ruling on such a general proposition. Instead, it confined its comments to the case of motor vehicle accidents where the presence and structure of compulsory insurance pursuant to a statutory scheme presented powerful policy reasons as to why there should be liability imposed on the mother. The Court said, 'There are, however, different policy considerations which arise in the context of a claim based on negligent driving and those which may arise, for instance, in the context of a claim based on the mother taking unjustified risks of physical injury.'⁶⁹

The prospect of a general duty of care owed by pregnant women to their unborn children has been criticised strongly in academic commentary⁷⁰ and rejected firmly by the Supreme Court of Canada in *Dobson v Dobson*.⁷¹ There the Court said that liability was a matter for the legislature to determine.⁷² Fear of the invasive effects on the privacy and lifestyle of pregnant women that a general duty would herald together with the difficulty of determining appropriate standards of behaviour during pregnancy are arguments often raised against a duty's existence. Furthermore, in another context, there is strong authority for parents possessing immunity from suit at the instance of their children in relation to the children's

66 Australian Sports Commission, *Pregnancy: Sport and the Law: A Guide for the Player, Coach, Official, Administrator and Facility Manager* (1996) at 6. Other examples of comments suggestive of a similar conclusion are to be found in Tracy Molloy & Maria Shand, 'The Coach and the Female Athlete', paper presented to the 8th Annual ANZSLA Conference, 26 August 1998 at 25 and John Mullins, 'Sports Law: The Answers to Some of Your Questions ...' (1999) 4 *Sweat* 23.

67 Above n65 at 414 (Clarke JA).

68 *Ibid.*

69 *Id* at 415.

70 Fiona Forsyth, 'Lynch v Lynch & Anor' (1992) 18 *MULR* 950.

71 [1999] 2 SCR 753; Ian Malkin, 'A Mother's Duty of Care to Her Foetus While Driving: A Comment on *Dobson v Dobson* (and *Lynch v Lynch*)' (2001) 9 *TLJ* 109. See also, *Stallman v Youngquist* 531 NE 2d 355 (1988) (SC of Ill).

72 Also, the Great Britain Law Commission, *Report on Injuries to Unborn Children: Advice to the Lord Chancellor under section 3(1)(E) of the Law Commissions Act 1965 Report 60* (1974) at 25 recommended that 'as a general rule, legislation should specifically exclude any right of action by a child against its own mother for pre-natal injury'; implemented by *Congenital Disabilities (Civil Liabilities) Act 1976* (UK).

supervision.⁷³ A factor influencing that immunity is the practical difficulty of obtaining liability insurance and presumably that would apply with equal force to the present case.

Thus, whether a pregnant athlete in Australia owes her unborn child a duty of care under the tort of negligence remains an open and controversial issue.

5. *Performance-enhancing Drugs*

Drugs in sport is the 'hot' topic among medico-legal issues in sport. Many controversies occur and recur. They include:

- The nature of the offences — whether they should reflect strict or absolute liability;
- The possible criminalisation of the use of drugs such as anabolic steroids;
- The extension of sport's anti-drug rules to encompass non-performance-enhancing drugs like marijuana;
- Whether the identity of athletes who have tested positive but are yet to face disciplinary proceedings should be publicised — this can be especially poignant if the positive test is caused by a prescription drug required to treat an embarrassing medical disorder;
- Deciding when a test to prove the presence of a prohibited drug is sufficiently reliable to withstand legal challenge; and
- The length of bans imposed as penalties — whether fixed, uniform penalties lead to unequal treatment for professional compared with amateur athletes.

This article will consider another issue. It involves the athlete who claims to require a prohibited performance-enhancing drug for a bona fide therapeutic purpose. There is considerable support for the view that where the claim can be proven, the drug ought to be permitted.

The position of asthmatics has long been the focus of attention in this regard. A number of asthma treatments are prohibited performance-enhancers (either as respiratory stimulants or anabolic (muscle-building) agents), but the problem this might represent has been solved by identifying treatments which under particular prescription and method of administration do not deliver prohibited performance-enhancing effects. However, there are other medical conditions that present more complex problems.

Australian sporting authorities have been prominent internationally in working towards the solution of those problems. In 1992, the Australian Sports Commission established a Medical Advisory Panel (hereinafter MAP) which, among other things, gave advice about approval of the use of prohibited drugs for therapeutic purposes. In particular, it developed guideline principles for deciding when a use is for a therapeutic purpose. Broadly, these were that:

73 *Robertson v Swincer* (1989) 52 SASR 356.

- the otherwise prohibited substance was an appropriate treatment for the athlete's condition;
- there was no alternative treatment which would not be prohibited under the anti-doping rules;
- the athlete would suffer if denied the treatment; and
- the treatment did not have a performance-enhancing effect other than to return the athlete to 'normal'.

The MAP commenced to grant athletes approval for 'therapeutic use' from 1992.⁷⁴ However, this was of no meaningful benefit unless the anti-doping rules of the athlete's sport recognised that therapeutic use as valid.

Even if those rules did so, further difficulty could arise if the athlete was tested by the Australian Sports Drug Agency (hereinafter ASDA). Under its governing legislation,⁷⁵ ASDA was required to make an entry in the Register of Notifiable Events (in layman's terms, a positive test) notwithstanding that therapeutic approval had been given. This was undesirable because in some circles an entry of a person's name in the Register was mistakenly equated with guilt and the athlete concerned risked opprobrium notwithstanding no offence was committed. Rather, a positive test and an entry in the Register are only necessary conditions for a breach of a sport's anti-doping rules and it is for the sport's disciplinary processes, not ASDA, to determine whether a breach has occurred.

Remedy came in the form of the *Australian Sports Drug Agency Amendment Act 1999* (Cth) which was proclaimed into force on 1 August 1999. The Australian Sports Drug Medical Advisory Committee (hereinafter ASDMAC) was established⁷⁶ to replace the MAP and it is to operate under the umbrella of ASDA rather than the Australian Sports Commission. This change in administrative 'location' for the therapeutic approval function may be seen as consistent with government policy of separating the 'sporting achievement' role of the Commission (which houses the Australian Institute of Sport) from the 'drugs watchdog' role of ASDA.

A person cannot be appointed to the ASDMAC unless she or he is a registered medical practitioner and has knowledge of or experience in certain relevant fields of medical science.⁷⁷ It seems unnecessarily limiting that the membership is confined to registered medical practitioners. This excludes people lacking that particular qualification who may be even more highly qualified in the relevant fields of medical science.⁷⁸

74 Personal communication on 1 May 2001 with Professor Ken Fitch, formerly a member of the MAP.

75 *Australian Sports Drug Agency Act 1990* (Cth) (hereinafter *ASDA Act*).

76 *ASDA Act* s65B.

77 *ASDA Act* s65B(2).

78 Some support for viewing this as an unnecessary limitation is found in the circumstance that the ASDMAC has needed to establish 'a group of experts/consultants to provide specialist advice to ASDMAC in its deliberations': <http://www.asda.org.au/ASDMAC/asdmac_new.html> (24 August 2001).

Under the new legislative arrangements, once an athlete has tested positive to a prohibited drug ASDA must enter his or her name and other particulars in the Register of Notifiable Events if certain conditions apply.⁷⁹ However, notwithstanding some rather convoluted legislative provisions, it would seem that the legislative intent is that ASDA must not do so if the athlete had therapeutic approval from the ASDMAC and complied with any specified conditions.

It has been Australian government policy to encourage Australian sport governing bodies to penalise the use of performance-enhancing drugs and to carry out drug testing both in and out of competition. It has also been government policy to have ASDA conduct the tests. Thus, in practice, an entry in the Register of Notifiable Events by ASDA becomes the key piece of evidence in any disciplinary proceedings against an athlete. However, it is the sport governing body that frames the anti-doping rules and has charge of the conduct of disciplinary proceedings. The need for the ASDA legislation and the anti-doping rules of the various sports to work in harmony is apparent.

An assumption behind the ASDA legislation is that sport governing bodies will confer on the ASDMAC the task of approving otherwise prohibited drugs for use for therapeutic purposes. Encouraged by government policy, it is now relatively commonplace for them to do so. For instance, Clause 4 of the 2000/2001 playing season's edition of the Anti-Doping Policy of the Australian Cricket Board states:

- 4.1 A player commits a doping offence if:
 - (a) a prohibited substance is present within the player's body tissue or fluids, unless:
 - (i) the player uses the prohibited substance for a therapeutic purpose (see clause 4.4) ...
- 4.4 A player uses a prohibited substance for a therapeutic purpose if:
 - (a) the player received written approval from ASDMAC, prior to the testing, for the use of that prohibited substance for a therapeutic purpose; and
 - (b) the player has complied with the relevant conditions applicable to that use ...
- 4.6 The onus of proof is on the player who claims that:
 - (a) he used a prohibited substance for a therapeutic purpose ...

The manner in which ASDMAC might go about granting any such approval is not set out in the amending Act, but it may be prescribed by the *Regulations*.⁸⁰ While to date the *Regulations* do not make any relevant provision for the factors to be considered in granting approvals to use prohibited drugs for therapeutic purposes, the practice of ASDMAC encompasses the guideline principles developed by the MAP.⁸¹

79 *Australian Sports Drug Agency Regulations 1999* (Cth) rr29(1)–(2) (hereinfter *Regulations*). See also r30.

80 *ASDA Act* s65E(1)(a).

81 Personal communications with ASDMAC on 27 and 30 April 2001.

The ASDMAC has, however, stated that it will not grant therapeutic approvals if either the international or the national governing body for the athlete's sport does not recognise therapeutic use of drugs.⁸² This position may be seen as the practical approach and one ensuring an element of harmony in the maze of overlapping rules that constitute the international anti-doping regime. There are many possible permutations that could present difficulty if arrangements were otherwise. A case likely to occur would be where an athlete received approval from the ASDMAC only to be tested at an international event overseas and disqualified because the sport's international body did not accord recognition of therapeutic use. This could even lead to the disqualification of a whole team of other innocent athletes as in, say, an athletics relay event or rowing.

The note of discord that is sounded by this approach is that athletes with similar medical conditions requiring treatment with prohibited drugs will be dealt with differently depending on the stand taken by their sport's national or international governing bodies. While most Australian national governing bodies now allow for therapeutic approval, the still significant level of non-recognition at the international level serves to limit ASDMAC's effective role.

There is a further and important dimension to therapeutic approval of performance-enhancing drugs, namely, anti-discrimination law. The *Disability Act*, section 28(1) provides that '[I]t is unlawful for a person to discriminate against another person on the ground of the other person's disability ... by excluding that other person from a sporting activity'.

One of the meanings of 'disability' in section 4 is '(e) the malfunction ... of a part of a person's body'. If an athlete required a prohibited performance-enhancing drug to treat such a malfunction, the banning of that drug raises issues of disability discrimination.

It may be that such a ban does not represent direct discrimination against the athlete because of his or her disability since the ban is aimed at the drug and not the disability and the ban applies to all athletes.⁸³ However, the prospect of indirect discrimination is raised because the athlete is asked to 'comply with a requirement or condition ... with which a substantially higher proportion of persons without the disability ... are able to comply ... and ... with which the ... [athlete] ... is not able to comply'.⁸⁴ Nevertheless, there will be no discrimination if the requirement or condition is 'reasonable having regard to the circumstances of the case'.⁸⁵

There will be cases where an athlete requires an otherwise prohibited performance-enhancing drug to overcome a bodily malfunction and to maintain his or her health at a 'normal' level. Cases in recent years involving Australian Football League player Alastair Lynch⁸⁶ and National Rugby League player

82 See <http://www.asda.org.au/ASDMAC/asdmac_role.html> (24 August 2001).

83 *Disability Act* s5(1).

84 *Disability Act* s6.

85 *Disability Act* s6(b).

Adam MacDougall⁸⁷ may fall into this category. If there was no alternative effective therapy not prohibited under the anti-doping rules, it would be unreasonable and therefore discriminatory for a sports body to require the athlete not to take the drug.

There are two lessons for Australian sport from the foregoing. First, a sport which does not adopt a therapeutic approval process using the ASDMAC, or something similar, risks breaching the *Disability Act* or corresponding state legislation. Any athlete who takes a therapeutically necessary drug in the above circumstances and is punished by exclusion from the sport is likely to be successful in a disability discrimination claim. However, it might be reasonable to apply a ban in respect of international competition if the athlete or a team risks penalty from the international sports body.

Second, disability discrimination is likely to occur if an Australian sports body enforces an international ban against an athlete who can show that he or she requires a prohibited drug for therapeutic purposes. The athlete might be an Australian or a visiting foreigner. This is another instance of the now familiar circumstance of a clash between the rules of international sports bodies and the laws of nation states.

6. *Sex Status*

Most sports offer separate competitions for men and women. The primary reason for doing so is the musculoskeletal differences between them that affect sporting performance: for many competitive sports, on average, men possess significant advantages in physical size and strength. The major source of these differences is found in the role played by the male hormone testosterone.

Many multi-sport events such as the Olympic Games and the Commonwealth Games, as well as individual sports, have required competitors participating in elite women's events to prove they are women by undergoing a 'sex test' — a process described as 'gender verification', or even 'femininity control'! The purpose of gender verification has been to prevent men impersonating or masquerading as women. Following mounting protest from medical circles,⁸⁸

86 Lynch admitted to taking a banned anabolic agent, DHEA, but claimed that he required it to recover from chronic fatigue syndrome. Lynch was charged by the Australian Football League but acquitted by its Tribunal when it was accepted that he had acted innocently on advice rendered to him: Tom Salom, 'I'm No Cheat' *Herald Sun* (Melbourne) (26 May 1998) at 1. Lynch's legal advisor threatened anti-discrimination proceedings if Lynch was not permitted to take the banned drug: Bruce Matthews, 'Lion Needs Banned Drug to Extend Career' *Herald Sun* (Melbourne) (26 May 1998) at 77.

87 In July 1998, it was reported that ASDA had detected an elevated testosterone/epitestosterone level in a test that it had conducted on a sample donated by MacDougall. Such a result can be consistent with the prohibited administration of testosterone. MacDougall claimed that the result was caused by medication that 'he must take to treat a rare condition called hyper-pituitarism, resulting from a blood clot on his brain which nearly killed him two years ago': 'I'll Be Cleared: Accused' *The Australian* (17 July 1998) at 20. The National Rugby League judiciary nevertheless suspended MacDougall for 22 weeks. However, upon his return to play he was permitted to continue taking the medication.

athletes and other interested groups,⁸⁹ the International Olympic Committee abandoned mass screening of competitors in women's events for at least the Olympic Games in Sydney in 2000,⁹⁰ but with the prospect of ad hoc tests if considered warranted.

Gender verification procedures were first introduced in 1966⁹¹ and initial attempts to determine the sex of female competitors have been described as 'crude',⁹² an 'ordeal for many women',⁹³ and 'degrading'.⁹⁴ These included requiring athletes to parade nude before a panel of physicians and even direct gynaecologic examination.⁹⁵ The Olympic Games in 1968 saw the introduction of a buccal smear for the chromosomes that determine sex.⁹⁶ While almost all people who submitted to the test were proved to be female, the test was widely discredited by the mid-1970s because of its limited ability to deal with people who possessed various chromosomal disorders which could lead them to be described as 'intersex'. Put simply, some 'men' could pass the test and some 'women' could fail depending on the nature and extent of various disorders.⁹⁷ For the 1992 Olympic Games a variant test was introduced.⁹⁸ However, even this measure proved to have its limitations. At the Olympic Games in Atlanta in 1996, out of 3 387 female competitors required to undergo gender verification, eight were unable to pass this test but were allowed to compete following further examination.⁹⁹ In particular,

88 For example, Joan Stephenson, 'Female Olympians' Sex Tests Outmoded' (1996) 276 *JAMA* 177 at 177. See also, Malcolm Ferguson-Smith, 'Gender Verification and the Place of XY Females in Sport' in Mark Harries et al (eds), *Oxford Textbook of Sports Medicine* (2nd ed, 1998) at 360–364.

89 For example, the Resolution of the 1st International Olympic Committee World Conference on Women in Sport, 1996, inter alia, urged 'the IOC to discontinue the current process of gender verification during the Olympic Games': <<http://www.olympic.org/ioc/le/org/women%5Fconf2000/women%5Fconf%5F1996/resol%5Fe.html>>.

90 Myron Genel, 'Gender Verification No More?' (2000) 5(3) *Medscape Women's Health*: <<http://www.medscape.com/medscape/WomensHealth/journal/2000/v05.n03/wh7218.genel/wh7218.gene.html>>. The International Amateur Athletic Federation, the governing body for the sport of track and field, ceased formal sex testing in 1992: Joe Simpson, Arne Ljungqvist & A de la Chapelle, 'Gender Verification in Competitive Sports' (1993) 16 *Sports Medicine* 305; see also, Ferguson-Smith, above n88 at 363.

91 Arne Ljungqvist & Joe Simpson, 'Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports' (1992) 267 *JAMA* 850 at 850.

92 Genel, above n90 at 2.

93 R J Carbon, 'The Female Athlete' in John Bloomfield, Peter Fricker & Kenneth Fitch (eds), *Science and Medicine in Sport* (2nd ed, 1995) at 544.

94 Stephenson, above n88.

95 Above n91.

96 Conducted on buccal epithelial cells obtained by scraping the buccal mucous membrane located on the inside of the mouth: above n91 at 851. See also, Carbon, above n93 at 544.

97 Above n91 at 851.

98 This was the polymerase chain reaction test that 'detected the SRY locus of the Y chromosome, which is the DNA sequence for testes and ... positive for men': Carbon, above n93 at 545.

99 Louis Elsas, Risa Hayes & Kasinathan Muralidharan, 'Gender Verification at the Centennial Olympic Games' (1997) 86 *J of the Medical Assoc of Georgia* 50 at 52; see also, Ferguson-Smith, above n88 at 363–364 who demonstrates that this proportion is broadly consistent with the experience of earlier Olympic Games from which results are available.

seven of them possessed a disorder (androgen insensitivity syndrome) that involves unresponsiveness to testosterone produced by 'intra-abdominal atrophic testes'.¹⁰⁰ Notwithstanding having male chromosomes, people with this disorder have a female physical form, especially in terms of external genitalia, and muscularity and stature within normal female ranges.

Whether the sex test had come to serve any useful purpose to prevent impersonation was highly questionable. The modern era of close-fitting, revealing clothing as well as widespread drug tests (in which a chaperone must witness the urine sample exit the athlete's body) made outright impersonation virtually impossible. Tests at the Olympic Games and in other quarters have been conducted with considerable confidentiality and so it is not known for sure whether the tests ever detected a real imposter,¹⁰¹ although they may have acted as a deterrent in the early years. The circumstances that the tests were discriminatory in the sense that only women had to undergo them, and quite absurd in the case of athletes who had borne children, served to reinforce the inappropriateness of 'gender verification' as a blanket measure. The preferable approach came to be seen as investigating and testing if there was reasonable ground for suspicion that an athlete was not eligible to compete in women's events, and, in substance, that is the approach which appears to prevail for the time being.

Much of the history of gender verification in sport has been as a source of profound difficulty for those individuals who are not unequivocally of one or other sex, rather than as a barrier to the impersonator. In theory at least, the apparent demise of sex testing as a mass measure does not remove this difficulty because there remains an eligibility requirement that women's events are for women only. If the sex status of an intersex athlete is questioned, it might be expected the relevant authorities in a sport would resort to the tests used previously. Those concentrated upon the performance-enhancing characteristics of testosterone as the means for distinguishing men and women. Current or historical¹⁰² exposure to testosterone is regarded as the determinant although the method of testing has evolved and changed since 1966. However, this approach has been criticised in the medical literature as too narrow and that, in the case of intersex athletes, the sex of rearing should be determinative.¹⁰³

Making the testosterone factor the pivotal consideration in determining a person's sex is not necessarily an approach that would withstand legal challenge in Australia.¹⁰⁴ The issue of determination of an individual's sex has received increasing legal attention over the past three decades. People who have undergone sex realignment surgery have presented significant new challenges for the law. Transsexuals have come before the courts in a variety of contexts such as the validity of marriages, entitlement to social welfare and in respect of criminal

100 Carbon, above n93 at 546.

101 Insiders claim that no imposter has ever been detected: Ferguson-Smith, above n88 at 365.

102 Exposure to testosterone prior to puberty seems not to matter. This may occur in the case of a person of indeterminate sex who undergoes male to female sex re-assignment surgery prior to puberty. See Ferguson-Smith, above n88 at 361.

103 Ferguson-Smith, above n88 at 361-362.

offences where the victim or offender must be of a particular sex (such as rape).¹⁰⁵ The approaches developed in cases concerning transsexuals might be expected to inform any decision involving an intersex athlete. Courts have looked to a wide range of factors such as sex of rearing, lifestyle, psychological sex and physical appearance. The approach of Australian courts¹⁰⁶ has tended to be more liberal than that of English courts¹⁰⁷ in this regard,¹⁰⁸ although an authoritative Australian pronouncement is yet to be made. Given the international nature of sports competition, there is the possibility of conflict of laws — the law of the place of a sports event, the law of the athlete's domicile and the law of the international sports body sponsoring the event may make different provision for determining the athlete's sex.

Furthermore, the status of transsexual women competing in women's sport has proven controversial. American tennis player, Renee Richards (formerly Richard Raskin), attracted much media interest in the late 1970s and was successful in legal proceedings to prevent her exclusion from the US Open.¹⁰⁹ In Australia in recent years, at least five transsexual women participated in women's sport and attracted public attention — one in athletics in New South Wales, two in golf in South Australia and one in hockey and another in triathlon in Western Australia.

The expression 'transsexual woman' is used here to describe a genetic male who has undergone sex realignment surgery to bring her physical sex into accord (as nearly as possible) with her psychological sex. The concern in sports circles is that transsexual women may have an 'unfair' advantage over other women because of the historical influence of testosterone upon physical development.

Apart from *Richards'* case, the common law is yet to directly confront the issue of transsexual women in sport. In *Attorney-General v Otahuhu Family Court*,¹¹⁰

104 The focus of the present argument is whether legal principles governing determination of a person's sex status could sustain a challenge to such an approach. Perhaps a challenge could be mounted upon an alternative basis; namely, that an intersex person suffers from a disability (a malformation of part of the body) and is discriminated against on the ground of that disability. This is an argument that is raised as a possibility and may well involve similar considerations as a challenge based on sex status principles, but it will not be explored here. See further: Menzies v Waycott (2001) EOC at ¶93–129.

105 See, for example, Andrew Sharpe, 'Attempting the "Impossible": The Case of Transsexual Rape' (1997) 21 *Criminal L J* 23.

106 See, for instance, *R v Harris and McGuinness* (1988) 17 NSWLR 158 (CA), especially the judgment of Mathews JA. In *R v Cogley* [1989] VR 799 (FC) at 805, the court said, 'There is, in our view, no legal test that can be applied to the question whether a person is a man or a woman in a particular context.' It went on to say the question was one of fact to be decided in the circumstances. This can be contrasted with *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 which also displayed a liberal approach but regarded the question as one of law.

107 *Corbett v Corbett* [1971] P 83.

108 See further: John Mountbatten, 'Priscilla's Revenge: Or the Strange Case of Transsexual Law Reform in Victoria' (1996) 20 *MULR* 871, especially the references cited at n10.

109 *Richards v USTA* 93 Misc 2d 713, 400 NYS 2d 267 (1977). See also, Susan Birrell and Cheryl Cole, 'Double Fault: Renee Richards and the Construction and Naturization of Difference' (1990) 7 *Sociology of Sport Journal* 1.

110 Above n106.

the New Zealand High Court was concerned with whether a post-operative transsexual woman could marry a man and concluded that a marriage in those circumstances was valid.¹¹¹ It went on to adopt and reproduce in the judgment a modified version of the brief of an *amicus curiae* which dealt with a wider range of issues concerning the legal status of transsexuals, including their participation in sport. The brief said in part:

It is submitted that the decision in *Richards* is wrong, in that in this kind of circumstance, a male to female transsexual may have a competitive advantage over other females. That advantage may not be absolute, as other factors apart from sex, such as skill, will also be relevant. Nevertheless, the issue in such a situation is very different, from a social policy point of view, from the issue of marriage. The professional tennis player who is a male to female transsexual is in a position potentially to disadvantage all other women professional tennis players by depriving them of potential earnings and prize money. Marriage is a private contract between two individuals without the potential for disadvantaging other persons not party to that contract.¹¹²

If this approach were to prevail, the curious result would be that for some purposes a post-operative transsexual would be of one sex and for other purposes the opposite sex. Also, it is worth noting that this extract makes express mention of: social policy, the circumstance that factors other than sex affect sporting performance, concern about *male to female* transsexuals obtaining an advantage, and advantage being rewarded financially at the expense of other competitors.

This unresolved position at common law is to a degree solved, but also greatly complicated, by state and territory legislation. Most Australian jurisdictions now prohibit discrimination on the basis of transsexuality:¹¹³ New South Wales,¹¹⁴ Victoria,¹¹⁵ South Australia,¹¹⁶ Western Australia,¹¹⁷ Tasmania,¹¹⁸ the Australian Capital Territory¹¹⁹ and the Northern Territory.¹²⁰ Some of these jurisdictions

111 Contrast *Corbett v Corbett* [1971] P 713 and *In the Marriage of C and D (falsely called C)* (1979) 28 ALR 524.

112 Above n106 at 617.

113 In NSW and Victoria the legislation extends to people who are intersex, and in Western Australia the legislation applies only to post-operative transsexuals rather than including people in a state of transition as is the case in the other states and territories. Importantly, in some jurisdictions difficulty may be faced in establishing that the discrimination occurs within an activity caught by the legislation, eg. clubs or the provision of services.

114 *Anti-Discrimination Act* 1977 (NSW) Part 3A.

115 *Equal Opportunity Act* 1995 (Vic) Part 3 prohibits discrimination on the basis of, inter alia, the attribute 'gender identity' which is defined in s6 to include transsexuality. See also *Menzies v Waycott*, above n104.

116 *Equal Opportunity Act* 1984 (SA) Part III prohibits discrimination on the basis of, inter alia, 'sexuality' which is defined in s5(1) to include 'transsexuality'.

117 *Equal Opportunity Act* 1984 (WA) Part IIAA (yet to be proclaimed).

118 *Anti-Discrimination Act* 1998 (Tas) s16 prohibits discrimination on the grounds of '(c) sexual orientation' which is defined in s3 as including 'transsexuality'.

119 *Discrimination Act* 1991 (ACT) Part III prohibits discrimination on the basis of, inter alia, the attribute transsexuality; see also ss4(1) ('transsexual'), 7(1)(c) ('transsexuality').

have gone further and accord legal recognition to a 'change of sex'. The New South Wales legislation is perhaps the most far-reaching in this respect and makes provision for many of the legal obstacles facing transsexuals to be rectified or removed: for example, identification of sex on birth certificates.¹²¹ In the Australian Capital Territory¹²² and the Northern Territory,¹²³ the result is similar: a transsexual person's birth record can be amended and a fresh birth certificate issued. In South Australia and Western Australia, a different procedure is followed: a certificate can be issued which formally recognises the person's re-aligned sex.¹²⁴ Overall, the resulting position is limited in scope and in need of a nationally co-ordinated approach. For example, in New South Wales, a person must have been born in the jurisdiction to obtain an amended birth certificate and so the legislation is of no benefit to long-term New South Wales residents who have undergone surgery in New South Wales but were born elsewhere.

If the common law regards the post-operative transsexual female athlete as female, which is possible but untested, then she cannot be accused of being male and excluded under the various legislative provisions that permit single sex sports. However, attempts to exclude her on the ground of transsexuality would have the following consequences. In Tasmania, she could not be excluded from women's events because discrimination against transsexuals is unlawful. In Victoria, although discrimination against transsexuals is prohibited generally, the sport body could exclude her by relying on a specific legislative exemption (see below) notwithstanding her female sex. In Queensland, where discrimination on the basis of transsexuality is not prohibited, a sport's governing body would have to make a rule excluding transsexual women from women's events, otherwise they could compete as women.

If the common law regarded transsexual women as men, they would not be able to compete in women's events in Victoria, Queensland and Tasmania.

In South Australia, the Australian Capital Territory and the Northern Territory, if the female transsexual athlete has been able to acquire the legal status of a woman under legislation, the common law is irrelevant and she is qualified to compete in women's sport. Furthermore, she cannot be excluded from women's sport on the basis of her transsexuality because that amounts to unlawful discrimination. If, however, she has not taken, or has been unable to take, advantage of the legislation, she would be unable to compete as a woman if the common law regarded her as male. If the common law regarded her as female, she could not be excluded from women's sport.

120 *Anti-Discrimination Act 1996* (NT) Part 3 prohibits discrimination on the basis of, inter alia, the attribute 'sexuality' which is defined in s4(1) to include 'transsexuality'.

121 Deborah Healey, 'Exemption for Sport in NSW Transgender Legislation' (1996) 6(3) *ANZSLA Newsletter* 3.

122 *Births, Deaths and Marriages Registration Act 1997* (ACT) ss24-29.

123 *Births, Deaths and Marriages Registration Act 1996* (NT) ss28A-28J.

124 *Sexual Reassignment Act 1988* (SA); *Gender Reassignment Act 2000* (WA) (yet to be proclaimed).

The position in New South Wales and Western Australia is the same as in South Australia, the Australian Capital Territory and the Northern Territory except that the relevant legislation provides a sport-related exception from the prohibition against discrimination on the basis of transsexuality. Victoria also provides an exception (see above). The exceptions apply only to participation, not to ancillary activities like administration, coaching and umpiring. None of the three exceptions are self-executing; the sport body must exclude the transsexual and it is that discriminatory action which may be protected. Otherwise, the terms of all three exceptions differ markedly. All are of recent origin.¹²⁵ The New South Wales exception exhibits the least understanding of the position of transsexuals in sport; the Western Australian exception exhibits the most understanding.

In making an assessment of these exceptions, it should be borne in mind that the general policy of the anti-discrimination and equal opportunity legislation in relation to transsexuals is to outlaw discrimination against them and to promote their integration into the community, especially in the case of those who have undergone sex realignment surgery. Any reason to depart from this policy ought to be a powerful one. The *Otahuhu* case focuses on competitive advantage, and this reflects the approach of Olympic Games' medical authorities in dealing with athletes who are intersex.¹²⁶

The *Anti-Discrimination Act 1977* (NSW) section 38P permits 'the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies.' A 'transgender person', as defined in section 38A of the Act, includes people who are of indeterminate sex, post-operative transsexuals and pre-operative transsexuals in transition.

However, the New South Wales exception is too wide in that it would permit the exclusion of:

1. female to male transsexuals from men's sport (even though they may be at a disadvantage in strength);
2. male to female transsexuals from those women's sports where any possible historical advantage from testosterone exposure is irrelevant, such as in lawn bowls and shooting;¹²⁷
3. male to female transsexuals from 'sporting activity', such as a round of golf, game of tennis, weight training, swimming in a pool or running around an athletics track where no formal competition occurs; and

125 *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW), *Equal Opportunity (Gender Identity and Sexual Orientation) Act 2000* (Vic) and *Gender Reassignment Act 2000* (WA) (yet to be proclaimed).

126 For an alternative approach which questions the male/female divide and advocates division based on physical attributes that affect performance, see: Andrew Sharpe, 'Naturalising Sex Difference Through Sport: An Examination of the New South Wales Transgender Legislation' (1997) 22 (1) *Alt LJ* 40.

127 For a humorous scenario in this regard, see John Clarke & Ross Stevenson, *The Games* (1999) at 91–97.

4. certain categories of intersex people from women's sport that, according to informed medical opinion (see above), should be allowed to participate.

Furthermore, the New South Wales exception pays no attention to whether the individual does in fact possess any relevant advantage over other participants. Importantly, the *Otahuhu* case noted the role of skill as a determinant of sporting success (although not conclusively). Also, it should not be forgotten that there are many genetic factors that influence athletic performance (compare the different physiques of elite female netballers and artistic gymnasts). One genetic factor, historical exposure to testosterone, among many may not be of sufficient importance *in any individual case* to warrant a person's exclusion and a departure from the primary policy of the legislation.

The Victorian exception avoids some of these problems. The *Equal Opportunity Act 1995* (Vic) section 66(1) permits the exclusion of people 'with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant'. 'Gender identity', as defined in section 4 of the Act, includes people who are of indeterminate sex, post-operative transsexuals and pre-operative transsexuals in transition. A 'competitive sporting activity' is defined in section 64 as not including the 'non-competitive practice of a sport'. Hence, transsexuals could not be excluded from competitive lawn bowls or shooting, or from the practice of any sporting activity that was non-competitive in nature.

It is problematic whether the exception would prevent the exclusion of female to male transsexuals from men's competitive sport like football, tennis or golf where strength at least is relevant. Even though the female to male transsexual will on average be at a disadvantage, a literal reading of the exception might suggest that because strength is relevant in the sporting activity, exclusion is lawful. Also, the Victorian exception looks only to the generic position in each sporting activity and not to whether the particular transsexual or intersex person's medical history in relation to testosterone accords any advantage in the circumstances leading to exclusion.

The Western Australian exception displays the most enlightened approach. The *Equal Opportunity Act 1984* (WA) will provide as follows once the *Gender Reassignment Act 2000* (WA) comes into force:

35AP. Discrimination in sport on gender history grounds

- (1) It is unlawful for a person to discriminate against a gender reassigned person on gender history grounds by excluding that person from —
 - (a) a sporting activity; or
 - (b) an administrative, coaching, refereeing or umpiring activity in relation to any sport.
- (2) Subsection (1)(a) does not apply to discrimination against a gender reassigned person if —
 - (a) the relevant sporting activity is a competitive sporting activity for members of the sex with which the person identifies; and
 - (b) the person would have a significant performance advantage as a result of his or her medical history.

Section 35AP permits exclusion where an individual post-operative transsexual possesses 'a significant performance advantage'. This approach avoids the difficulties identified in the New South Wales and Victorian legislation. There is, of course, room for argument over what may be 'significant'. The *Otahuhu* case hints at some guidance. When the stakes are large in terms of earnings and prestige, the small physical differences that separate winners and losers in the refined atmosphere of elite sport carry great significance. However, at lower levels of competitive sport where the many factors separating competitors are more fluid, past exposure to testosterone may on balance play a poorly defined role in competitive sporting performance against other participants and should be ignored.

7. *Conclusion*

This article has sought to illustrate the variety, complexity and importance of medico-legal issues in sport. Increasingly the field will come to be seen as a whole rather than as isolated issues. Hopefully this is a start in that direction.

Many of the legal outcomes are strongly influenced by advances in medicine and by medical evidence. Greater understanding of the issues on both medical and legal sides is needed if effective health and risk management policies are to be developed for sport.

The law's interest in protecting human rights will at times be seen by sports administrators and health professionals as an irritating obstacle. However, such protection is an important element of a free and democratic society and, as has been demonstrated, anti-discrimination law in particular has a growing role to play in the medico-legal arena.