Jason Haynes and J. Tyrone Marcus

# Commonwealth Caribbean Sports Law

ROUTLEDGE

# COMMONWEALTH CARIBBEAN SPORTS LAW

Sports Law has quickly developed into an accepted area of academic study and practice in the legal profession globally. In Europe and North America, Sports Law has been very much a part of the legal landscape for about four decades, while in more recent times, it has blossomed in other geographic regions, including the Commonwealth Caribbean. This book recognizes the rapid evolution of Sports Law and seeks to embrace its relevance to the region.

This book offers guidance, instruction and legal perspectives to students, athletes, those responsible for the administration of sport, the adjudication of sports-related disputes and the representation of athletes in the Caribbean. It addresses numerous important themes from a doctrinal, socio-legal and comparative perspective, including sports governance, sports contracts, intellectual property rights and doping in sport, among other thought-provoking issues which touch and concern sport in the Commonwealth Caribbean.

As part of the well-established Routledge Commonwealth Caribbean Law Series, this book adds to the Caribbean-centric jurisprudence that has been a welcome development across the region. With this new book, the authors assimilate the applicable case law and legislation into one location to facilitate an easier consumption of the legal scholarship in this increasingly important area of law.

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# FOREWORD

We, former World Cup 2006 and England Premier League goalkeeper Shaka Hislop and Justice Adrian Saunders, President of the Caribbean Court of Justice, are proud to contribute the Foreword to this text as we look at two sides of the same coin, with one perspective from the playing field and the other from the legal bench:

## ATHLETES NEED A CHAMPION

I've played football all my life. From the playgrounds of Diego Martin, through university in the United States, to some of the most iconic stadia in European football. The first time I put on the national colours of Trinidad and Tobago was against a national select team from Venezuela. I was 10 years old. The last was against England at the World Cup. I was 37. Now, as I sit in the comfort of retirement and look back on my years in the game with the clarity that only hindsight affords, I can't help but recognize the way football has defined its own existence, with a government and laws of its own, handed down dictatorially. The intersectionality between sport and the actual law of the land played out in ways that were unique to the places, cultures and histories of the countries I played in. Oftentimes playing outright in front of my very eyes.

In the United States, life is defined by the constitution. And rightly so. Despite the ages and successes of the established leagues, everything has to relate to that doctrine, and the at-the-time interpretation of it. The National Collegiate Athletics Association (NCAA) has seemed to define its own existence, yet is now bracing for the most significant challenges since the Title XI amendments were passed in 1972. I first stepped through the doors of Howard University in 1987, and the Title XI interpretation was still being debated and challenged by the NCAA even then.

It was six years after my arrival in England, and my turning pro, that the European Courts handed down judgment in favour of Jean-Marc Bosman, upending the European, and consequently world, transfer system. I was among the first to benefit from what became known as a 'Bosman transfer' in moving from Newcastle United to West Ham United in July 1998.

But while the US's sporting landscape is dominated by the constitution, European football wrestles with its relationship with the European courts, and players increasingly view FIFA's preferred go-to, CAS (the court of Arbitration for Sport), as little more than an extension to FIFA itself. I is in Trinidad and Tobago (T&T), and indeed the wider Caribbean, where I have most reason to take pause.

I honestly can't remember what the leadership or administrative structure was like as I climbed the ranks and age groups of junior national football. I do remember my first call up to the senior national team in 1990 though, for what was then the Shell Caribbean Cup – an experience that was cut short by the attempted coup. It was an experience that started with a broken verbal agreement made by the TTFA. Maybe it's as a result of T&T's own colonial past, or maybe it was a product of FIFA's enforced culture on world football; but footballers were not meant to challenge authority, we were expected to obey and to accept whatever was decided was best for us – what we were due, and what we should expect and accept. There was little recourse for players in the case of any disagreement. There was even less by way of a formal,

legal and binding structure on which we could lean. Through the 1990s and 2000s the mere thought of recourse could, or more than likely would, be career ending.

These issues were not unique to T&T. We in T&T and the Caribbean shared these concerns with the world over, hence the founding of FIFPro, the world organization of players associations. Already having well-established players associations of their own, and the European game becoming increasingly international, the associations of England, Scotland, France, Italy and the Netherlands sought to unify to give players the world over representation, and a voice in the modern game.

But what of players who were from other parts of the world, who did not ply their trade in Europe? The resistance continues to this day, though more muted. FIFPro and FIFA continue to speak, working on an agreeable framework for every aspect of the game, from transfer windows to player representation. As much as that should be celebrated it has taken FIFA nearly 120 years, with FIFPro banging on their door for the last 25, to get to this point.

Oddly, as I reflect on my career, it has dawned on me that the curtain on my national team duties was lowered exactly as it was raised – with a broken verbal agreement. The resulting court case between the players of the T&T 2006 World Cup team would drag on, and drag through over a decade of legal manoeuvring before eventually being settled. My experiences in the game, playing from the 1970s through to the 2000s, with the clarity of hindsight, the comfort of retirement, and the involvement in the International Football Association Board (IFAB), and the TTFA Constitutional Reform Committee, I recognize that sporting excellence can be defined in any number of ways. And in each of those the participants' best interest must be at the forefront, championed by good governance and with sound and strong legal foundations. Without these there should be no curtain call.

Shaka Hislop, ESPN Football Analyst

## LAW IS HERE TO HELP

Over the last few decades, organized sports in the Caribbean have become increasingly commercialized. The region has produced and continues to produce some of the world's top sports personalities. And major international sports events have successfully been hosted in the Caribbean. These developments have undoubtedly cemented a worthy place for the region in the world of sport. If, however, the sports industry is to have an even more impactful role in national development – if it is to maximize its contribution to the social, cultural and economic development of the region – more is required.

Sporting bodies in the region must function in keeping with internationally acceptable standards for the practice, administration and regulation of sports. They must be accountable. They must be governed by the rule of law.

This text provides a comprehensive analysis of the evolution of Sports Law and its relevance and application to the development of sports in the Commonwealth Caribbean. It is an invaluable resource for sportspersons, sporting bodies, administrators and lawyers across the region, whether dealing with sports contracts, intellectual property, sports governance or doping regulations.

The authors make the vital link between sports and the most noble aims and aspirations of the people of the Caribbean Community, noting that in several areas of the Revised Treaty of Chaguaramas there are references to the value of sport to the region and ways of promoting it and facilitating the free movement of sportspersons.

This text is the first of its kind in the region and it brings together substantive law, and practical guidance that would be useful in the adjudication of sporting disputes in the Caribbean. It is a defining contribution to Caribbean legal literature and the authors are to be congratulated for this pioneering venture.

The Honourable Mr Justice Adrian Saunders,
President, Caribbean Court of Justice

# PREFACE

Sports Law has quickly developed into an accepted area of academic study and practice in the legal profession globally. In Europe and North America, in particular, Sports Law has been very much a part of the legal landscape for about four decades, while in more recent times, it has blossomed in other geographic regions, including the Commonwealth Caribbean. This book recognizes the rapid evolution of Sports Law and seeks to embrace its relevance to the region.

The introduction of Sports Law at the tertiary level at various educational institutes in the region has made the publication of this book opportune. Not only does Sports Law now form a part of the Bachelor of Laws (LLB) programme, but under the alternate name 'The Law and Sport' it represents one of the fields of study in various Sports Management degrees, both at the undergraduate and postgraduate levels. Fortunately, the study of Sports Law is not restricted to students, but has direct relevance to the functions of sports administrators whose roles continue to assume greater importance as more and more Caribbean athletes excel on the global stage. This book offers guidance, instruction and legal perspectives to those responsible for the administration of sport, the adjudication of sports-related disputes and the representation of athletes in the Caribbean.

As part of the well-established Routledge *Commonwealth Caribbean Law Series*, this book adds to the Caribbean-centric jurisprudence that has been a welcome development across the region. The increasing volume of sports-related Caribbean cases has in many respects been somewhat surprising, and often unaccounted for. With this new book, we aim to assimilate the applicable case law into one location in order to facilitate an easier consumption of the legal scholarship in this increasingly important area of law.

This is the first edition of this text. We the authors feel a real sense of privilege and honour to have contributed to this pioneering book, and we sincerely thank all those who have contributed to its publication. It is our hope that this book offers our readers a refreshing perspective on the applicability of the law to the sports sector. We anticipate that the chapters on *Sports Contracts*, *Intellectual Property*, *Sports Governance* and *Doping Regulation*, in particular, will assume practical importance to athletes, lawyers and administrators across the region, while the other chapters will present a contextual framework for the broader relevance of the law in Caribbean sport.

We are grateful to the editorial team at Routledge for their unwavering commitment to academic excellence, and for their support in the publication process. We have tried to state the law as at 31 July 2018.

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I, Jason, am personally grateful to my family and friends, namely Camelie and Dea Haynes, Remorno Hamilton, Jai-Len Williams, Krystal Lawrence, Rose-Ann Richardson, Jezeel Martin, Odelia Thomas, Gabrielle Myers and Bernisa Roberts for their tremendous support and contribution to the completion of this book.

I, Tyrone, am grateful to my father, Stanley Marcus SC who supported me in many ways during my LLM in Sports Law and who also bought me my first Sports Law book, *Sport and the Law* (3rd edn) authored by Edward Grayson. Similar thanks are extended to two amazing women in my life: my mother, the late Ruth Marcus, who was at my side in 2010 when I graduated from the De Montfort University in Leicester and my incredible wife Michelle Marcus who continually embraced extra homework and skilfully managed various other responsibilities with our two wonderful children, so that I could have uninterrupted focus during my research and writing.

Most of all, we especially give thanks to God for providing us with the vision, insight and strength necessary to complete this book.

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# CHAPTER 1

# INTRODUCTION TO COMMONWEALTH CARIBBEAN SPORTS LAW

## 1.1 SPORT IN CARIBBEAN SOCIETY

Michael Malec has described sport as a social phenomenon.[1] In his study of baseball, basketball, cricket, football and horse racing in Barbados, Cuba, the Dominican Republic, Jamaica, Trinidad and Tobago, St Vincent and the Grenadines, he concludes that organized sport has economic, political, religious and educational implications.[2] The multi-dimensional nature of Commonwealth Caribbean sport described by Malec mirrors, to some degree, the five-pronged functions of sport described in the 2007 European Model of Sport, namely, its social, educational, cultural, public health and recreational functions.[3]

No Caribbean sport underscores this fascinating interconnectedness like West Indies cricket. In this connection, Malec holds that the study of West Indies cricket must begin with cultural studies.[4] Notably, it is this very West Indies cricket that has provided the Caribbean region with a growing body of sports arbitration law, not sufficiently developed to be coined its own *lex sportiva*, but certainly raising legal issues of profound regional relevance.[5]

The capacity of sport to foster national pride is not unique to the Commonwealth Caribbean. Yet, the small populations and the tight-knit societies within the region magnify sport's impact in these territories. For this very reason, no matter how poorly a particular athlete or team from the region performs, supporters' heartstrings remain closely tied to their sporting heroes. This connection, in turn, motivates athletes to avoid ethical controversies, in general, for fear of the social backlash that will be felt, similar to the deep-rooted impact of the ball-tampering scandal that rocked the cricketing world and the wider Australian society in March 2018. It is in such a context that sport is played in the Caribbean. An equally salient consideration for the practice of sport in the region is its legal backdrop.

## 1.2 DEFINING SPORT

Sport has been defined in the 2013 Jamaica National Sport Policy as:

> [a]ll forms of physical activities that contribute to physical fitness, intellectual and economic well-being, as well as social interaction, such as play, recreation, organized or competitive sport, indigenous sport and games.[6]

The emphasis on the word 'physical' in the aforementioned definition may bring discomfort to the masterminds of chess, scrabble, dominos and all fours, but such an approach is by no means surprising. Before the completion of its 2017–2027 National Sports Policy, Trinidad

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1 Michael Malec, *The Social Roles of Sport in Caribbean Societies* (Psychology Press, 1995) 7.
2 Ibid 3.
3 European Commission, 'White Paper on Sport' (COM(2007) 391 final).
4 Ibid 14.
5 These arbitral awards in the context of West Indies cricket will be discussed further in Chapter 2.
6 'White Paper on The National Sport Policy' (Ministry Paper No. 29/13, Office of The Prime Minister, March 2013) [3.2] quoting the definition from the United Nations Inter-Agency Task Force on Sport for Development and Peace.

and Tobago, in its 2002 Sports Policy, borrowed the Council of Europe's definition of 'sport'. This definition covers 'all forms of physical activities which through casual or organized participation aim at improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels'. The two definitions identified above are quite similar, both in in their wording and their express requirement for physical activity. Indeed, 'physical activity' in both definitions must lead to intellectual or mental well-being, but the catalyst for the latter is the former. Unfortunately, neither definition appears to contemplate actual mental activity inherent in activities like chess, dominos and card games.

### 1.2.1 Card games as 'sport'

> While admitting that duplicate bridge involves logic, memory and planning, and may constitute an activity beneficial to the mental and physical health of regular participants, the Court finds that *the fact that an activity promotes physical and mental health is not, of itself, a sufficient element for it to be concluded that that activity is covered by the concept of 'sport' within the meaning of that same provision* ... The Court concludes that an activity such as duplicate bridge, which is characterized by a physical element that appears to be negligible, is not covered by the concept of 'sport' within the meaning of the VAT Directive.[7] [Emphasis added].

Although the decision of the Court of Justice of the European Union (CJEU) in *The English Bridge Union Ltd v Commissioners for Her Majesty's Revenue & Customs* (*HMRC*) was made in the context of an application for a refund on value added tax (VAT), its discussion and eventual conclusion on the question of whether duplicate bridge was a sport is quite instructive. The threshold established by the CJEU was that, in everyday language, 'sport' involved an activity 'of a physical nature characterized by a not negligible physical element'.[8] The CJEU added that the fact that an activity 'promotes physical and mental health is not, of itself, a sufficient element for it to be concluded that the activity is covered by the concept of "sport" within the meaning of that same provision'.[9]

Prior to the CJEU's guidance, the English High Court had ruled in 2015 in *English Bridge Union Ltd v The English Sports Council*[10] that the non-negligible physical nature of the activity is the qualifying criterion when defining 'sport'. In the context of a rejection by the Sports Council of a request for funding by the English Bridge Union, the High Court had held:

> ... the proper interpretation of the Physical Training and Recreation Act 1937 and the surrounding factual context of the 1996 Royal Charter are of far greater significance than any help which is to be derived from dictionary definitions of the individual words comprising the phrase in question. Read in context therefore, the word "sport" as it appears in the 1996 Royal Charter phrase "sport and physical recreation" connotes and requires an essential element of physical activity. In this connection, the decision of the defendant to adopt the European Sport Charter definition of sport which requires an element of physical activity was entirely consistent with the proper understanding of their Royal Charter. Thus, whilst the word "sport" may have other definitions in other contexts, the correct interpretation of the operative phrase in the 1996 Royal Charter incorporates in this instance an essential element of physical activity.[11]
>
> The importance of supporting physical training and physical recreation remains a significant element of public policy, and the desirability of the specific promotion of physical activities

7 Case C-90/16 *English Bridge Union Ltd v Commissioners for Her Majesty's Revenue & Customs*.
8 Ibid [19].
9 Ibid [2].
10 [2015] EWHC 2875.
11 Ibid [48].

> remains as relevant today as it was at the time the 1937 Act was passed. That is not to say that there may not be good reason for public policy to promote mental activity and agility, but in the light of the originally intended meaning of the phrase remaining both relevant and appropriate there is no warrant for the phrase to be reinterpreted to include activities not involving a physical element. There is therefore no warrant in this case to reinterpret this phrase as a result of the passage of time: inclusion of activities promoting mental activity and agility would in my view undoubtedly require amendment of the legislation.[12]

The question of All Fours, for instance, a very popular card game in Trinidad and Tobago, or dominoes, equally popular in Barbados, St Vincent and the Grenadines and Jamaica, being coined a sport is yet to be ventilated before Caribbean courts. Yet, it is hard to see why there would be any rationale for diverting from the reasoning of the CJEU in *English Bridge Union v HMRC* in a Commonwealth Caribbean context in view of this region's adoption of European definitions of sport. In future, this may, however, have certain negative externalities, possibly including the exclusion of the governing bodies of these sports from certain benefits provided by the State, such as tax exemptions and funding for their programming.

## 1.3 CARIBBEAN LEGAL SYSTEMS

> ... even after independence, our courts have continued to develop our law very much in accordance with English jurisprudence.[13]

Justice of Appeal Satnarine Sharma's words above succinctly sum up the historical development of the law of the Commonwealth Caribbean. Indeed, as Rose-Marie Belle Antoine has similarly noted, the law and legal systems in the Commonwealth Caribbean 'were born out of the colonial experience'.[14] There is little disagreement, then, that many Caribbean territories have legal systems that adopted those of their colonial masters, with the English language being the dominant identifying mark in the region.

The common law forms the foundation of the law and legal systems in the Commonwealth Caribbean, with decisions from the respective High Courts and Courts of Appeal, plus those of the Privy Council in England and the Caribbean Court of Justice, forming the heart and substance of regional law. Yet, it would be misleading to suggest that all Caribbean countries share one unified legal philosophy and practice. Antoine's observations, in this context, are apposite:

> From a legal perspective, the Commonwealth Caribbean can be seen as a homogenous entity, joined by strong British legal ties. The major deviations are the hybrid legal systems of St Lucia and Guyana. [Yet], while countries share the inheritance of the common law as the basic law, there are differences in socio-political and economic policy which are reflected within the law.[15]

Guyanese and St Lucian law, therefore, stand out within the region as they combine the common law and civil law experience.[16] However, there is simply not enough sporting case law within the region to fairly or accurately assess the impact that the divergent legal systems have had on the region's sporting landscape. It is, however, worth mentioning that in the build up to the Rio 2016 Summer Olympic Games, the Caribbean broadcast rights holder was an entity

12 Ibid [44].
13 *Boodram v Attorney-General* (1994) 47 WIR 459.
14 Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (Routledge, 2008) 3.
15 Ibid 7.
16 For a detailed treatment of this subject, readers are commended to chapters 3 and 4 of *Commonwealth Caribbean Law and Legal Systems* by Rose-Marie Belle Antoine.

known as the Caribbean Association of National Olympic Committees (CANOC) Broadcasting Inc. (CBI), incorporated under St Lucian law via the International Business Company's Act. Yet, its incorporation in St Lucia produced no unique legal consequence as CBI entered into various sub-licensing agreements with a number of broadcast partners within and outside of the region. It remains unlikely, therefore, that even when more sports-related matters are heard and determined across Caribbean courts that the prevailing nuances inherent in our legal systems will significantly impact on the final disposition of these cases.

## 1.4 WHAT IS 'SPORTS LAW' AND WHY DOES IT EXIST?[17]

> We have chosen the title for this book to give expression to our view that the time has come for the term 'sports law' to become accepted as a valid description of a system of law governing the practice of sports. We are conscious that the term is not yet universally accepted among lawyers. Nor is it in common use among practitioners or administrators of sport.[18]

The above opinion was expressed by authors Michael Beloff QC, Tim Kerr and Marie Demetriou, as they penned the first edition of their text entitled *Sports Law* back in 1999. Almost two decades ago, they held the view that Sports Law had evolved into a *bona fide* arm of the law, with specific legal regulations and rules being developed that are unique to sport. Holding the opposite view, however, was well-respected academic and author of *Sport and the Law*, the late Edward Grayson, who spoke of 'the arcane, arid and artificial argument about whether there is a law of sport or sports law'.[19] There are supporters on both sides of the divide. Davis' evaluation of the nature of Sports Law offers a nuanced perspective:

> 'What is sports law' is a question often asked by students, academics, lawyers and lay persons. The person attempting to respond often searches in vain for a response that is cogent and demonstrates some modicum of understanding of 'sports law.' Perhaps the difficulty in articulating a response is, in part, a result of uncertainty related to what information is being sought. Is the 'what is sports law' query intended to focus our attention on the content of the practice of sports law? In other words, which substantive areas of practice fall under the rubric of sports law? Specifically, is the role of the sports lawyer intended as the principal focus of the question? In this regard, perhaps what is sought is information concerning the range of services provided by the attorney who practices in the sports law context. Finally, perhaps the person who asks 'what is sports law' seeks an answer to a more fundamental consideration – does such a thing as sports law exist? In other words, is sports law recognized as an independent substantive area of the law such as torts, contracts or employment law?[20]

The question of the independence of Sports Law and the related question of sport's uniqueness have generated significant debate especially at the level of the European Union (EU). Prominent international sports federations, like the Fédération Internationale de Football Association (FIFA),[21] Union of European Football Associations (UEFA)[22] and the International Olympic Committee (IOC)[23] have been among the loudest advocates for recognition of the notion of

17 This section of this chapter was first published by J. Tyrone Marcus, 'Sports law in the Caribbean' (LawInSport, 3 June 2013) and is reproduced, including updates, with permission.
18 Michael Beloff, Tim Kerr, Marie Demetriou and Rupert Beloff, *Sports Law* (Hart Publishing, 1999) 1.
19 Edward Grayson, 'The Historical Development of Sport and Law' (2011) 19(2) Sport and the Law Journal 64.
20 Timothy Davis, 'What is Sports Law? in *Lex Sportiva: What is Sports Law?* (TMC Asser Press, 2012) 2.
21 FIFA is the world governing body for football.
22 The continental governing body for European football.
23 The guardian of the Olympic movement.

the 'specificity of sport', claiming that sport's special nature should, to a large degree, make it exempt from the application of EU law.

Their efforts, evidently, have not gone in vain as Article 165(1) of the Treaty on the Functioning of the European Union states that the 'Union shall contribute to the promotion of European sporting issues, while taking account of the *special nature of sport*, its structures based on voluntary activity and its social and educational function.' While there are limitations to this new EU competence in the area sport, it is still considered a partial victory in the fight to recognize sport as unique and special.

A similar approach has been countenanced in the Caribbean, namely through the Revised Treaty of Chaguaramas. For instance, Article 17(2)(e) provides that the Council for Human and Social Development shall 'promote and establish programmes for the development of culture and *sports* in the Community'. Additionally, pursuant to Article 46(1)(c), Member States have agreed and undertake, as a first step towards achieving the right to free movement, to accord to certain categories of Community nationals the right to seek employment in their jurisdictions, including sportspersons.[24] Furthermore, according to Article 75(2), the Community shall 'promote in the Member States the establishment and improvement of health, education, *sports* and social security institutions and facilities'.

The seeds have, therefore, been scattered in the Caribbean that could eventually reap a harvest of jurisprudential innovation resembling European Sports Law. Even with this optimism, though, the admonition from Blanpain, Colucci and Hendrickx, in *The Future of Sports Law in the European Union*, remains apt: 'According to established ECJ case law, the specificity of sport will continue to be recognised, but it should not be interpreted in such a way that justifies a general derogation to the enforcement of [C]ommunity Law.'[25]

## 1.5 SOURCES OF COMMONWEALTH CARIBBEAN SPORTS LAW

Such has been the evolution of the law relating to sport that *sui generis* terminology has increasingly been attached thereto. In this regard, Mark James' taxonomies are instructive. He defines the term 'Domestic Sports Law' as 'the body of internally applicable legal norms created and adhered to by national governing bodies of sport'.[26] Its counterpart at the international level is 'Global Sports Law', which is defined as

> The autonomous transnational legal order through which the body of law and jurisprudence applied by international sports federations is created; in particular it includes the jurisprudence of the Court of Arbitration for Sport and its creation and harmonisation of sporting-legal norms.[27]

These two concepts are often contrasted with 'National Sports Law' and 'International Sports Law'. The former is described as 'the law created by national parliaments, courts and enforcement agencies that directly affects the regulation and governance of sport or which has been developed to resolve sports disputes',[28] while the latter addresses 'the general or universal

24 This provision is justiciable before the courts, since it grants an enforceable right, rather than simply being a hortatory objective.
25 Roger Blanpain, Michekle Colucci and Frank Hendrickx (eds), *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper* (Wolters Kluwer, 2008) 25, citing paragraph 4.1 of the EU White Paper on Sport.
26 Mark James, *Sports Law* (Palgrave Macmillan, 2013) 3.
27 Ibid.
28 Ibid.

principles of law which are part of international customary law, or the *jus commune*, that are applied to sports disputes'.[29]

The foregoing taxonomies are somewhat eye-catching, as they neatly capture the increasing momentum with which the law has been infiltrating sport's domain. Domestic Sports Law has emerged and continues to emerge as national governing bodies, whether it is UK Athletics in Britain, the Board of Control for Cricket in India (BCCI) on the Asian subcontinent or the Barbados Cricket Association in the Caribbean, develop and apply rules and laws to effectively administer their respective sports. By contrast, National Sports Law seems to have a more 'credible' source as this law develops out of the courts and national parliaments. In fact, James believes that National Sports Law is 'the application of "real law" to sport'.[30] This reality is reflected in the fact that more and more countries have enacted sports-specific legislation, whether those Acts of Parliament were merely sunset legislation for the purpose, for instance, of combating ambush marketing at mega sporting events like the Olympics or the FIFA World Cup, or statutes intended for posterity, like the UK's Safety of Sports Grounds Act 1975 or the 2016 Sports Act of Mauritius.

As far as Global and International Sports Law are concerned, a starting point, especially for the former, is the analysis of the case law emanating from the 'supreme court of world sport', the court of Arbitration for Sport (CAS), based in Lausanne, Switzerland.

### 1.5.1 CAS at the centre of Global Sports Law

> By reinforcing and helping to elaborate established rules and principles of international sports law, the accretion of CAS awards is gradually forming a source of that body of law. This source is referred to as 'lex sportiva.'[31]

The jurisprudence of the Court of Arbitration for Sport (CAS) is credited with giving Global Sports Law its normative content and parameters. International Sports Law, on the other hand, goes further and is succinctly defined by Ken Foster in the following manner: 'International law deals with relations between Nation States. International Sports Law therefore can be defined as the principles of international law applicable to sport.'[32] Mitten and Opie (2011) observe that 'CAS arbitration awards are globally respected adjudications, which generally are validated and enforced by national courts.'[33] The body of law that has developed through CAS rulings has become the core of *lex sportiva*. Even the Swiss Federal Tribunal, the court to which appeals from CAS are heard, albeit on very limited grounds, has recognized the validity of the CAS. This pronouncement came in the *Elmar Gundel* decision[34] when the independence of the CAS was brought into question. The Swiss Federal Tribunal found the CAS to be a true court of arbitration.[35]

Of note is the fact that a significant portion of the arbitral decisions at the CAS are anti-doping matters, while selection disputes are also common. In the lead up to the 2012 London Olympics, the CAS Ad Hoc Division remained a hub of activity as it dealt, *inter alia*, with selection disputes involving equestrian riders from South Africa and Ireland, an Olympic

29 Ibid.
30 Ibid 8.
31 Robert Siekmann, 'What is Sports Law? Lex Sportiva and Lex Ludica' (2011) 3(4) International Sports Law Journal 4.
32 Ken Foster, 'Is There a Global Sports Law?' (2003) 2(1) Entertainment Law 1.
33 Matthew Mitten and Hayden Opie, ' "Sports Law": Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution' (2011) 19(1) Sport and the Law Journal 23.
34 *Gundel v FEI Swiss Federal Tribunal*, 15 March 1993.
35 Ian Blackshaw, *Sport, Mediation and Arbitration* (TMC Asser Press, 2011) 152.

qualification boxing controversy, an impasse regarding the assignment of Olympic places in the sport of canoe kayak and doping cases from canoeing and athletics. Four years later, at Rio 2016, the predominance of anti-doping disputes manifested itself in the establishment of an inaugural CAS Anti-Doping Division which ruled in 28 cases during the Rio Games. At the 2018 PyeongChang Winter Olympics, the CAS *ad hoc* Division heard six cases, including selection disputes and the widely covered application by Russian athletes to participate in the Games, following allegations of State-sponsored doping in that country.

Not many intellectual property (IP) conflicts seem to reach the CAS, possibly due to the role of the World Intellectual Property Organization (WIPO) in dealing with IP disputes through its Arbitration and Mediation Center. Nonetheless, Mitten and Opie observe that, 'the evolving body of *lex sportiva* established by CAS awards is an interesting and important example of global legal pluralism without States arising out of the resolution of Olympic and international sports disputes between private parties'.[36] It appears, then, that the resolution of sports-related disputes, especially through arbitration at the CAS, has been the catalyst for the rapidly expanding body of case law that has shaped Sports Law. Indeed, while the doctrine of *stare decisis* is not strictly adhered to by the CAS, such is the validity of its jurisprudence that subsequent panels still tend to follow previous precedents, sometimes with immaculate precision.

Within Sports Law, a class of 'sports arbitration law' appears to be blossoming, founded on CAS decisions and supported by the rulings from other bodies like the American Arbitration Association (AAA) in the United States, the Fédération Internationale de Basketball Amateur (FIBA),[37] the Basketball Arbitral Tribunal (BAT), Sport Resolutions UK, the Sports Dispute Resolution Centre of Canada and Just Sport Ireland.

## 1.6 LEGAL INTERVENTION IN SPORTING AFFAIRS: INTERNATIONAL AND CARIBBEAN PERSPECTIVES

> It is beyond question that sports law is at its most advanced in Europe and America. Unfortunately, the same cannot be said for sports law in Asia, which lags way behind Europe and America at both the working and research levels. Thus, when we take into account the prominence of Asia on the world stage from the perspectives of economics and population, this undoubtedly illustrates the pressing need to improve and develop sports law through the region.[38]

This Asian lament is instructive as it probably mirrors a sentiment felt in other parts of the globe, including the Caribbean, where Sports Law is still at its embryonic stages. Notwithstanding the passage in June 2011 of the Basic Act on Sports in Japan, Asia is still considered to be at an early juncture in the establishment of its legal framework to regulate sport.

Europe is considered to be the traditional home of Sports Law. In their text, Roger Blanpain, Michele Colucci and Frank Hendrickx have noted that the 'relation between sport and law has always been very special', and questioned 'whether the EU legal order applies to sport activities'.[39] That question is answered with a resounding 'yes', as has been confirmed by the Court of Justice of the European Union's (CJEU) case law and, indeed, by the Treaty on the Functioning of the European Union. Most notably, cases such as *Walrave and Koch v UCI*,[40] *Donà*

36 Mitten and Opie (n 33) 23.
37 FIBA is the world governing body for basketball.
38 Takuya Yamazaki, 'The prospect of and need for sports arbitration in Asia – a Japanese lawyer's perspective' (LawInSport, 11 February 2013).
39 Roger Blanpain, Michele Colucci and Frank Hendrickx (n 25) 2.
40 [1974] ECR 1405.

*v Mantero*[41] and the well-known *Bosman*[42] decision have laid the foundation for the application of EU law to sport.

In like manner, North America has both embraced and contributed to the development of Sports Law. In that geographical region, the American Arbitration Association has been responsible for churning out significant sporting decisions, including the landmark *La Shawn Merritt* anti-doping arbitral decision,[43] which was a catalyst for the eventual outlawing of the IOC's Osaka Rule and the British Olympic Association by-law, both of which were deemed to contravene the *ne bis in idem* principle.

It is an interesting undertaking to observe the birth and growth of Sports Law in emerging sporting stakeholders such as the Caribbean region. One of the factors contributing to this expansion was the hosting of major sports events in recent years, which became an occasion for developing, teaching and introducing Sports Law concepts. In 2007, the ICC Cricket World Cup was hosted in the West Indies. One of its salient features was the anti-infringement programme developed to combat ambush marketing and other potential infringements of intellectual property rights. Nine host nations enacted the ICC Cricket World Cup West Indies 2007 Act, 2006. Indeed, ambush marketing legislation has become a common feature of major event hosting in modern times. Since then, the 2010 ICC T-20 Cricket World Cup was held in the Caribbean as will be the 2018 ICC Women's T-20 Cricket World Cup. Trinidad and Tobago hosted the 2010 FIFA Under 17 Women's World Cup, while in 2017 the Bahamas successfully delivered the Commonwealth Youth Games, after another Caribbean territory, St Lucia, could no longer host the event. The Bahamas has also been a repeat host of the IAAF's World Relays.

Besides the blossoming regional sports tourism industry, which is directly related to the increasing number of international sporting events being held in the Caribbean, the other positive impact has been increasing awareness of event legacy planning, sponsors' brand protection, commercial sports contracts and intellectual property rights in the sports sector. The emergence of judicial and academic discourses on sports legal matters also augurs well for the expansion of Commonwealth Caribbean Sports Law.

### 1.6.1 Legal intervention through legislation

One of the most conspicuous features of the acceptance of Sports Law in legal and academic circles is the plethora of sports-related statutes that can be found on the global stage. It is not surprising to find such legislation in the United Kingdom, whether it is transient law like the London Olympic Games and Paralympic Games Act 2006, which was passed in preparation for the 2012 Games, or more sustainable legislation like the 1989 Football Spectators Act or the Sporting Events (Control of Alcohol) Act 1985. Similarly, American legislation like the Ted Stevens Olympic and Amateur Sports Act 1998 or the Major Sporting Events (Indicia and Images) Protection Act 2014 of Australia have expectedly been passed in these developed countries with a rich sporting tradition. In like manner, France passed its Loi du Sport in 1984, while Brazil enacted its Pélé Law in 1998.

41 *Re Bosman* [1976] ECR 1333.

42 *Union Royal Belge des Societe de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4292.

43 CAS 2011/O/2422 *United States Olympic Committee (USOC) v International Olympic Committee (IOC)*, award of 4 October 2011. The Court of Arbitration for Sport struck down a 2008 IOC rule that barred athletes who had served a doping suspension of six months or longer from competing in the next Olympics, even if they had completed their original sanctions. In its ruling, the CAS called the IOC's rule 'invalid and unenforceable', finding that it violated the World Anti-Doping Code, which was created to bring about uniformity in the handling of doping cases. In short, the rule had the effect of twice penalizing athletes for the same offence.

Less expected perhaps are statutes like the Sports Act 2012 of Hungary, the Namibia Sports Act,[44] the Sports Commission Ordinance 1994[45] of the Turks and Caicos Islands or the Sports Act 2000[46] of Belize, since these countries have not had a history of international success and prominence as compared to other countries. The fact that such statutory enactments exist, though, does constitute cogent evidence that more States are adopting an interventionist approach to sports regulation and are willing to engage the attention of their respective parliaments.

In recent years, Grenada passed the 2012 National Sports Council Act, one year after the Bahamas Sports Authority Act became law in The Bahamas. In Guyana, the 2014 Cricket Administration Act zoned in on a single sport, seeking to offer stricter regulation of a sport, cricket, that has historical and emotional significance in the Caribbean. Similarly, regional sporting giants, Jamaica, repealed the 2008 Anti-Doping in Sport Act, replacing it with a revised edition, which reflect the changes introduced by the 2015 World Anti-Doping Code. The trend of new Caribbean sports legislation being introduced is expected to continue as the region gains a greater appreciation for the commercialization of sport and as it accepts the simultaneous juridification of the industry.

### 1.6.2 Legal regulation of ethics in sport

Sports observers are neither naive nor unrealistic when it comes to embracing the fact that ethical codes are often broken in the world of sport. The evidence is most visible in the areas of match-fixing, doping, illegal betting and child exploitation. The 2011 Jerry Sandusky child sexual abuse conviction in the United States,[47] the 2018 Larry Nassar gymnastics sex abuse charges,[48] the Lance Armstrong cycling debacle[49] and the spot-fixing fiasco involving three Pakistani cricketers in 2011[50] are reminders of the battle that wages on for clean and fair sport.

The issue of child protection in sport is sensitive, but has increasingly received due attention even before the Sandusky and Nassar revelations. The UK regulatory approach has been a holistic one, which included the introduction into law of the 2006 Safeguarding Vulnerable Groups Act. This area, admittedly, warrants the best possible legal regulation which includes the criminal law, necessarily going beyond the ambit of strict Sports Law as defined earlier.

The fight for drug-free sport has, at times, also demanded a rigid regulatory framework and the intervention of the criminal law. Many countries have enacted specific anti-doping laws, including a few Caribbean territories like Jamaica, Trinidad and Tobago, The Bahamas and Bermuda, all within the last 10 years. These laws imitate, in both content and intent, anti-doping rules and regulations existing in Australia, Canada, New Zealand and Spain. Mitten and Opie have identified this as an important contributor to the development of international sports anti-doping law,[51] citing the role of 2005 UNESCO International Convention against Doping in Sport as central to this process. They further highlight the function of the World

44 Act No 12 of 2003.
45 Chapter 21.07.
46 Chapter 46.
47 Bill Chappell, 'Penn State Abuse Scandal: A Guide and Timeline' (NPR, 21 June 2012). Sandusky was accused of sexually abusing 10 boys over a 15-year period.
48 Hadley Freeman, 'How was Larry Nassar able to abuse so many gymnasts for so long?' (*The Guardian*, 26 January 2018). Nassar was accused of abusing girls in London at the 2012 Olympics; at the Károlyi Ranch, USA Gymnastics' training centre in Texas; at gymnastics meets in Rotterdam.
49 'A timeline of Lance Armstrong's cycling career' (*Associated Press*, 19 April 2018).
50 Nick Hoult, 'Pakistan spot-fixing shame: The inside story on the day the home of cricket became engulfed in scandal' (*The Telegraph*, 12 July 2016).
51 Mitten and Opie (n 33) 19.

Anti-Doping Code as having 'a significant capacity to foster appreciation of the need for a uniform international rule of law, particularly in parts of the world where international legal norms generally are not recognized, as well as a sense of global connectivity and legal harmony'.[52]

The match-fixing threat, equally, has become increasingly pronounced in recent years, prompting many sports governing bodies to create and enforce anti-corruption codes. Spot-fixing in cricket, match-fixing in football and illegal betting in tennis are the oft-cited examples of this growing menace to sport's integrity. Sport's watchdogs indeed have their work cut out for them, though the birth of the Sport Integrity Global Alliance (SIGA) in November 2015 is a welcome addition to the family of sports regulators. At the time of writing, the Caribbean region was represented on the board of SIGA by Brian Lewis, the President of both CANOC as well as the Trinidad and Tobago Olympic Committee (TTOC).

The role of the law in safeguarding good ethics in sport is incontrovertible and has led to significant law and policy developments in the industry.

### 1.6.2 Legal intervention through arbitration and litigation

This introductory chapter closes with two case summaries both of which involved Cricket West Indies[53] as defendant. The cases highlight the ever-growing intervention of the law, through arbitration and litigation, in Commonwealth Caribbean sport.

#### *1.6.2.1* The West Indies Players Association v The West Indies Cricket Board[54]

Caribbean cricket differs from most other nations playing the sport, because the team is comprised of players from a number of sovereign countries in the Caribbean. The West Indies Players Association (WIPA), therefore, plays a crucial role as it seeks to represent the interests of cricketers from various territories with different cultures and, sometimes, as mentioned before, different legal systems.

On 26 March 2013, High Court Judge Ricky Rahim issued his ruling in yet another dispute involving the West Indies Players' Association (WIPA) and cricket's regional governing body, the West Indies Cricket Board (WICB), now rebranded as Cricket West Indies (CWI). Notably, in this particular dispute, although the WICB was incorporated under the laws of the British Virgin Islands, the relevant collective bargaining agreement (CBA) stipulated that the governing law would be that of Antigua and Barbuda. To make matters even more complex, the CBA was amended so that the governing law would be that of Trinidad and Tobago![55]

At the heart of the dispute was the question of whether the conduct of the WICB in unilaterally terminating the relevant CBA amounted to a dispute fit for arbitration. Among the issues under judicial consideration were the relevant law relating to the interpretation of contracts, the common law doctrine of estoppel by representation and the applicability of the applicable dispute resolution clause. The discourse on commercial contract interpretation and the true definition of a dispute was technical, but instructive. The following excerpt from the case offers guidance on the issue:

> The court is of the view that while negotiation and discussion are likely to be more consistent with the existence of a dispute, in this case, it is not open to the claimant to refer to an impasse

52 Ibid 21.
53 Formerly the West Indies Cricket Board.
54 CV 2011–04679, High Court of Justice, Trinidad and Tobago.
55 Ibid [5] per Rahim J.

> in negotiations as to the existence of the very root from which the power to arbitrate springs *ab initio* as a dispute. What the parties are at variance with is not the application of a term of the Agreement or rectification of a term of the agreement. The claimant is not putting forward a claim to which the defendant does not agree. In the court's view there is no claim and no disagreement, but instead an inability to arrive at a mutually accepted position in relation to a new agreement on new terms at least for the time being. The mechanism for resolving disputes emanates and derives jurisdiction from the agreement between the parties which governs their relationship with each other. The dispute resolution mechanism must relate to the matters set out in the agreement while in existence. To accept to the contrary would be to aver unto the arbitrator the power and function of crafting the will of the parties in an artificial exercise that may result in some clauses being included or omitted although one party or the other have not agreed to them. This is not the essence of agreement which by definition is voluntary and not imposed. For these reasons, [t]he court therefore does not consider that the failure to agree new terms amounts to a 'dispute' as contemplated by Article XI of the CBA.[56]

The court held, ultimately, that the dispute in question was not fit for arbitration. Admittedly, there was little in the judgment that could be considered *bona fide* Sports Law, as many of the supporting case law precedents used in the submissions of both the claimant and defendant were based on well-established contract principles unrelated to the sporting context. Nevertheless, the ruling continues an increasing trend, especially in Caribbean cricket, to have matters settled via arbitration or litigation. It was not the first time that the WICB was a defendant in a High Court action, as illustrated below.

### *1.6.2.2* The Trinidad and Tobago Cricket Board v The West Indies Cricket Board[57]

The foundation of this case was a challenge by the Trinidad and Tobago Cricket Board (TTCB) against the WICB, a claim rooted in the interpretation of a competition rule. The TTCB, as applicant, sought leave to apply for judicial review of a WICB decision, wherein the latter decided that Jamaica would advance to the final of the regional four-day tournament instead of Trinidad and Tobago (Team T&T), arguing that it was irrational, unreasonable and in breach of the tournament rules.[58] More specifically, the TTCB sought an order of certiorari to quash the said decision and to declare that Team T&T was the team to advance to the final.[59]

In brief, when Team T&T played Jamaica in the round robin part of the competition, Jamaica was victorious on what in cricketing terms is known as 'first innings points', having scored more runs than Team T&T when the teams batted in their first of two innings. When they faced off again in the semi-final and there was a 'no result', it became necessary to interpret the competition rules to decide on who would progress to the final.

Although the applicant put forward a passionate argument, most onlookers would agree with counsel for the WICB, who submitted that the rules were 'not ambiguous, but clear and consistent'.[60] Those rules simply stated that the victorious team in the head-to-head clash would progress. The court ruled that the WICB's interpretation of the rule was accurate, making Jamaica the right team to advance to the final.

One notable aspect of this case, which was unfortunately not ventilated to any significant degree, was the application for judicial review. This issue raises the often-vexed question as to

56 Ibid.
57 CV 2011 of 1276, High Court of Justice, Trinidad and Tobago.
58 Ibid [4] per Kokeram J.
59 Ibid.
60 Ibid [9].

whether sporting bodies are amenable to judicial review, given their quasi-public law function.[61] The law in this area is evolving and the rejection of the applicability of judicial review proceedings to sporting bodies, whose relationships are often rooted in private law, is no longer viewed as axiomatic.

Although there have been few cases in the Caribbean like the TTCB/WICB affair that have been heard and determined in court, the potential for legal scholarship based on the diverse issues raised was still significant. Kokeram J, as a useful side note, closed his judgment by encouraging the WICB to develop alternative dispute resolution mechanisms within its administrative structure, to reduce the likelihood of such matters culminating in litigation.

## CONCLUSION

Sports Law academics and practitioners within and outside of the Commonwealth Caribbean will agree that the future of Sports Law is bright. Some advocates have already postulated theories for the development of Olympic Law[62] as well as Global Administrative Law[63] as core tenets of Sports Law in the future. This raises the useful question as to what criteria should be used to determine the legitimacy and validity of this emerging area of the law. In this connection, Davis notes:

> The debate concerning sports is not extraordinary given that questions regarding the substantive legitimacy of new fields of law are quite common. For instance, similar controversy has accompanied the development of other new fields of law such as computer law. In a treatise on computer law, its author acknowledges that computer law is not a body of law, like contract or tort law, but rather is comprised of a collection of legal doctrine. Nevertheless, the author argues that it should be recognized as a specific body of law given that this collection of legal doctrine shares a common feature- 'they all have been created or altered by the emergence of computer technology.'
>
> ... Likewise, before they gained recognition as specific fields of study, bodies of law as diverse as labo[u]r law, health law, and environmental law endured similar fates. Indeed, the process of recognizing a new legal category has been characterized as slow moving because it signifies the occurrence of a fundamental change in society. Inherent in this transformative process is the development of new patterns of behavior and cooperation that seek common acceptance.[64]

Davis' analysis, it is submitted, is a pragmatic approach to the question of the authenticity of a new area of law. Sports Law, he suggests, must endure the same process of slow acceptance as it counterparts, namely labour law, health law and environmental law.

Like the 11 members of a football or cricket team, the following 11 factors have been proposed by Davis, himself citing other authors, as salutary in determining whether an area of law has matured to the point of being commonly accepted:[65]

(1) Unique applications by courts of law from other disciplines to a specific context;
(2) Factual peculiarities within a specific context that produce problems requiring specialized analysis;

61 The question of judicial review and sporting bodies will be addressed in Chapter 2.
62 Alexandre Miguel Mestre, *The Law of the Olympic Games* (TMC Asser Press, 2011).
63 Ken Foster, 'Global Administrative Law: The next step for Global Sports Law' (2011) 19(1) Sport and the Law Journal 45.
64 Timothy Davis (n 20) 7–8.
65 Ibid 8.

(3) Issues involving the proposed discipline's subject matter must arise in multiple, existing common law or statutory areas;
(4) Within the proposed discipline, the elements of its subject matter must connect, interact and interrelate;
(5) Decisions within the proposed discipline conflict with decisions in other areas of the law and decisions regarding a matter within the proposed discipline impact another matter within the discipline;
(6) The proposed discipline must significantly affect the nation's (or the world's) business, economy, culture, or society;
(7) The development of interventionist legislation to regulate specific relationships;
(8) Publication of legal casebooks that focus on the proposed discipline;
(9) Development of law journals and other publications specifically devoted to publishing writings that fall within the parameters of the proposed field;
(10) Acceptance of the proposed field by law schools; and
(11) Recognition by legal associations, such as bar associations, of the proposed field as a separate identifiable substantive area of the law.

A strong case can possibly be made that Sports Law today would receive a passing grade when matched against the foregoing yardstick. Perhaps, there is no better way to conclude this introductory chapter than by referencing Davis' important observation: 'In the end, whether Sports Law is recognized as an independent field of law may turn on the perceptions of those who practice, teach and engage in scholarship related to Sports Law.'[66] This book attempts to add to that ever-growing scholarship.

In the upcoming chapters, our attention will turn to other features of the legal landscape as applicable to sports. Chapter 2 will tackle the topical issue of sports governance, while Chapter 3 will examine the theme of sports contracts. Chapter 4 describes the function of intellectual property law in sport, with particular attention being given to the protection of myriad sporting rights.

Chapters 5 and 6 will address, respectively, the questions of civil and criminal liability in sport, with the latter chapter also covering matters of sporting integrity and ethics. Chapter 7 offers a detailed analysis of doping in sport and the ongoing attempts to regulate the ever-increasing sophistication in the methods used to enhance performance through banned drugs.

The book closes with two final chapters; Chapter 8 considers a number of emerging issues in Commonwealth Caribbean Sports Law, while Chapter 9 offers a brief summary of the book's main arguments and themes advanced by the book. Having captured the panoramic view of the book, our focus is next placed on the important matter of good governance in Caribbean sport.

66 Ibid 9.

# CHAPTER 2

# SPORTS GOVERNANCE

## 2.1 INTRODUCTION

The aim of this chapter is to explore the key factors that contribute to effective sports regulation. The chapter begins by offering a definition of the term 'sports governance', and then proceeds to examine matters like autonomy and self-regulation, juxtaposing these principles against the role played by governments in regulating sport. Intertwined in this analysis will be an overview of the legal status of sports governing bodies together with a discussion of the very interesting question of whether judicial review principles apply to the decisions made by sports federations. The chapter will end by addressing the connected themes of sports dispute resolution and the applicable principles in the sports disciplinary process.

## 2.2 DEFINING SPORTS GOVERNANCE

> Sport governance can be defined as the process by which the board sets strategic direction and priorities, sets policies and management performance expectations, characterizes and manages risks, and monitors and evaluates organizational achievements in order to exercise its accountability to the organization and owners.[1]

King offers, in the foregoing excerpt, one of many definitions of sport governance, with his definition embracing policy-setting, strategic direction, management performance and accountability. The question of accountability, in particular, has taken on added significance within recent years, exemplified in the United Kingdom by the establishment of the 2016 Code for Sports Governance whose purpose is 'to protect the value for money the public receives from investment into sport and maximize the effectiveness of those investments'.[2]

The UK's perspective, then, is that there should be a tangible product that provides evidence that the financial investments made in British sport are not in vain. Value for money is a clear and reasonable expectation, which straddles not only British sport, but increasingly Caribbean sport as well.

Interestingly, it is within the context of public procurement, with emerging legislation like the Public Procurement (Caribbean Community) Act 2017, where core pillars such as transparency, integrity, proportionality, accountability and value for money are promoted. The expectation is that when public money is spent, it can be accounted for. Notably, the very definition of 'public money' in the 2015 Public Procurement and Disposal of Public Property Act[3] of Trinidad and Tobago is wide enough to capture the various national governing bodies (NGBs) for sport in that country.

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1 Neil King, *Sport Governance: An introduction* (Taylor & Francis, 2016).
2 Nick Bitel and Rod Carr, 'A Code for Sports Governance' (Sport England and UK Sport, 2016).
3 Act No 1 of 2015.

### 2.2.1 The Olympic movement: good governance principles

> Good governance implies proper financial monitoring.[4]

This succinct principle, evidently, has proven elusive to many international sports federations, with 2016 media reports suggesting that even the IOC was itself embroiled in allegations of financial impropriety linked to the successful Tokyo bid for the 2020 Summer Olympics.[5] Those developments generated much public interest not only in the aftermath of the Rio 2016 Games, but also against the backdrop of the sports governance taskforce created in late 2015 by the Association of Summer Olympic International Federations (ASOIF).

In the Caribbean context, the month of May 2016 will be remembered as pivotal in the Trinidad and Tobago Olympic Committee's (TTOC) journey to deepen the roots of good governance among its affiliates. The TTOC initiated the creation of a Good Governance Commission offering NGBs affiliated with it the opportunity to endorse various commitments, including term limits for executive committee members and regular constitutional reviews. Such an initiative closely followed the October 2015 *Final Report of the Review Panel on the Governance of Cricket*, the product of a Committee chaired by Professor V. Eudine Barriteau,[6] Pro-Vice Chancellor and Principal of the University of the West Indies, Cave Hill Campus, Barbados. The following excerpt from the report is noteworthy:

> We have reviewed the state of West Indies Cricket, particularly its governance arrangements and conclude that the challenges lie not specifically with the leadership per se, *but with a governance structure that is antiquated* and incapable of addressing the social, economic and cultural realities of cricket in the twenty first century Caribbean ... We firmly believe that this archaic structure continues to support particular types of governance practices that do not recognize that in the production of cricket, the interests of the stakeholders-not only those of shareholders-are equally valid and cannot be ignored. The extant governance arrangements are oblivious to, and/or out of touch with the changes in the Caribbean and the international game and Caribbean societies. The WICB and Territorial Boards have been able to ignore the extent to which their operations lack transparency and accountability because *the current structures do not respect these basic tenets of good governance within their operations.*[7] [Emphasis added].

This was an incisive observation that sought to get to the heart of the difficulties facing West Indies cricket, both on and off the pitch in the last two decades.

The Barriteau Report[8] lucidly made a distinction between the individuals and the structure, describing the latter as antiquated and anachronistic. Indeed, the comment that the

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4 Basic Universal Principles of Good Governance of the Olympic and Sports Movement, Principle 3.2.

5 'Olympics: IOC refuses to comment on Tokyo "payment" claim' *BBC Sport* (London, 11 May 2016) www.bbc.com/sport/olympics/36270719.

6 The other Cricket Review Panel members were Sir Dennis Byron, Mr Dwain Gill, Mr Deryck Murray and Mr Warren Smith.

7 Final Report of the Review Panel on the Governance of Cricket (CARICOM, October 2015) 12.

8 A similar cricket governance review was concluded in Trinidad and Tobago in February 2018, chaired by High Court Judge Vasheist Kokaram with remarkably similar governance concerns and recommendations. Vasheist Kokaram, Sheila Rampersad and Ellis Lewis, 'Report on the Governance of Trinidad and Tobago Cricket' (Independent Review Committee, 22 February 2018). Among other things, the committee considered that:

> the incumbents have a head start at a general election with a possible twelve (12) votes comprising six (6) votes from outgoing officers of the Executive and six (6) votes of the nominated members. Theoretically, taking this argument to its logical conclusion, a case can be made that the incumbents can command a total of twenty seven (27) votes – eleven (11) executive members,

structures did not respect the basic tenets of good governance, especially accountability and transparency, are far from complimentary. It suggests that one of the sports with the most powerful unifying capacity in the region has failed to keep in step with sports governance best practice in the modern era. Arguably, the most contentious element of the report was the recommendation for the immediate dissolution of the Board and the resignation of its members. It is hardly surprising that this proposal was greeted with a lukewarm response by the sitting Board.

The 'antiquated' governance structure that was demonized in the Barriteau report represents a relic of the past that serves little commercial, logistical or operational purpose today. Under this governance structure, which came into effect in 1998, the six constituent territorial boards which comprise CWI, namely Barbados, Guyana, Trinidad and Tobago, Jamaica, the Leeward Islands and the Windward Islands, are automatically guaranteed two directors on the CWI Board of Directors, amounting to 12 directors in total. More recently, a few non-member directors (currently three) have been appointed to the CWI, but power, in its truest sense, still rests with the 12 directors, and the territorial boards themselves, each of which, as shareholders, are allotted two shares and an equivalent number of votes. These territorial boards in turn elect CWI's president and vice-president.

Among the challenges associated with this antiquated form of governance are the fact that a territorial board could only appoint or remove a director from its territory, and therefore, as shareholder, it is unable to influence the general composition of the board, apart from its own appointees. As a natural corollary to this, the territorial boards, and the directors who are appointed by them, are primarily accountable to their respective boards, and arguably represent the interests of their respective boards, rather than the interests of West Indies cricket as a whole. Moreover, in similar vein to the sentiments expressed by David Crawford and Colin Carter in their review of Cricket Australia's governance structure in 2011, this method of governance 'does not even pretend to take the needed skills of the [Board] into account [as each territorial board] appoints its own representative(s) to the [Board] with little consideration for whether their appointees add to, or duplicate, the skills already there'.[9] In other words, it is arguable that under the current dispensation of governance of Cricket West Indies, directors are not chosen for their complementary skills, experience or their capacity to contribute, but rather, based on their loyalty and representation of their respective territorial boards.

More generally, at present, in similar vein to the governance of Cricket Australia prior to its recent reconfiguration, it is possible that each nominated director is, or has been, a serving member of his territorial board, which invariably creates a real conflict of interest. Governance 'best practice' has it that conflicts of interest are undesirable.

All in all, in the absence of a willingness by CWI to voluntarily dissolve, a first, and perhaps conservative, step might be to adopt an approach to governance whereby directors are not

six (6) nominated members and ten (10) affiliates – and need to command twenty nine (29) out of the forty nine (49) available votes in the delegate system to perpetuate their term of office. In other words, incumbents have the task of securing only two (2) votes from the twenty one (21) zonal representatives and six (6) national league representatives to be re-installed. The submission was made to the IRC based on a view that nominated members and affiliates may owe their loyalty to internal political affiliation or other partisan considerations based upon the financial rewards conferred on it during the term of office. The Independent Review Committee agrees with the view that such a system is not consistent with the principle of open participation although the TTCB has attempted to embrace all stakeholders in the organization through the delegate system.

9 David Crawford and Colin Carter, 'A Good Governance Structure for Australian Cricket' (Australia Cricket Board, December 2011).

appointed by individual territorial boards, but rather that candidates be voted on collectively by all territorial boards, and only candidates who have the support of at least two-thirds of the territorial boards be appointed to the CWI Board as Directors. This is because in this modern dispensation of efficient corporate governance, there is a need for an independent and well-skilled board that is clearly accountable to the owners, but which does not confuse its own role with that of management.

That said, from a legal and corporate governance standpoint, an interesting question surfaces as to whether the Review Panel and, at a higher level, the Caribbean Community (CARICOM), could mandate the implementation of the recommendation to dissolve CWI. CWI[10] is an entity whose corporate personality arises from its incorporation in the British Virgin Islands and which comprises of its own directors and shareholders. These are the ultimate decision-makers, who are under no legal obligation to adhere to recommendations made by any external committee, no matter how competent or well-intentioned. The consequence of this reality is that if the shareholders do not initiate such a move through its internal corporate mechanisms, the governance structure of CWI can remain untouched for posterity. Such is the power inherent in an autonomous sporting body.

## 2.3 THE FIGHT FOR AUTONOMY AND SELF-REGULATION

The varying approaches of different governments towards sports governance in their respective countries raise the tendentious question of autonomy and self-regulation among sports governing bodies.[11] The threat of suspension from the world's major sporting events often serves as a disincentive for politically invasive State intervention in the running of sports in individual countries. Indeed, it appears from the Charters of various international governing bodies and, indeed, court decisions, that governmental/State interference of this nature in the private affairs of sporting bodies is not legally justifiable, and therefore will not be countenanced. For example, the ICC Memorandum/Articles of Association provides that:

> Article 2.4 Each Member must at all times:
>
> (D) manage its affairs autonomously and ensure that there is no government (or other public or quasi-public body) interference in its governance, regulation and/or administration of Cricket in its Cricket Playing Country (including in operational matters, in the selection and management of teams, and in the appointment of coaches or support personnel);

(...)

> Article 2.11
>
> (A) A Member may have its membership of the ICC terminated if:
>
> (i) the Board of Directors considers that the Member's breach of its obligations as a Member is sufficiently serious to warrant termination.

Similarly, FIFA's Statutes provide:

> Article 17.1. Each Member shall manage its affairs independently and with no influence from third parties.

10 All references to CWI in this text are deemed to be references to the former WICB.

11 The term 'sports governing bodies' has been used interchangeably with similar expressions throughout the text, such as national governing body, national federation, national sports governing body and national sporting organization.

> Article 14.1. The Congress is responsible for suspending a Member. The Executive Committee may, however, suspend a Member that seriously violates its obligations as a Member with immediate effect.
>
> Article 15.1. The Congress may expel a Member:
>
> b) if it seriously violates the Statutes, regulations or decisions of FIFA.

Moreover, the Olympic Charter provides:

> Article 16.1.5. Members of the IOC will not accept from governments, organizations, or other parties, any mandate or instructions liable to interfere with the freedom of their action and vote.

(...)

> Article 27.9. Apart from the measures and sanctions provided in the case of infringement of the Olympic Charter, the IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered. The IOC Executive Board shall offer such NOC an opportunity to be heard before any such decision is taken.

The seemingly strict approach against governmental interference in the private affairs of sporting bodies does not appear to only apply as a matter of law, but also as a matter of practice. For example, the ICC recently suspended the membership of Cricket Association Nepal (CAN) in circumstances where the National Sports Council of Nepal had formed an ad hoc committee to act in place of a duly elected committee. Following its suspension, the ICC blocked in excess of USD $900,000, which CAN was supposed to have received from the ICC as a cricket development grant since 2014, though, in its absolute discretion and considering that the players should not suffer due to this suspension, it decided that the Nepal cricket teams would be able to continue to feature in ICC events.[12] The ICC also threatened to withhold the 2015 financial distribution due to Sri Lanka Cricket on account of governmental interference, namely the dissolution of the SLC's Board by the Sri Lankan government in 2015 after they had failed to hold timely internal elections, and the installation of a nine-member interim committee at the direction of Sri Lanka's sports minister.[13] More recently, at least one nation's court has had to become involved in resisting governmental interference in the private affairs of sporting bodies, illustrated in *Bangladesh Cricket Board v National Sports Council*,[14] a case in which Bangladesh's National Sports Council (NSC), through a letter, sent an amended constitution to the BCB mandating that the BCB constitution be amended to increase the NSC's directorship in the BCB from one to three, among other things. The court, however, held that these government-directed amendments were void, since, under the BCB constitution, the NSC had no authority to amend said constitution, though it had the authority to approve the BCB's proposed amendments.

That said, a court in Nigeria has taken a different approach, effectively allowing for governmental intervention in the affairs of, in this case, the Nigerian Football Federation (NFF). More specifically, the Nigerian High Court had made an order preventing the duly elected

12 'ICC suspends Cricket Association of Nepal' (*ESPN CricInfo*, 26 April 2016) www.espncricinfo.com/ci-icc/content/story/1003757.html.

13 'Sri Lanka mulls options as ICC threatens to stop funds' (*Emirates24/7*, 17 April 2015) www.emirates247.com/sports/cricket/sri-lanka-mulls-options-as-icc-threatens-to-stop-funds-2015-04–17–1.587647.

14 *Supreme Court Civil Appeal,* 26 July 2017.

president of the NFF, the NFF Executive Committee members and the NFF Congress from running the affairs of Nigerian football, and, in so doing, mandating the Nigerian Minister of Sports to appoint a senior member of the civil service to manage the NFF until the matter was heard in court, without giving any date for such a hearing. The authorities then appointed a person who decided to convene an extraordinary general assembly in violation of the NFF statutes, which ultimately resulted in FIFA suspending the NFF until the court's order was lifted, and the properly elected NFF Executive Committee, the NFF General Assembly and the NFF administration were able to work without any governmental interference in their affairs. A similar approach was taken by FIFA when it suspended the Kuwait Football Association (KFA) in 2015 as it was subject to strong governmental interference because of the interventionist Sports Law of Kuwait.[15]

In light of the foregoing, an interesting question arises as to whether governmental intervention in the affairs of sporting bodies, whether resulting in dissolution of these bodies or a consequence short of this, could give rise to a breach of the right to property and/or the right to freedom of assembly and association. In *Robin Singh and Rajendra Singh (Representatives of The Guyana Cricket Board) v AG of Guyana*,[16] the facts of which are described later in this chapter, although the Caribbean Court of Justice (CCJ) did not go as far as deciding this important question, it nonetheless intimated that a court order may be issued in appropriate circumstances to quash the 'unlawful conduct of public bodies which can very well cause interference with fundamental rights which include rights to property ... and freedom of association under [the Constitution]'.[17]

On the question of the constitutionality of government's intervention in the affairs of sporting bodies, it remains clear that such conduct could in fact be subject to constitutional review if it is of a sufficiently egregious nature. As intimated above, the primary rights in issue include the right to property and freedom of assembly and association, especially where the sports body's assets are taken away or placed in the hands of another agency or the sports body is unilaterally dissolved. A related question arose in the European case of *'Les Authentiks' v France and 'Supras Auteuil 91' v France*,[18] which concerned the dissolution of two Paris Saint-Germain football team supporters' associations, following scuffles in which some of their members were involved, leading to the death of one supporter. In fact, one of the Paris Saint-Germain (PSG) football team supporters' clubs even unfurled an offensive banner in the stands at a French League match, which was broadcast live on television. In issue was the dissolution of the association by a prime ministerial decree. The applicant associations submitted that the dissolution amounted to a disproportionate interference with their rights to freedom of assembly and association. However, the European Court of Human Rights (ECtHR) held that, on the facts, there had been no violation of Article 11 (freedom of assembly and association) of the European Convention on Human Rights (ECHR) as the impugned measures served a 'pressing social need', and were necessary in a democratic society for the prevention of disorder and crime. The court further considered that the offences of which the applicant association was accused were particularly serious and prejudicial to public order, and that, therefore, the dissolution measure was a proportionate response to the aim pursued.

What is clear from this judgment is that should a government intervene in the affairs of a privately-run sporting body resulting in a sufficiently egregious impact on the rights of the body

15 'Suspension of the Kuwait Football Association' (FIFA.com, 16 October 2015) www.fifa.com/governance/news/y=2015/m=10/news=suspension-of-the-kuwait-football-association-2717726.html.
16 [2012] CCJ 2 (AJ).
17 Ibid [30].
18 ECtHR, 27 October 2016.

or indeed its constituent members, a constitutional action may very well be possible. The question then arises as to how else can governments, which provide funding to sporting bodies and their affiliates and provide necessary infrastructural frameworks, ensure that there is accountability and transparency on the part of sporting bodies, if it is that there is a non-interventionist approach countenanced by the courts? One approach might be for international federations such as the ICC and FIFA, amongst others, to impose strict membership conditions upon sporting bodies so as to incentivize them to make requisite good governance changes. Another approach might be for governments to indirectly influence good governance changes on the part of these sporting bodies through withholding funding, just as the ICC and other international federations have done in the past in respect of recalcitrant members. The final approach lies with courts taking a more interventionist, rather than declaratory, approach to their determinations in similar vein to the court in India, which mandated, in *Board of Control for Cricket in India (BCCI) v Cricket Association of Bihar (CAB)*,[19] discussed later in this chapter, the setting up of the Lohda Panel and then asked the Committee of Administrators to implement the recommendations of that panel when the BCCI appeared to flout the court's order. Whether there is appetite for this type of interventionist approach among judges in other jurisdictions, like the Caribbean, is debatable, but certainly remains a possibility in this modern dispensation of sports justice.

## 2.4 SEPARATION OF POWERS

> Sports governing bodies are at the same time executive bodies, which are managing their sport, legislators in setting up 'the rules of the game' but also judges whenever it comes to settling sporting disputes. These manifold dimensions of sports governance are quite unique if compared with other sectors ... Because sports is based on ethics and fair competition, the governance of sport should fulfil the highest standards in terms of transparency, democracy and accountability.[20]

The above observations, made in 2001 by former President of the International Olympic Committee (IOC), Jacques Rogge, remain pertinent close to two decades later. The core principles of accountability, transparency and integrity, often associated with tendering law, should also resonate within the sports industry, especially given the radical commercialization that this sector has experienced over the last three decades.

Since the FIFA scandal exploded in May 2015, although evidently it was brewing over a period of many years, the eyes of stakeholders in football, in particular, and, sport in general, have become fixed on administrators, perhaps in unprecedented fashion. This may very well be the much-needed catalyst for the restoration of good governance in global sport.

## 2.5 CORPORATE GOVERNANCE

> The corporate governance provisions of the company's legislation include a focus on considerations, which include a wide group of stakeholders. The duties and responsibilities of directors and officers must take into account shareholders, employees and even the community in which the company operates.[21]

19 Civil Appeal No 4235 of 2014.
20 Jacques Rogge, 'The Rules of the Games' (Europe's first conference on the Governance of Sport, Brussels, 26–27 February 2001).
21 Suzanne Ffolkes-Goldson (ed), *Commonwealth Caribbean Corporate Governance* (Routledge, 2015) 34.

With an increasing number of national governing bodies being accorded legal personality,[22] the limbs of company and corporate law have spread into the field of sports through the tentacles of corporate governance. It is in this light that Goldson's observations above assume relevance in a Caribbean context. Many Commonwealth Caribbean territories have enacted Companies Acts, whose remit has reached the terrain of sports governing bodies, which have become incorporated under said legislation.

## 2.6 THE LEGAL STATUS OF CARIBBEAN SPORTS GOVERNING BODIES

> It is trite law, as stated in *John v Rees*, that a club or an association 'if unincorporated is not an entity separate from its members' and so cannot sue or be sued. Nevertheless, it is also trite law, as stated in *Hanchett-Stamford v Att-Gen*, 'that the members for the time being of an unincorporated association are beneficially entitled to 'its' assets, subject to the contractual arrangements between them,' so that a member cannot sever his share and claim assets from the trustees unless the association is dissolved under its constitution: his share must accrue to the other members on his death or resignation.[23]

The above comments, made by Chang CJ (Ag) and cited by the CCJ *in Robin Singh and Rajendra Singh v The Attorney-General of Guyana*, were made against the backdrop of a challenge to the legal status of the primary cricketing bodies in Guyana. At the time of the case, the following entities were all unincorporated associations, although the legal personality of the first four bodies was changed following the passage of the 2014 Guyana Cricket Administration Act:[24]

(1) the Guyana Cricket Board (GCB)
(2) the Berbice Cricket Board (a GCB member)
(3) the Demerara Cricket Board (DCB) (a GCB member)
(4) the Essequibo Cricket Board (a GCB member)
(5) the East Coast Cricket Board of Control (a DCB member)
(6) the Georgetown Cricket Association (a DCB member)
(7) the East Bank Cricket Association and (a DCB member)
(8) the West Demerara Cricket Association (a DCB member).

The scenario in Guyanese cricket back in 2011, to a large degree, still reflects the current reality of Commonwealth Caribbean sport. However, as sporting bodies in the region have evolved over time, more and more of them have elected to change their legal status. Most NGBs in the region have their roots in volunteerism, with not a few sporting organizations becoming well-known for their 'car trunk' offices. The idea of a few volunteers assembling for the purpose of promoting their shared interest in sport is, however, not in any way unique to the Caribbean.

Generally speaking, these administrative pioneers of their particular sports are able to gather sufficient support so that a core membership group can be formed. Soon afterwards, it is not irregular for a constitution to be drafted, oftentimes by a lay person, since the costs of retaining legal counsel can be prohibitive for a fledgling entity. The evolution of the growing sports body, however, tends to be manifested by increasing numbers and, in some instances, by

22 This is discussed in further detail later in the chapter.
23 *Robin Singh and Rajendra Singh v Attorney-General of Guyana* [2012] CCJ 2 (AJ) [3].
24 Sections 3(1) and 9(1) Guyana Cricket Administration Act, 2014.

increasing competitions. Yet, the progression does not usually extend to matters touching and concerning governance structures and legal status. The immediate implication from a legal standpoint is that the law of unincorporated associations has taken on greater significance in the region, in a context where many NGBs are unaware of the relevant considerations.

However, a great opportunity exists in this regard, given the strong foundation of company law in the Caribbean, complemented by some countries that have enacted international business companies legislation to back up the respective Companies' Acts. As it is beyond the scope of this text to engage in a detailed analysis of company legislation in the Caribbean, the reader is referred to more specialist publications in this field.[25]

### 2.6.1 Regional examples: the Olympic movement

Within the region, a number of prominent sporting bodies have acquired legal status through private Acts of Parliament or, as alluded to above, via the applicable companies legislation. At the level of the Olympic movement, it was the Saint Kitts and Nevis Olympic Committee (Incorporation) Act 2008 that established that country's national Olympic committee (NOC). Section 2 of the 2008 Act uses language that is typical of these types of statutes where it states that the Saint Kitts and Nevis Olympic Committee is 'hereby created a body corporate with perpetual succession and a common seal, and capable of suing and being sued in its corporate name'.

The legislation, in section 3, goes on to identity some of its major objectives, including:

(1) Affiliation with the International Olympic Committee;
(2) The enforcement of the Olympic Charter[26] in St Kitts and Nevis;
(3) The propagation of the fundamental principles of Olympism at the national level;
(4) The adoption and implementation of the World Anti-Doping Code; and, very significantly,
(5) The preservation of its absolute autonomy, while resisting all pressures of a political, religious or economic nature which could become a hindrance to compliance with the Olympic Charter.

The 1974 Bermuda Olympic Association Act created the NOC for that country. This legislation stipulates aims similar to those of its Kittitian counterpart, such as affiliation with and recognition by the International Olympic Committee and the Commonwealth Games Federation, among others.[27] The 1974 Act also stipulates that it should be completely independent and autonomous and that it should resist all political religious and commercial pressures.[28] Similar language can be found in the Trinidad and Tobago Olympic Committee (Incorporation) Act 1995, which set up the national Olympic committee (NOC) of the twin-island Republic.

Each of these incorporating statutes contain the common features of affiliation with the IOC, thus creating a contractual relationship, as well as the preservation of autonomy and the enforcement of the Olympic Charter within the boundaries of that sovereign nation.

25 Andrew Burgess, *Commonwealth Caribbean Co Law* (Routledge, 2013).
26 The Olympic Charter describes itself as the Codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee and further, that it governs the organization, action and operation of the Olympic movement and sets forth the conditions for the celebration of the Olympic Games (Introduction to the Olympic Charter, September 2017 edn). In short, the Olympic Charter serves as the constitution of the Olympic movement.
27 Section 3(1)(a) Bermuda Olympic Association Act, 1974.
28 Ibid section 3(2)(b).

### 2.6.2 The role of governments

Discussions about sporting autonomy often lead to a distinction being drawn between government involvement and government interference. It is a thin line, but there is a line nonetheless. There is arguably no other more prominent forum where this issue arises than within the Olympic movement, where there is fierce protection of the autonomy of the independence of national Olympic committees. The suspensions within the last decade of both the Indian Olympic Association and the Kuwait Olympic Committee are just two examples of the strict implementation of rule 27.6 of the Olympic Charter, which states that the National Olympic Committees 'must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter'. The NOC's mandate, then, is to resist, among other things, political pressures. The Olympic Charter does not define exactly what 'political pressure' is, but those familiar with the sports industry would suggest that it involves undue and inappropriate interference by politicians, especially ministers responsible for sport, in the day-to-day running of NGBs. Any attempts by ministers to influence the outcome of NGB elections, for instance, is seen as the most blatant expression of political interference.

In the Caribbean context, with small populations and limited expertise in sports administration, a potential conundrum exists. In countries like St Lucia and Antigua and Barbuda, for example, it has been the practice that persons have simultaneously served on the Executive Committees of the respective NOCs or Commonwealth Games Associations (CGA) while simultaneously holding governmental[29] or parliamentary positions.[30] The International Olympic Committee has never flagged this scenario as a cause for concern, the implication being that, notwithstanding the seemingly innate conflict of interests, in both territories the boundary lines have not been crossed.

It is not only within the Olympic movement that the matter of autonomy must be analysed and weighed, from a Caribbean perspective. Indeed, a number of territories have established boards to regulate the sport of boxing, some of them being creatures of statute. For example, the Trinidad Boxing Board of Control (TBBC) was established under the 1933 Boxing Control Act, apparently as a result of the death in December 1932 of a Colombian boxer during a fight held in Port of Spain, Trinidad. The response was parliamentary intervention in an effort to allay fears within the fraternity that there was insufficiency of regulation in place to address, among other things, injuries sustained by boxers.

It is no secret that the sport of boxing has been considered an enigma from a legal perspective in view of the fact that the very objective of each participant is to make sufficient bodily contact that the opponent is either knocked out or simply unable to continue fighting. Outside of combat sports, this would usually constitute criminal and/or civil assault and battery, at the very least. It is no surprise, then, that an entire book has been written on this theme, appropriately labelled, *The Legality of Boxing*, by Jack Anderson.

The legality question aside, the ongoing challenge faced by Caribbean countries with boxing boards is that a territorial battle continues to wage between professional and amateur boxing. The matter has been exacerbated by the birth of professional boxing under the umbrella

29 Terry Finisterre, 'Fortuna Belrose back as Commonwealth Games VP' (*St Lucia News Online*, 6 September 2015) www.stlucianewsonline.com/fortuna-belrose-back-as-commonwealth-games-vp/.

30 Duncan Mackay, 'Antigua and Barbuda Olympic Association President given senior Government role' (*Insidethegames.biz*, 18 August 2014) www.insidethegames.biz/articles/1021979/uyana-and-barbuda-olympic-association-president-given-senior-government-role.

of the International Amateur Boxing Association, better known by its French acronym, AIBA[31] and now carrying the name the International Boxing Association. Even the removal of the word 'Amateur' from the original AIBA acronym is indicative of the cross-fertilization of AIBA's expanded mandate.

Another sport that regularly throws up the matter of autonomy, both globally and in the Commonwealth Caribbean, is football. Countries like Guatemala, Kuwait, Nigeria, Botswana and Iraq have all felt the brunt of FIFA's no-nonsense approach to outside interference.[32] In the region, the suspension by FIFA of the Football Federation of Belize (FFB) back in 2011 was noteworthy, especially since the Supreme Court litigation involving the FFB raised a number of interesting governance questions. This case, *Football Federation of Belize v National Sports Council*,[33] accordingly warrants closer scrutiny.

### *2.6.2.1* Football Federation of Belize v National Sports Council (NSC)

**Facts**

The FFB stated that the decision of the NSC not to register it as a sporting association pursuant to section 19 of the Sports Act, Chapter 46, was arbitrary, discriminatory and unreasonable given that other sporting bodies like the Cycling Association, the Karate Association, the Boxing Association, the Dominoes Association and the Chess Association were able to use the NSC's facilities although they were not yet registered with the NSC.[34]

The FFB's application was for administrative orders, including constitutional orders that, *inter alia*, the NSC had breached the FFB's rights to the equal protection of the law and to equality before the law, which were enshrined in the Constitution of Belize, as well as:

(1) An interim injunction prohibiting the National Sports Council (NSC) from itself prohibiting the FFB from using the NSC's sporting facilities until the trial and determination of the current claim;

(2) An interim injunction prohibiting the Minister of Sports from himself prohibiting the FFB from representing Belize in any local or international competition or in any other forum for football until the trial and determination of the claim;

(3) An order directing the Commissioner of Police to provide police security at the FIFA qualifying match between Belize and Montserrat to be played in Belize at the FFB Sporting Complex in Belmopan at the FFB Headquarters on or before 11 July 2011 and at another FIFA qualifying match to be played in Belize before the trial and determination of the claim.

The FFB also argued that it had a legitimate expectation, which they submitted was breached by the NSC.

**FFB's legal submissions**

With respect to the actions of the NSC, the FFB submitted that the NSC could only refuse to register a sporting organization under section 22 of the Sports Act. Section 22 states:

31 Association Internationale de Boxe Amateur.

32 'FACTBOX-FIFA suspensions caused by political interference' (*Reuters*, 23 November 2016) www.reuters.com/article/uyana-rohingya-malaysia-soccer-backgro/factbox-fifa-suspensions-caused-by-political-interference-idUSLAN1DO3H0.

33 BZ 2011 SC 45.

34 Ibid [2(k)].

> 22. The Council may refuse registration, or suspend or cancel the registration of a sporting organization –
>
> (a) for failing or neglecting to remedy any malpractices, misconduct, or irregularities on the part of the office-bearers or members of such organizations on being notified to do so in writing by the Council within such time as may be specified in such notification;
>
> (b) for inactivity, non-co-operation or obstruction in the implementation of the policies of the Council; or
>
> (c) for failing to carry out their duties and functions.

The FFB added that, to be lawful, any refusal to register a sporting organization should not be arbitrary and had to observe the rules of natural justice and fairness (*audi alteram partem*). Useful reference was made in this regard to *Board of Education v Rice*,[35] citing Lord Loreburn LC who stated that the Board of Education 'must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything'.[36]

With respect to the actions of the Minister of Sport, the FFB contended that the minister was under a duty to fairly listen to it and to the NSC *before* making the decision that the FFB was not authorized to be Belize's representative for the sport of football. Relying on *Council for Civil Service Union v Minister for Civil Service*,[37] the FFB added that the minister's failure to so act contravened the basic principles of natural justice which are encapsulated in sections 3(a) and 6(1) of the Belizean Constitution.[38]

## NSC's legal submissions

The NSC argued, as a preliminary point, that the FFB's non-compliance with the Public Authorities Protection Act meant that the court actually had no jurisdiction to hear the application. Additionally, they contended that an alternative remedy was available to the FFB and that the latter's claim should have been brought by way of appeal to the National Sports Tribunal pursuant to section 21(2) of the Sports Act, which states that: 'Any person who is aggrieved by any decision or action of the Council, may appeal to the Sports Tribunal against such decision or action.' Notably, the NSC also suggested that the FFB's claim ought to have been brought by way of judicial review.

## The key issues for the court's determination

(1) Whether the FFB should have utilized the procedure prescribed by statute;

(2) Whether the grounds of equal protection of the law raised by the FFB are subject to constitutional redress by way of declaration or judicial review; and

(3) Whether notice under the Public Authorities Act should have been served on the respondents.[39]

## The court's ruling

In so far as the first issue was concerned, Hafiz J held:

> 27. I do agree with the respondents that the general rule is that the courts encourage the use of alternative administrative remedies as shown in the Swati[40] case. However, there are some cases

35 [1911] AC 179.
36 *Football Federation of Belize v National Sports Council*, BZ 2011 SC 45 [8].
37 [1985] AC 374, 408.
38 *Football Federation of Belize v National Sports Council*, BZ 2011 SC 45 [11].
39 Ibid [25].
40 *R v Secretary of State for the Home Department ex p Swati* [1986] 1 All ER 717.

> where the Court will exercise jurisdiction notwithstanding that statute has provided an alternative form of redress ...
>
> 28. The Sports Act has provided an alternative form of redress by way of appeal but does not say that it prohibits recourse to the court ...
>
> 30. I have carefully considered the arguments on all sides and in my view, the Sports Council would not be in a position to hear legal arguments for an injunction, especially a mandatory injunction as is being sought by the FFB and for that reason I think that *the court is the proper forum*. [Emphasis added]
>
> Further, in the grounds of their application, FFB raises issues of legitimate expectation and violation of rules of natural justice which are alleged infractions of public rights and as such, it is my view that such issues cannot be properly considered by the Sports Council or Sports Tribunal. As such, I find that FFB need not exhaust the alternative remedy.

In short, the court looked at the complexity of the issues raised and the alleged breaches and held that an internal sports tribunal could not be saddled with the responsibility of resolving matters of such a magnitude. Notwithstanding the statutory procedure outlined in the Sports Act of Belize, these circumstances warranted the exercise of the court's jurisdiction. It is not the first time that a regional court believed that it was more prudent and necessary for the effective administration of justice to allow the resolution of a sports-related dispute to be kept within the confines of the courtroom. In *Thema Yakaena Williams v Trinidad and Tobago Gymnastics Federation*,[41] for example, Seepersad J similarly held that the High Court was the better forum to resolve the Olympic selection dispute involving the claimant's non-selection for the Rio 2016 Summer Olympics. In that case, the defendants sought a stay in the High Court proceedings in order to commence arbitral proceedings as an alternative route to resolving the dispute. Considering the issues to be of national importance and expressing concerns about the independence and impartiality of the dispute resolution processes of the Trinidad and Tobago Gymnastics Federation, Seepersad J insisted that 'the instant matter *shall proceed before this Court*' (emphasis added).

With regards to the second issue, Hafiz J disposed of the question in the following manner:

> 34. FFB raised issues of legitimate expectation and breach of principles of natural justice in their application which is also within the realm of judicial review. In the case of *Council for Civil Service v Minister for Civil Service* ... Lord Diplock identified three grounds on which applications for Judicial Review can properly challenge decisions of public bodies, namely, illegality, irrationality and procedural impropriety. Also judicial review has been approached on the bases of breach of natural justice, abuse of discretion and abuse of jurisdiction. Hence the reason I am convinced that the claim by FFB should be Judicial Review proceedings. FFB should therefore proceed by way of an Application for Permission to apply for Judicial Review.

The court viewed the issues raised by the FFB as falling squarely within the ambit of judicial review, especially since the matters raised touched and concerned natural justice principles, including the doctrine of legitimate expectations. The National Sports Council, established as a body corporate[42] under section 5(1) of the Sports Act of Belize, by virtue of the ministerial appointments of the council's members, appears to have been construed as a public body performing a public law function.

Regarding the third issue, Hafiz J agreed with the respondents. He found that the FFB sought to avoid seeking permission to apply for judicial review and to serve notice pursuant to section 3(1) of the Public Authorities Protection Act. The court reminded the parties of the general rule that where no notice is served under the said Act in a matter that should proceed

41 Claim No CV2016–02608.
42 The legal status of sports governing bodies in the Caribbean will be addressed in the next section.

by way of judicial review proceedings, the court will dismiss the action.[43] Accordingly, the application by the FFB for the injunction was dismissed.

The *Football Federation of Belize* case turns out to be a very useful case as Commonwealth Caribbean Sports Law continues its evolution. The overlapping legal issues, including autonomy, governance, dispute resolution, judicial review, natural justice, legitimate expectation and equitable remedies are a reminder of the synergy between sport and the law. Throughout the rest of this book, this growing nexus will become even more obvious.

Another regional case, a decision of the Caribbean Court of Justice, which only incidentally concerned questions of sporting autonomy in the face of potential political interference was *Robin Singh and Rajendra Singh (in their capacity as representatives of the Guyana Cricket Board) v The Attorney-General of Guyana*.[44] This case primarily dealt with the jurisdiction of the Court of Appeal of Guyana to hear an appeal from the Full Court, and involved a remarkable discussion on the interpretation of various pieces of Guyanese legislation, including the Court of Appeal Act,[45] the Civil Law Act,[46] the Criminal Law Procedure Act[47] and the Caribbean Court of Justice Act.[48] From a sports governance perspective, the pertinent matter that arose for consideration was the intervention of the then Minister for Culture, Youth and Sport writing to the Secretary of the Guyana Cricket Board, compelling the latter to 'cease to act as, or on behalf, or hold [himself] out to be a representative or agent or an officer of the Guyana Cricket Board'.[49] This controversial move had as its catalyst the ruling of Chang CJ (Ag) in *Angela Haniff v Ramsay Ali*,[50] in which the learned judge made the following pronouncement:

> In the present state of affairs, while a legislative structure for the administration of cricket is desirable, there may be the immediate need for the Minister responsible for sports to impose his executive will in the national interest until such time as [P]arliament can provide a more permanent welfare structure. The Minister can take immediate interim action.[51]

Indeed, the minister responsible for sport felt empowered by Chang CJ's recommendation and proceeded to appoint an Interim Management Committee (IMC) to assume the administration of cricket in Guyana in place of the Guyana Cricket Board. Nothing was said in the CCJ's ruling about the consequences of this decision and perhaps not surprisingly, because the issue of sporting autonomy was not the legal question being ventilated before the court. Yet, in the wider Caribbean sporting community, the IMC was a major talking point,[52] especially since the committee was led for a time by West Indies cricket legend, Sir Clive Lloyd.[53]

The response of the International Cricket Council (ICC), the sport's world governing body, was expected. In a press release, the ICC stated that it condemned 'government interference in the strongest possible terms', reaffirming 'the principle of non-interference and that the only legitimate cricketing authority is that recognized by the West Indies Cricket Board'.[54] The

43 *Football Federation of Belize v National Sports Council*, BZ 2011 SC 45 [35].
44 [2012] CCJ 2 (AJ).
45 Chapter 3:01.
46 Chapter 6:01.
47 Chapter 10:01.
48 Act No 16 of 2004.
49 Excerpt from a letter dated 23 December 2011 quoted at paragraph 7 of the CCJ's ruling in *Robin Singh and Rajendra Singh v Attorney-General of Guyana* [2012] CCJ 2 (AJ).
50 No 319-W of 2011.
51 *Robin Singh and Rajendra Singh v Attorney-General of Guyana* [2012] CCJ 2 (AJ) [6].
52 'Interim committee to run Guyana Cricket Board' (*Stabroek News*, 25 August 2011) www.stabroeknews.com/2011/news/guyana/08/25/interim-committee-to-run-guyana-cricket-board/.
53 'ICC condemns Guyana government intervention' (*ESPN CricINfo*, 1 February 2012) www.espncricinfo.com/ci-icc/content/story/551774.html.
54 Ibid.

ICC's statement, then, confirmed two well-established principles of good governance in sport, namely, the prohibition of political or governmental interference and, secondly, respect for the contractual relationship that exists between sports governing bodies and their member federations. The latter issue is at the core of the pyramidal structure of sport and has both contractual and constitutional implications, as noted by Adam Lewis QC and Jonathan Taylor QC:

> The fact that the legitimacy and authority of a sports governing body under English law is derived entirely from the consent of its members also has other important 'constitutional' consequences. First and foremost, because this regulatory structure is a private arrangement between the governing body and its members, those aggrieved by the actions and decisions of a governing body may not invoke the judicial review mechanism that is available in English law to challenge the actions and decisions of public bodies; rather a private law cause of action must be identified and private law remedies apply. Furthermore, the rules issued by the governing body in the exercise of its regulatory authority are not to be construed strictly, as if they were akin to Acts of Parliament; rather, a purposive approach is to be taken to construction of the 'contractual' rule-book, considering the context and the objectives behind the rules. Thirdly, because a sports governing body is not an organ of the state, exercising public powers, it is not bound (at least directly) by laws (including human rights laws) constraining the exercise of public powers.[55]

The question of the amenability of sports governing bodies will be addressed in greater detail below, but it is worth stating here that the realities lucidly identified by Lewis and Taylor have shaped the regional and global administration of modern-day sport. International sports federations, continental sports federations, regional sports federations and national sports governing bodies are contractually connected to each other by mutual consent and, within the various membership structures, they have agreed to be bound by the constitution, by-laws, statutes, rules and/or regulations of their respective parent bodies. Lewis and Taylor also note that this 'derivation of authority through consent is a strength for the national governing body, but also an important constitutional limitation, because its authority depends on it retaining the loyalty of all its members'.[56]

Clearly, these matters were not live questions to be addressed by the CCJ in *Singh and Singh*, but the case still offered very helpful legal guidance on other well-established arms of the law, including the law surrounding unincorporated associations.

## 2.7 SPORTS GOVERNING BODIES AND JUDICIAL REVIEW

> Sports governing bodies' regulatory actions are reviewed by the courts on grounds that arise out of the control exercised over the sport by those bodies, independently of any other cause of action. The Court of Appeal's approval of Richards J's decision in *Bradley v Jockey Club*, and the cases that have followed, indicate that two broad propositions now summarize the extent of and basis for these grounds of review.[57]

Lewis QC et al go on to make the point that one of the propositions is that sports governing bodies, although not public bodies, carry out a regulatory function that is akin to that of public bodies. The second proposition is hinged on the presence or absence of a contract, with the latter position giving rise to relief by way of a declaration or injunction.[58]

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55 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Professional, 2014) [A 2.15], 72.
56 Ibid [A 2.14], 72.
57 Adam Lewis, Jonathan Taylor, Nick De Marco and James Segan, *Challenging Sports Governing Bodies* (Bloomsbury Professional, 2016) 57.
58 Ibid.

With the increasing commercialization of sport, NGBs have clearly adopted new and greater responsibilities in the administration of sport. The extent of this expanded role is at the heart of the ongoing debate as to whether sports governing bodies should be amenable to judicial review. The *Jockey Club* cases in the United Kingdom[59] have offered practical legal direction, though not purporting to fully and finally resolve the question.

In the Caribbean context, a number of regional courts have made their own pronouncements on this question, with general consistency in outcome. In *La Clery Football League v St Lucia Football Association*,[60] for example, Cottle J offered useful guidance in respect of the question of whether the decisions of the St Lucia Football Association were subject to judicial review. His response to that question was, in part:

> Mr Fraser cited the case of *R. v Panel on Take-Overs and Mergers, ex parte Datafin* [1987] 1 All E.R. 563. That case concerned a self-regulating unincorporated association. The panel on Take-Overs had no statutory, common law or prerogative powers. The Court of Appeal held that to answer the question the Court was not confined to considering the source of the panel's powers and duties but could also look to their nature. Accordingly, since the duty imposed on the panel was a public duty and the panel was exercising public law functions, the Court had jurisdiction to entertain an application for judicial review of the panel's decision.
>
> I do not believe that the situation of the St Lucia Football Association is analogous. The panel on Take-Overs, while it had no coercive powers, could refer an offending party to a regulatory body which did have coercive powers. The St Lucia Football Association is a private body. They are entitled to arrange their internal rules and regulations as they wish. They operate by consensus. I do not consider that the decisions of the St Lucia Football Association are subject to judicial review.[61]

Cottle J saw the matter as a straightforward one. The St Lucia Football Association was a private body whose rules and regulations were drafted internally and whose decision-making was a product of the consent and consensus of its members. As a result, its decisions were not amenable to judicial review.

Similarly, in *Barbados Cricket Association v Pierce*,[62] the Court of Appeal rejected the Wanderers Cricket Club's reliance on the *Datafin* case, noting that,

> The *Datafin* case cannot assist Wanderers. The nature of the functions of the BCA which are under challenge in this case are in no way comparable to those of the Panel in that case. The dispute in this case is about the interpretation of the rules of the Fire Cup competition and whether Wanderers should go into the quarter finals of the Competition. Moreover the source of BCA's power to determine the dispute is not the private Act which incorporated the association and made consequential provision but the rules of the association of which the cricket clubs are members and which enabled them to participate in the Fire Cup competition. A more apt comparison would be between the BCA and the Jockey Club of Great Britain at the time of the latter's dispute with the Aga Khan as reported in R. *v Jockey Club, ex p. Aga Khan* ... the headnote to which states, in part ...:-' ... the Jockey Club was not in its origin, its history, its constitution or its membership a public body, and its powers were in no sense governmental. Furthermore, the powers which the Jockey Club exercised over those who, like the applicant, agreed to be bound by the rules of racing derived from the agreement of the parties and gave rise to private rights on which effective action for private law remedies such as a declaration, an injunction and

59 For example, *R v Disciplinary Committee of the Jockey Club ex p Aga Khan* [1993] 1 WLR 909 and *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207.
60 LC 2008 HC 10.
61 Ibid [7].
62 BB 1999 CA 8.

> damages could be based without resort to judicial review. In those circumstances the disciplinary committee's decision to disqualify the applicant's horse was not susceptible to judicial review.'

Having, thus, cited *ex p Aga Khan*,[63] the Court of Appeal summarized its findings:

> Notwithstanding the exclusive control which the Jockey Club exercised over horse racing in Great Britain, it was held not to be amenable to judicial review. In contrast, the BCA has never had sole control over cricket in Barbados, it being common knowledge that for many years another body (The Barbados Cricket League) has organised cricket competitions in Barbados concurrently with the BCA: indeed the BCA's very Act of incorporation had and has built-in restrictions on its powers and authority, in that section 4 provides *inter alia* that its bye-laws, ordinances, rules and regulations 'shall not in any manner affect any other person or persons but those who are or may become members of the association.' It follows, a fortiori, that the BCA is likewise not amenable to judicial review.[64]

The Court of Appeal, then, in its concluding remarks looked at two factors. Firstly, it considered that the lack of exclusive control of cricket in Barbados by the BCA militated against it being captured by the boundary lines of judicial review. The second factor was the precise wording of the 1933 Barbados Cricket Association Act (BCA Act), which established the BCA as a body corporate. Section 4 of the BCA Act made it clear that the governance documents of the BCA were applicable only to its members. This endorsed the private nature of its operations and made the question as to the applicability of judicial review an easy one to resolve.

Incidentally, an interesting ancillary question in *Pierce*, which remained unaddressed by the court, was the issue as to who is the *bona fide* affiliate in Barbados of Cricket West Indies (CWI), given the generally accepted rule of one national governing body per sport per country. Given its incorporating legislation as well as the listing of the BCA on CWI's website as its member association, the BCA appears to hold that position undisputedly. However, to the unfamiliar onlooker, the existence of both the BCA and the Barbados Cricket League (BCL) could have been problematic from a governance point of view. Notably, in *Gittens v The Barbados Cricket League*,[65] where an application was made to review the decision of the BCL's Complaints Committee, Kentish J spoke succinctly to the BCL's oversight function noting that 'it would be in the interest of good governance of the matches if the Rules were revised to fill obvious omissions therein in order to achieve greater clarity'.[66]

Kentish J's comments only addressed the competitions run by the BCL and nothing more. It therefore appears to be the case in Barbados that although the BCA is the national governing body for cricket, the BCL has oversight of certain cricket competitions there. It is conceivable, then, that the BCA has to sanction all competitions overseen by the BCL. The close terminology is unfortunate and potentially quite confusing, but not uncommon in sport, when one thinks, for instance, of the existence of the banned Indian Cricket League (ICL), which actually existed before the very popular Indian Premier League (IPL) was born or, in a regional context, the co-existence of both the Trinidad and Tobago Karate Union (TTKU) and the Trinidad and Tobago Karate Federation (TTKF).[67] It is usually the case, though, that on the ground, the relevant affiliates, athletes, clubs and other stakeholders are clear in their minds as to who holds NGB status in a particular country.

63 [1993] 2 All ER 853 at 854.
64 BB 1999 CA 8.
65 BB 2006 HC 4.
66 Ibid [21].
67 The TTKU is the recognized NGB for karate in Trinidad and Tobago and is duly affiliated to the World Karate Federation and the Trinidad and Tobago Olympic Committee.

Lewis, Taylor, De Marco and Segan[68] have concluded that, as far as English law is concerned, the question of the amenability of sports governing bodies to judicial review is, for now, a closed one. They have proposed that the decision in *R (Mullins) v Appeal Board of the Jockey Club (Jockey Club as an interested party)*[69] has 'laid to rest for the present the argument that a sports governing body's decisions are amenable to public law judicial review in the English courts'.[70] The High Court in *Mullins* was as lucid as it was brief on this particular question, concluding that '[r]eview of the disciplinary decisions of the Jockey Club and its organs is a matter for private law, not public law.'[71]

By contrast, the Indian courts have seemingly taken a sharply interventionist approach to the private affairs of sporting bodies, such as the Board of Control for Cricket in India (BCCI), suggesting that cricket in India is a 'public good' and that therefore the BCCI is amenable to judicial review. In *Board of Control for Cricket in India (BCCI) v Cricket Association of Bihar (CAB)*,[72] the Appellate Court, apart from asserting its jurisdiction to review the decisions of the BCCI, took the further interventionist step of mandating the setting up of the Lohda Panel to review the BCCI's governance structure and make recommendations for improvements, and later temporarily installed a Committee of Administrators (CoA) to manage the affairs of the BCCI after it refused to implement certain recommendations made by the Lohda Panel relating to age caps, tenure restrictions, one-man-one-post and one state-one-vote, among others. The approach of the court in this case flies in the face of the traditional declaratory theory of law encapsulated in the discussion above, but, according to the court, this approach was justified on the basis that cricket in India is a 'public good':

> The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India have allowed the Board to select the national team which is then recognized by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards ... apart from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organization or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to take over the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a non-government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action.[73]

Among other things, the court could be taken to be suggesting that if the State takes action to regulate the affairs of a sporting body short of depriving or diluting the body's monopoly in the particular field, such conduct may be justified on the basis of the public importance attributed

68 Adam Lewis, Jonathan Taylor, Nick De Marco and James Segan, *Challenging Sports Governing Bodies* (n 57).
69 [2005] EWHC 2197.
70 Adam Lewis, Jonathan Taylor, Nick De Marco and James Segan, *Challenging Sports Governing Bodies* (n 57) 62, [7.10].
71 [2005] EWHC 2197 [45].
72 Civil Appeal No.4235 of 2014.
73 Ibid.

to the sport, more specifically cricket in the Indian context. Interestingly, the International Cricket Council (ICC) itself appears to be supportive of the court's intervention, noting that the court could be trusted to bring necessary governance changes to the BCCI, though under the ICC rules, the government would not be permitted to intervene in the affairs of the BCCI.[74]

## 2.8 SPORTS DISCIPLINARY PROCEEDINGS: THE RIGHT TO BE HEARD

The above discussion on judicial review has as one of its corollaries the question of procedural fairness and the broader issue of natural justice. The jurisprudence in this area is broad and wide and easily extends beyond the sporting arena. Yet, its prevalence in the sports industry is striking and has brought into view the governance practices of many oversight bodies in this sector. Three Caribbean cases stand out in this regard and will be considered in some detail below, but it suffices to note here that although judicial review of the actions of sporting bodies is not possible, courts appear to be willing to countenance a private law claim against a sporting body either based on an alleged breach of contract or through an action invoking the supervisory jurisdiction of the court. In relation to the former, an aggrieved party who is in a contractual relationship with a sports body may bring an action seeking a declaration, injunction or compensation in circumstances where the body is in breach of its contract by failing to uphold its own rules or procedures or where said rules or procedures are unfair, erroneous or an abuse of discretion or, indeed, a breach of natural justice.[75] In *Jones v Welsh Rugby Union*,[76] for example, a professional rugby player was held to have been denied a fair hearing in circumstances where, after being sent off the field for fighting during a game, the Disciplinary Committee conducted a hearing in which the player was denied the opportunity to examine video evidence of the incident since the video was shown in private, thus precluding the player from giving his version of the events that transpired. The court quashed the decision of the Disciplinary Committee on the basis that the failure to afford the player a fair hearing amounted to a breach of contract.

In relation to the latter cause of action, only a declaration or injunction, but not compensation, can be sought in circumstances where, despite the non-existence of a contract between the parties, the sporting body exercises a significant degree of control over the sport in question and its decision(s) has had a real adverse impact on the aggrieved person's ability to earn a living from his chosen sport. Although the court's supervisory jurisdiction is, as its name suggests, only supervisory and not appellate in nature, the court has the power to review the procedure followed by the sports body in question or the decision arrived at in order to determine whether it was fair, or erroneous in law or unreasonable.[77]

It would thus appear that although courts have resisted calling actions brought against sports bodies as actions for 'judicial review', it is apparent that the private law proceedings described above strongly mirror an action for judicial review. In fact, sports bodies may now be subject to private law remedies in circumstances where they have acted outside the scope

74 'ICC Welcomes Supreme Court-Nominated BCCI Representatives For Dubai Meeting' (*Outlook India*, 1 February 2017) www.outlookindia.com/website/story/icc-welcomes-supreme-court-nominated-bcci-representatives-for-dubai-meeting/297778.

75 *Diane Modahl v British Athletic Federation* [2001] EWCA Civ 1447. The court recognized that an action can be brought against a sports body for breach of contract, especially where the rules of natural justice were breached, but noted that, on the facts, the claimant was afforded an appeal after being banned from competing as an athlete after failing a drugs test which she said was faulty, and there was accordingly no breach of the rules of natural justice.

76 (unreported) High Court (Law Com D), 27 February 1997.

77 *Bradley v Jockey Club* [2005] EWCA Civ 1056.

of their powers as defined by their own rules or regulations or have acted contrary to national law or contrary to the rules of natural justice[78] or contrary to the rule against bias[79] or have acted unreasonably, irrationally, arbitrarily, capriciously or disproportionately or on the basis of irrelevant considerations or where they have failed to take account of relevant considerations.

### 2.8.1 The Board of Management of Alexandra School v The Barbados Cricket Association[80]

#### Facts

On 6, 13 and 14 December 2002, the Alexandra School (Alexandra) played the intermediate semi-final cricket match against Her Majesty's Prisons Officers (HMPO) Sports Club under the auspices of the Barbados Cricket Association (BCA). Alexandra won the match by an innings. On 17 December 2002, the Board of the BCA informed Alexandra that it determined that the school had breached the eligibility rules and that, consequently, it had forfeited the game. The effect of this decision was that Alexandra was unable to proceed to the finals and. instead, the game was awarded to the opposing team, HMPO, which would then play in the finals. Alexandra, in response, filed an originating summons in which it sought the following orders:

(1) That the decision made by the respondent BCA at its monthly meeting on December 15, 2003 that Alexandra had forfeited the game against HMPO Sports Club be deemed null and void;

(2) That Alexandra *was not given the opportunity to be heard* at the BCA's monthly meeting on December 15, 2003 and thus was *denied the right to a fair hearing*;

(3) That the decision made by the BCA was therefore *in contravention of the fundamental principles of natural justice*; and

(4) An injunction prohibiting the BCA from hosting the intermediate finals, between HMPO Sports Club and an opponent known as MTW scheduled to be played on December 20 and 21 2003 as well as January 3 and 4, 2004.[81] [Emphasis added]

#### The High Court's ruling on natural justice

The ruling of Inniss J on the alleged breaches of natural justice was quite pointed and offered welcome guidance in the context of sport, and, in particular, Caribbean sport. He held as follows:

> [22] I am surprised that in this day and age the Barbados Cricket Association would seek to make a finding against one of its members and penalize it *without affording it the opportunity to be heard*. As early as 1911 the Court observed in *Board of Education v Rice* [1911] A.C. 179 that 'a duty lying upon everyone who decides anything is to fairly listen to both sides.'

78 *Saint Catherine Cricket Club and Melbourne Cricket Club v Jamaica Cricket Association Ltd* JM 2010 SC 24. The court stated that a club or player would have a right to be heard before the disciplinary committee decided what form of sanction was to be imposed because that club or player would be a party directly affected by the committee's decision.

79 *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117. Although the court recognized that the rule against bias must be adhered to by sporting bodies, Baker LJ said that bodies, such as the defendant, should be afforded 'as great a latitude as is consistent with the fundamental requirements of fairness' and 'it is not in the interest of sport to double guess'. They 'have unrivalled and practical knowledge of the particular sport that they are required to regulate. They cannot be expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers the courts should allow them to get on with the job that they are required to do.'

80 BB 2004 HC 5.

81 Ibid.

[23] Sports especially cricket, plays a pivotal role in the lives of many Barbadians. *Those who administer sporting organizations must recognize that they must observe the basic principles of natural justice. They cannot deliberate in secret, and then pronounce their decisions expecting them to be accepted unquestionably*. A provision such as Rule 22 of the Barbados Cricket Association's Rules will not insulate their procedure from judicial scrutiny. Mr Yearwood for the applicant submitted that in spite of Rule 22 which in effect seeks to oust the jurisdiction of the Court, *the Barbados Cricket Association is bound to observe the rules of natural justice.*

[24] The question as to whether the Barbados Cricket Association can by its rules oust the jurisdiction of the Court was addressed in *Griffith v Barbados Cricket Association et al* [1989] 24 Barb. LR 108. Williams, C.J. in that case, in considering the effect of the said Rule 22 cited with approval the cases of *Lee vs. Showman's Guild of Great Britain* [1952] 2 Q.B. 329 and *Baker v Jones* [1954] 2 All E.R. 553.

[25] In Lee's case Romer, L.J. stated at page 354:

> 'The proper tribunals for the determination of legal disputes in this country are the Courts and they are the only tribunals which by training and experience and assisted by proper qualified advocates are fitted for the task.' The Courts jealously uphold and safeguard the prima facie privilege of every man to report to them for the determination and enforcement of his legal rights.

[26] *In Baker v Jones* Lynskey, J. said at page 58: 'The parties can make a tribunal or council the final arbiter on questions of fact but though they can leave questions of law to the decision of a tribunal, they cannot prevent its decision being examined by the Courts.'

[27] In conclusion the Chief Justice stated in Griffith *v* Barbados Cricket Association at page 125: 'To hold that Rule 22 makes the Board or the Association the ultimate arbiter of the law would be contrary to the cases. Such an interpretation would make the regulation repugnant to the law of Barbados.'

[28] Since the members of the Barbados Cricket Association have agreed among themselves to vest the authority in the Board to interpret its rules and regulations, that body has every right to carry out its functions free of enquiry and the Courts will not seek to usurp the authority of the Board. *If, however, in carrying out these functions the Board breaches its contractual relations with its members to allow them a hearing in cases of disputes, or if it fails to observe the common law principles of natural justice, an aggrieved person to whom the rules apply may seek the assistance of the Court.*

[29] Even if the Board of the Barbados Cricket Association has the sole right to interpret the rules it does not have the right to apply them in a manner which adversely affects those who are bound by the rules without having given such persons the opportunity to be heard.

[30] In this case the effect of the Board's decision is to deprive the school of the opportunity to appear in the cricket finals. Having won the semi-final match decisively, the school would have had a legitimate expectation to proceed to the finals. It could only be deprived of its right to the fruit of its labour for good and sufficient cause *and after an enquiry in which there was procedural fairness*. The relevant principle has been expressed in *Kioa v Minister for Immigration and Ethnic Affairs* [1985] 62 A.L.R. 321 at page 346 in the following words:

> The law has now developed to a point where it may be accepted that *there is a common law duty to act fairly in the sense of according procedural fairness*, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention. [Emphasis added].

This is an accurate exposition of the prevailing principles of administrative law as applied to sport in the Commonwealth Caribbean. Inniss J cited regional and international case law, emphasizing the primacy that must be given to adherence to the common law principles of

natural justice, which necessarily include, *inter alia*, the opportunity to be heard. He later posed a fundamental question, asking on what basis did the Board of the BCA exercise its discretion under the applicable competition rules, if Alexandra had not been afforded a hearing.[82] It was, therefore, no surprise when he made a declaration that the BCA acted in contravention of the fundamental principles of natural justice.[83]

Similar issues were addressed by the Trinidad and Tobago High Court in the 2016 case involving the former Permanent Secretary at the Ministry of Sport, Mr Ashwin Creed.

### 2.8.2 Ashwin Creed v Central Audit Committee[84]

#### Facts

In 2012, the Ministry of Sport of Trinidad and Tobago developed the Life Sport Programme ('Life Sport'), which was designed to assist 'at risk youth' in Trinidad and Tobago. In 2014, against the backdrop of very negative media coverage of Life Sport, the then Minister of Finance commissioned an audit into the financial management of Life Sport, to be conducted by the Central Audit Committee ('CAC'). The claimants applied for judicial review seeking an order of certiorari quashing the CAC's Final Audit Report, alleging that they were not granted an opportunity to be heard before the report was presented by the CAC to the Minister of Finance.

The issues considered by the court were:

(1) Whether the CAC acted unfairly by failing or omitting to give the claimants an opportunity to be heard before the submission of the Final Report to the Minister of Finance;
(2) Whether the CAC acted in breach of a legitimate expectation which was held by the claimants;
(3) Whether the CAC acted irrationally; and
(4) Whether the CAC acted in bad faith.[85]

Dean-Armorer J found that the claimants failed to meet what is generally accepted as a high threshold as far as irrationality is concerned.[86] Additionally, the court held that there were no traces of fraud, dishonesty, malice or personal self-interest.[87] The court's ruling on natural justice was more detailed, the salient parts of which were as follows:

> Fairness will often require that a person who may be adversely affected by a decision *will have an opportunity to make representations on his own behalf*, '... before the decision is taken, with a view to producing a favourable result ...' [As per Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560] These were the words of Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560] where his Lordship formulated a five point synopsis of the meaning of fairness ...
>
> Having considered the authorities together, it was my view, that there was, in fact, no conflict and that the authorities were easily reconciled by reference to the two categories identified by Hidden J at page 15 of the Report. There is no obligation of fairness on the body which is mandated to

82 Ibid [35].
83 Ibid [46(d)].
84 TT 2016 HC 230.
85 Ibid [33].
86 Ibid [37].
87 Ibid [39].

> conduct a wide investigation and to make general recommendations to inform the development of government policy. By contrast, an investigative body, which is mandated to enquire into the activities of specific persons and into specific circumstances, *has a duty to be fair and to extend an opportunity to be heard* to persons who are adversely affected by their investigation.
>
> The CAC, whose report is impugned in this application for judicial review, falls into the second category of investigative bodies. The Audit of the CAC was trained on specific persons, natural and corporate. Consequentially, the outcome of the investigation was specific in its denigration of specific persons and events. As in *Pergamon Press* [*Re Pergamon Press Ltd* [1970] 3 WLR 792] and *Mahon* [*Peter Thomas Mahon and Air New Zealand Ltd. And Others* [Appeal from the Court of Appeal of New Zealand] [1984] A.C. 808], the CAC *was under a duty to be fair*. Fairness in this context included a duty to alert persons to adverse comments, which might be made against them and *to allow them an opportunity to present evidence or arguments* which might dissuade the investigator from making such comments.
>
> Similarly, in the Privy Council decision of *Rees v Crane* [*Rees v Crane* [1994] 2 AC], Justice Crane was held to be entitled to an opportunity to be heard, regardless of the fact that the decision to appoint an investigative tribunal was only the first step in elaborate statutory procedure.
>
> In the instant claim, the defendants have not denied that the report contained potentially damaging material against the claimants or that the Final Report, having been submitted to the Minister, found its way into Parliament and was subjected to widespread public scrutiny.
>
> In these circumstances, it is my view that *the claimants were entitled to be treated fairly and in particular, they were entitled to an opportunity to make representations* before the Final Report left the control of the CAC, as the investigative body. [88] [Emphasis added].

The law cited in *Creed* mirrored that in *Alexandra v BCA*, with the courts in both Barbados and Trinidad and Tobago highlighting the critical need for governing bodies, whether in public law or private law, to adhere to principles of natural justice. Sports governing bodies would do well to cement these principles into their regulatory framework as the courts, although reticent when it comes to getting involved in the internal disputes of sporting organizations, will not hesitate to so do where justice and fairness are under threat.

Queens Counsel Michael Beloff's overview of the nature of sports disciplinary proceedings is instructive:[89]

> Sporting disciplinary bodies, like other domestic tribunals, are not required to conduct themselves as if they were amateur courts of law. This proposition is the traditional starting point for any exposition of their obligations. They are not bound by strict rules of procedure and evidence which apply in courts of law (but normally not in statutory tribunals), except to the extent that their rules provide. However, they must not misinterpret the meaning of the rules they are applying; nor must they conduct themselves other than in conformity with well-recognised principles of fairness.[90]

The responsibility placed on sports disciplinary tribunals, then, is not necessarily to be a mini-court, but to act fairly, equitably and justly. This was particularly evident in *Alexandra*, in which the BCA's Board had disciplinary powers. The responsibility to act in a fair manner procedurally was seen in *Creed* to extend beyond private sporting bodies, and to reach the entities connected to the State, including when State oversight enters the sporting context. The third Caribbean case, involving the regulatory function of the Barbados Turf Club, bears factual resemblance to the UK Jockey Club cases.

88 Ibid [40] and [58]–[62].
89 Michael Beloff, Tim Kerr, Marie Demetriou and Rupert Beloff, *Sports Law* (2nd edn, Hart Publishing, 2012).
90 Ibid 190, [7.10].

### 2.8.3 Melnyk v Barbados Turf Club[91]

**Facts**

The plaintiff, Mr Eugene Melnyk, approached the High Court of Barbados, seeking:

(1) a declaration that the decision of the Prohibitive Substance Body (PSB) of the defendant, Barbados Turf Club, to (a) disqualify his horse 'Kathir' from the first place of the Sandy Lane Gold Cup race; (b) fine the trainer of 'Kathir' $500; and (c) order the trainer to pay costs and expenses of the enquiry leading up to the said decision and ensure the return of the Gold Cup Trophy was null and void;
(2) an interim and permanent injunction restraining the defendant its officers, servants or agents or members from enforcing the said decision; and
(3) damages, interest and costs.[92]

Notably, the plaintiff's action was based on the allegation that the Barbados Turf Club breached a contract of membership between the Turf Club and himself. Melnyk claimed that this breach occurred when the Turf Club failed to comply with certain provisions of the applicable rules of racing and to conduct the relevant enquiry in accordance with the rules of natural justice.[93]

Kentish J summarized the issues to be determined by posing two questions:

(1) Was the disciplinary hearing by the PSB conducted in accordance with the principles of natural justice? and
(2) If not, to what relief, if any, would the plaintiff be entitled?[94]

Before the disposition of the substantive legal issues by the court, a preliminary objection was raised by counsel for the Turf Club, namely that the plaintiff had no *locus standi* for the purposes of bringing the claim. The court made a useful distinction between Melnyk's *locus standi* at the disciplinary hearing (which it said he did not have based on the rules of racing) and his *locus standi* before the court (which it said he did have).

### 2.8.4 *Breach of contract of membership*

Melnyk relied on the well-cited *ex p Aga Khan*[95] case to allege that there was a contract of membership between him and the Barbados Turf Club. This particular submission was well-summarized by Kentish J as follows:

> Mr Alair Shepherd QC, counsel for Melnyk, ... cited the case of *R v Jockey Club, Ex p Aga Khan* [1993] 2 ALL ER 853 and adopted the argument of counsel for the Jockey Club summarized by Bingham MR (as he then was) at p. 860 that:
>
> > [The] relationship [of the Jockey Club] with those who, like the applicant, agree to be bound by the Rules of Racing is an essentially private law relationship based on contract. A duty to conduct any inquiry fairly would be implied into this contract and if the applicant could establish a breach of that duty he could recover appropriate private law remedies by way of declaration, injunction and damages.

91 BB 2007 HC 22.
92 Ibid.
93 Ibid.
94 Ibid.
95 [1993] 2 All ER 853.

> That argument found favour with the Court of Appeal as expressed by Bingham, M.R., in these words at p. 867:
>
> > ... the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private law rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review.[96]

Kentish J agreed with these submissions and felt satisfied that the contract of membership alleged by Melnyk did, in fact, exist and that accordingly he had *locus standi* in the proceedings before the High Court.

The absence or presence of a contract in such situations becomes a critical factor when a proposed claimant seeks to challenge a decision of a sports governing body. In *Fitzroy Richards v Trinidad and Tobago Boxing Board of Control (unreported, 2008)*, one of the authors of this text, in representing the defendant boxing board, sought to rely on the doctrine of implied contracts to contend that the boxing board had jurisdiction to discipline the claimant Fitzroy Richards, a boxing promoter. Richards's case was, in fact, in defamation and he was eventually victorious without the need for the court's determination as to whether an article published in the *Newsday* newspaper was libellous. Based on the relevant Civil Proceedings Rules his claim for a default judgment succeeded. While Rajnauth-Lee J (as she then was) never had to rule on the substantive defamation issues, she was asked to consider the question of whether Richards who, because of his failure to hold a licence at the material time, could have been sanctioned by the Boxing Board.

The Boxing Board relied on *Modahl v British Athletics Federation*[97] to allege that it did have jurisdiction over the claimant. It submitted as follows:

> The TTBBC as the governing body for local boxing has a critical role and responsibility with regards to that sport. In the case of *Mc Innes v Onslow Fane* [1978] 3 All ER 211, Megarry V-C at page 223 made a sterling contribution to Sports Law jurisprudence in stating that:
>
> > *Bodies such as the board [the British Boxing Board of Control] which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not be hampered in their work without good cause.* [Emphasis mine]
>
> Megarry V-C's comments are directly comparable to the instant case in which a sports governing body has been charged with the role of governing a sport and preserving its integrity, status and social significance. The attempts of the Defendant to control and regulate the conduct of the Claimant was compatible with the mandate given by the Boxing Control Act ...
>
> In its function as the national governing body for boxing, the TTBBC exercises a certain degree of control over certain classes of persons. This is a well-established principle in the global sporting industry where national and international sporting associations govern specific sports. The class of persons under the rule of these sporting bodies includes athletes, administrators and other support staff. Many of these individuals have express contracts with the sports governing bodies while others fall within their jurisdiction via implied contracts. The case of *Diane Modahl v British Athletics Federation [2002]* addressed the issue of the implication of contracts between athletes and their governing bodies. Though this case dealt primarily with the legality of a doping sanction against Modahl, the Court of Appeal by a majority decision found the existence of a contract *based on the conduct of the parties*. It was not necessary for an express contract to exist for the governing body, the BAF to exercise a disciplinary jurisdiction over the athlete.[98]

96 *Melnyk v Barbados Turf Club* (n 91) [13]–[14].
97 [2001] EWCA Civ 1447.
98 Submissions of the Trinidad and Tobago Boxing Board of Control.

While, unfortunately, there was no determination by the court on the legal validity of the Boxing Board's submissions on the implication of a contract, Sports Law academics have continually cited cases like *Modahl* and *Korda v ITF Ltd*.[99] to highlight the court's willingness to imply the existence of a contract in circumstances where athletes have submitted to the jurisdiction of a sports governing body, whether by participation in an event it organized or by submitting to its anti-doping rules as happened in *Korda*. This keeps the litigation door open for potential claimants in the absence of express written contracts between themselves and the governing bodies under whose supervision they fall.

### 2.8.5 *The court's ruling*

Returning to the *Melnyk* case, Kentish J offered a sound analysis of the law relating to procedural fairness, making use of the sports-based legal expertise of Michael Beloff QC[100] in so doing. The salient aspects of this part of the judgment is as follow:

> It is common ground between the parties that the PSB was obliged to conduct the disciplinary proceedings in accordance with the principles of natural justice.
>
> In the jurisprudence this has come to be equated with a duty of procedural fairness. As explained by Lord Bridge in *Lloyd v McMahon* [1987] A.C. 625 at 702:
>
> > The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of an individual depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.
>
> The scope and extent of the duty, therefore, will vary from case to case, having regard to the particular circumstances. And in *Modahl v British Athletic Federation Ltd* 28 July 1977, (unreported) C.A. Lord Woolf, M.R., accepted as arguable, the proposition that each step in the disciplinary process must be individually fair.
>
> Beloff, Kerr and Demetriou: SPORTS Law at paras. 7.62–7.64 identified four distinct aspects of the duty. Briefly stated they are:
>
> (i) the right of an accused to be fully informed in clear terms of the allegations against him or her;
> (ii) the right of that accused to make representations by way of defence against the charge,
> (iii) the right to a hearing before an adjudicating tribunal, free from bias; and
> (iv) the rule against being a judge in one's own cause. Put another way, the complainant before the adjudicating tribunal cannot also be an adjudicator on the complaint.
>
> Melnyk has sought to rely on those aspects (not all of which were pursued at trial) in his amended statement of claim to challenge the decision of the PSB.[101]

On the question of bias, the court added that a fair-minded person informed of the circumstances surrounding the conduct of the disciplinary hearing would conclude that there was a real possibility of bias, since the attorneys representing the PSB were also present when deliberations were being held on whether or not there was a breach of the rules that prohibited the use of

99 (unreported) High Court (Ch) 29 January 1999, 30; Court of Appeal (Civ) 25 March 1999, 31.
100 Michael Beloff, Tim Kerr and Marie Demetriou, *Sports Law* (1st edn, Hart Publishing, 1999).
101 *Melnyk v Barbados Turf Club* (n 91) [30]–[33].

prohibited substances by the horses involved in the 2004 Sand Lane Gold Cup. Kentish J, in this regard, reminded the parties of the decision in *Griffith v Barbados Cricket Association; Byer v Barbados Cricket Association*,[102] which he said was 'clear authority that it is no answer to a challenge of bias that persons, not members of the adjudicating body but present during its deliberations, did not participate in the deliberations'.[103] The court, ultimately, found that the decision of the PSB to disqualify Melnyk's horse 'Kathir' and to impose a fine upon the trainer to be null and void.[104]

A final word is worth mentioning in the context of sports disciplinary proceedings and its relationship with dispute resolution proceedings, in particular. In *England and Wales Cricket Board v Kaneria*,[105] an admittedly innovative decision, the English High Court sought to address the question as to when proceedings, in the nature of those that occurred in *Alexandra* and in *Melnyk,* were disciplinary and when they were arbitral. In *Kaneira*, the England and Wales Cricket Board (ECB) attempted to have the appeal proceedings declared an arbitration. Mark James'[106] summary of the court's findings provides assistance:

The High Court held that the following 10 factors must be addressed in order to determine whether the proceedings are truly arbitral:

(1) Were the parties given a proper opportunity to present their case?
(2) Did the arbitrators disclose all communications with one party to the other?
(3) Were proper and proportionate procedures in place for the provision and receipt of evidence?
(4) Was the tribunal expected to make a binding decision?
(5) Was the process between those persons whose substantive rights are to be determined by the tribunal?
(6) Was it clear that the process was an arbitration?
(7) Was the panel chosen by the parties or by a method agreed by them?
(8) Was it expected that the hearing would be conducted in a fair and impartial manner?
(9) Was the tribunal's decision intended to be enforceable in law? and
(10) The dispute must have already been formulated when the tribunal is appointed.

Following this analysis, the ECB's appeal procedure was held to be an arbitration.[107]

This analysis is yet to be tested in the Commonwealth Caribbean, but it does provide a timely opportunity to foster the development of sports mediation and sports arbitration in the region.

## 2.9 ALTERNATIVE DISPUTE RESOLUTION: MANAGING SPORTS-RELATED DISPUTES OUTSIDE OF THE COURT SYSTEM[108]

> the internal relations between sport federations and their stakeholders are regulated by quasi-legal, mediation and arbitration mechanisms that prioritize the dynamics of sport over those of law.[109]

102 (1989) 41 WIR 48.
103 *Melnyk v Barbados Turf Club* (n 91) [81].
104 Ibid [82].
105 [2013] EWHC 1074.
106 Mark James, *Sports Law* (3rd edn, Palgrave, 2017).
107 Ibid 41.
108 This section is an amended and updated version of a paper that was first published by J. Tyrone Marcus in (2011) 2(2) Global Sports Law and Taxation Reports.
109 Dino Numerato and Thomas Persson, 'To Govern or to Dispute? Remarks on the Social Nature of Dispute Resolutions in Czech and Danish Sports Associations' (2009) 7(2) The Entertainment and Sports Law Journal 3.

Numerato and Persson's observation is as philosophical as it is thought-provoking. Their assessment acknowledges the tension between the increasing involvement of the law and the desire to sustain the purity and sanctity of self-regulated sport. Yet, the reality is that the law's role in sport is undisputed especially because of the plethora of disputes, which include matters like team selection, doping violations and the abovementioned question of alleged breaches of natural justice in disciplinary proceedings. Further, the commerce of sport, which marries concepts from the industries of law, business, intellectual property and taxation, has been the breeding ground for many legal battles.

With disputes being an inherent part of daily human existence, modes of resolving conflict have taken on real meaning in both personal and professional environments. Alternative dispute resolution (ADR) seeks to offer, as the name suggests, an alternative manner of settling disputes. While conciliation, mini-trials and the hybrid 'med-arb' have been less popular, arbitration and mediation have traditionally been the most widely utilized methods of ADR. Notably, the 2015 World Anti-Doping Code states that '[e]ach government will respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law.'[110]

Where the preservation of relationships is paramount, mediation is appropriate as a form of dispute resolution. Blackshaw has defined mediation as 'a voluntary, non-binding, "without prejudice" process that uses a neutral third party (mediator) to assist the parties in dispute to reach a mutually agreed settlement without having to resort to a Court'.[111] In short, mediation is facilitated negotiation. Arbitration, on the other hand, is a process by which the third party, the arbitrator, makes a binding decision with which both parties must comply. In this regard, it is similar to litigation since the outcome is not in the hands of the disputants, but in the hands of the adjudicator.

The Court of Arbitration for Sport, introduced briefly in the previous chapter, has established itself as the global leader in sports-based ADR.

### 2.9.1 The Court of Arbitration for Sport: the gold standard

The brainchild of former IOC President, the late Juan Antonio Samaranch, the CAS created its own statutes, which the IOC ratified officially in 1983. The statutes came into force on 30 June 1984 marking the operational beginning of CAS as a provider of sports-specific dispute resolution services. The CAS contains an Ordinary Arbitration Division, where it acts as a first-instance tribunal and an Appeals Arbitration Division, where it serves as an appellate body hearing appeals from decisions from sporting bodies, especially those of a disciplinary nature.

The four main functions of the CAS are succinctly summarized by Ian Blackshaw, Robert Siekmann and Janwillem Soek[112] in their book recounting the first 20 years of the CAS's existence:

> In its first role, the CAS is seized of disputes immediately and directly as an arbitration court of first and sole instance, either by virtue of an arbitration clause contained in a contract or through a submission agreement signed after the dispute has arisen. In that function, the CAS can for instance settle disputes arising out of sponsoring contracts, contracts between athletes and managers, contracts granting TV rights in connection with sports events, etc.

110 Article 22.4 World Anti-Doping Code 2015.

111 Ian Blackshaw, *Mediating Sports Disputes: National and International Perspectives* (Cambridge University Press, 2002).

112 Ian Blackshaw, Robert Siekmann and Janwillem Soek, *The Court of Arbitration for Sport:* 1984–2004 (Cambridge University Press, 2006).

> Secondly, the CAS, by its Appeals Arbitration Division, intervenes as a last instance court of appeal, in case a statement of appeal is lodged by any party against a decision of a sports federation, in principle a disciplinary decision. Also in that case, the jurisdiction of the CAS must be based on an arbitration agreement or arbitration clause, for example contained in the statutes or the regulations of sports federations.... The seat of the CAS is in Lausanne, Switzerland. This seat is also the seat of every arbitration conducted in accordance with the Code of Sports-related Arbitration, even if the hearings are held elsewhere. This means that all CAS arbitrations are governed by the Swiss Federal Act on Private International Law (PIL Act), to the extent that one of the parties is domiciled or has its registered office outside Switzerland. This Act is the *lex arbitrii* and applies to issues such as arbitrability, validity of arbitration agreement and remedies against awards.
>
> In its third role, the CAS gives advisory opinions ... Finally, CAS also provides for mediation services in order to offer to the parties an alternative method of settling certain kinds of disputes.[113]

Since the early days of the CAS, there have been expected changes, one of them being that it no longer offers advisory opinions. More recently, the CAS introduced provisions for legal aid, conscious that not all athletes could afford the costs associated with CAS proceedings. One regional athlete to avail himself of the CAS legal aid facility was Jamaican sprinter Steve Mullins. In *Steve Mullings v Jamaican Anti-Doping Commission (JADCO)*,[114] the CAS considered that:

> legal aid should be granted to any natural person who requests it, provided that his/her income and capital are not sufficient to allow him/her to cover the costs of proceedings before CAS without drawing on that part of his/her assets necessary to support him/herself. The applicant must, however, establish that his/her claim has a legal basis and that he/she would have begun the proceedings at his/her own expenses.

Some Caribbean countries have drafted clauses in their governance documents that expressly identify the CAS as a court of final appeal. For instance, section 31 (V) of the 2018 edition of the constitution of the Trinidad and Tobago Olympic Committee states:

> Any decision made by the arbitrator(s) on behalf of the Council may be submitted exclusively by way of appeal firstly to an Appeals Tribunal comprising of no more than 3 members to be selected by the Council. A further appeal may be submitted to the Court of Arbitration for Sport in Lausanne, Switzerland, which will resolve the dispute definitely in accordance with the Code of Sports-related Arbitration. The time limit for appeal is twenty-one days after the reception of the decision concerning the appeal.

The TTOC's constitution, in its arbitration clause, makes provision for a final appeal to CAS in accordance with the Code of Sports-Related Arbitration, the primary CAS governance document in terms of the procedural aspects of CAS hearings. Similarly, anti-doping legislation in the Caribbean, discussed in greater detail in Chapter 7, also contains references to the CAS as a final Court of Appeal. The Bahamas legislation, for example, reads as follows: 'Where an appeal is in respect of an international event or a case involving an international-level athlete, the decision of the Disciplinary Panel may be appealed directly to the Court of Arbitration.'[115] Similarly, in Bermuda, appeals from international level athletes also go to the CAS: 'An international-level athlete may appeal decisions of the Disciplinary Panel directly to the Court of Arbitration.' In *Marvin Andrews v Trinidad and Tobago Football Federation and Oliver Camps*,[116] Rampersad

113 Ibid 36–37.
114 CAS 2012/A/2696, order of 4 May 2012.
115 Section 24 Anti-Doping in Sport Act 2009.
116 CV 2007–02238.

J's determination of the case involved an interpretation of the following arbitration clause contained in a player's agreement:

> The Arbitration award shall be final and binding on the parties and shall be registered as a judgment of the High Court of Trinidad and Tobago in these proceedings and enforceable accordingly, provided however that either party shall have a right of appeal to the Court of Arbitration for Sport but only with leave of the Arbitrator.[117]

In practice, Caribbean countries have sought to avail themselves of the services of the CAS, invoking the jurisdiction of the Appeals Arbitration Division. By way of example, one of the most recent Caribbean cases in which there was a hearing before the CAS involved an unsuccessful application by the Virgin Islands Olympic Committee for a bobsleigh and skeleton quota place in the 2018 PyeongChang Winter Olympics. In *CAS OG 18/01 Virgin Islands Olympic Committee v International Olympic Committee*, the CAS *ad hoc* Division[118] found itself to have jurisdiction to hear the matter pursuant to rule 61.2 of the Olympic Charter which states that: 'Any dispute arising on the occasion of, or in connection with, the Olympic Games, shall be submitted exclusively to the court of Arbitration for Sport (CAS) in accordance with the Code of Sports-Related Arbitration.' On the other hand, though, Jamaican athlete Jason Morgan was not as fortunate when he approached the CAS just before the Rio 2016 Olympics. In *Jason Morgan v Jamaican Athletic Administrative Association (JAAA)*,[119] as in *Virgin Islands Olympic Committee v IOC*, although the CAS, under Olympic Charter rule 61.2, had jurisdiction to hear the case, Morgan's application was deemed inadmissible because it was filed too far in advance of the Rio Olympics to fall within the scope of the applicable CAS Ad Hoc Rules.[120]

Despite numerous informal calls for and casual conversations about a Caribbean version of the CAS, that reality does not appear to be anywhere on the horizon. Until then, Caribbean athletes, especially those at the elite level, are likely to continue to approach the CAS, which, notwithstanding the sometimes prohibitive costs, undoubtedly offers a commendably high standard of sports-related ADR services.

### 2.9.2 Choosing the ADR mechanism

The rapid growth of professional sport, bringing with it a large financial outlay, has sparked a discussion as to what forms of dispute resolution are most apt in particular circumstances. A classic example of sport's commercialization leading to high-level disputes is in the sphere of broadcasting rights, where the financial stakes are extremely high. It is therefore not surprising that rights disputes are common in the field of sports broadcasting.[121] For example, following the 1990 FIFA World Cup in Italy, the British Broadcasting Corporation (BBC) commenced a legal action against B Sky B[122] for showing highlights from the former's live coverage of World Cup matches. The court found in B Sky B's favour since they only used the highlights as part of their news coverage and this was permissible as fair dealing under the 1988 Copyright Designs & Patents Act. Such battles, because of the vast sums of money involved, are usually channelled along the litigation or arbitration road. Mediation would likely be avoided since the aggrieved party wants a binding decision to protect the value of its investments. The utility of ADR, therefore, is brought into focus.

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117 Ibid 13.
118 The CAS Ad Hoc Division is special division of CAS that sits at major events like the Olympic Games with a general mandate to resolve disputes as quickly as possible, with a 24-hour turnaround being the usual benchmark.
119 Arbitration CAS ad hoc Division (OG Rio) 16/008, award of 5 August 2016.
120 Ibid 5.
121 Sports broadcasting will be addressed in greater detail in Chapter 4.
122 Formerly the British Satellite Broadcasting (BSB).

### 2.9.3 The effectiveness of ADR in sport

> Legal complexities and jurisdictional uncertainties make litigation even more hazardous and costly, and in such circumstances, mediation becomes significantly more attractive.[123]

Humphrey is not alone in expressing concern over litigation as a form of resolving sporting disputes. Legal complexities and jurisdictional uncertainties accurately describe the litigation involving American sprinter Harry 'Butch' Reynolds and the IAAF.[124] Among Reynolds' multiple claims was one for tortuous interference with business relations, culminating in a default judgment in the sum of 'over US$27 million, including treble punitive damages, followed by garnishee proceedings against four creditors of the IAAF'.[125] Interestingly, after four years of litigation, the action was dismissed by the Sixth Circuit Court of Appeals for lack of jurisdiction. This was a loss of precious time and money.

The telling words of former English Vice Chancellor Megarry in *Mc Innes*[126] that sports bodies 'are far better fitted to judge than the courts'[127] have become well-known among Sports Law practitioners. These words reflect the general attitude of English courts towards sporting disputes. Indeed, Mummery LJ in *Bradford v Keith James*[128] suggested that an 'attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive'. He added that 'Litigation hardens attitudes.'[129] In similar language, Ward LJ noted that 'compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole'.[130] The Law Lords concur in their synopsis of the pitfalls of litigation and the benefits of ADR.

The Arbitration Associates of Canada (AAOC) makes the observation that 'often parties prefer a means of resolving a dispute that avoids the rigidity and time and cost of litigation. Most people prefer using a process that is flexible, quick to set up, private and less costly.' Findlay also notes that over 'the recent past, programs for sport-specific independent arbitration have emerged in a number of countries including the United States, the United Kingdom, New Zealand, Australia, Japan, China and Canada'.[131]

From a Commonwealth Caribbean standpoint, the courts' approach is fairly similar. In the previously mentioned case, *Alexandra School v Barbados Cricket Association*,[132] Inniss J lamented the parties' failure to invoke the ADR process that was available to them. He said:

> It is unfortunate that an increasing number of sporting organizations either seek or are forced to seek the assistance of the Court with little or no attempt to resolve their differences amicably. The time has come when these organizations need the assistance of a sports Referee or Arbitrator to assist in the resolution of disputes.[133]

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123 Thomas Humphrey, 'Dust in the balance: the use of mediation to resolve disputes in Australian sport' (2008) (1) International Sports Law Review 2.
124 Then, the International Amateur Athletics Federation (now the International Association of Athletics Federations).
125 Michael Beloff, Tim Kerr and Marie Demetriou, *Sports Law* (1st edn) [8.99].
126 *Mc Innes v Onslow-Fane* [1978] 3 All ER 211.
127 Ian Blackshaw, 'The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively "Within the Family of Sport" ' (2003) 2(2) The Entertainment and Sports Law Journal 4.
128 [2008] EWCA Civ 837.
129 *Bradford* cited in Stuart Kennedy, 'Alternative Dispute Resolution' (A Paper for the Law Association of Trinidad and Tobago, 18 November 2009).
130 Ibid Stuart Kennedy citing *Carver v BAA plc* [2008] EWCA Civ 412 [31].
131 Hilary Findlay, 'Form Follows Function: Crafting Rules for a Sport-Specific Arbitration Process – "The Canadian CAS" ', in Ian Blackshaw, Robert Siekmann and Janwillem Soek, *The Court of Arbitration for Sport*: 1984–2004 (Cambridge University Press, 2006) 281.
132 BB 2004 HC 5.
133 Ibid [19].

What compounded the court's distress in that case, however, was the fact that rule 23(a) of the Special Conditions and Regulations of Play explicitly made reference to arbitration as one of the dispute resolution options, pursuant to the Arbitration Act, Chapter 110 A of the Laws of Barbados. Yet, this avenue was not accessed, leaving the judge to comment that the 'entire dispute has progressed as though Rule 23 does not exist'.[134]

Kokaram J, in *Trinidad and Tobago Cricket Board v West Indies Cricket Board*,[135] also pleaded for greater use of ADR in the sporting context when he deliberated on a very interesting dispute involving the cricket teams from Jamaica and Trinidad during the 2011 regional four-day tournament. While the case turned primarily on the interpretation of the competition rules to determine which team would qualify for the final, the learned judge remarked that:

> what this case does demonstrate is that there is a dire need to quickly formalize alternative dispute resolution mechanisms internally within the Respondent's organization which can deal with these matters quickly, effectively and finally.[136]

This was language reminiscent of that used by Inniss J in *Alexandra*.

The following three case studies offer valuable context for the practical application of ADR mechanisms from a Caribbean perspective.

## 2.9.4 Conflicts in West Indies cricket

In July 2009, Nishi Narayanan, writing for *Cricinfo*, provided a useful summary of the history of conflicts between CWI and the West Indies Players Association (WIPA). Spanning about a seven-year period, many of the conflicts had commercial roots. An impasse occurred during that very month where the WIPA claimed that CWI refused to adhere to obligations under previous arbitral decisions and further that the players were playing without signed contracts. Although a contract need not be in writing to be legally binding, typically, many difficulties arise in the absence of express written contractual terms. Sir Shridath Ramphal served as the mediator for the July 2009 dispute.

The beauty of the mediation process is that the solution comes not from the mediator, but from the parties. This helps them to own it and take responsibility for its implementation. Were an arbitrator appointed, his ruling would end the matter, subject to any right of appeal, and the parties would have to live with that decision. One past arbitration of particular interest concerned the use of the intellectual property rights of the West Indies players at a time when the WICB's primary commercial partners changed hands. The ingredient that added spice to the imbroglio was that the outgoing partners (Cable & Wireless) and incoming sponsors (Digicel) were direct and fierce rivals in the Caribbean telecommunications market.

### *2.9.4.1 The Saunders's arbitration*

The main issue for determination by the sole arbitrator, Saunders J (as he then was),[137] in or about December 2004, was the interpretation of an endorsement clause in the CWI/Digicel

134 Ibid.
135 CV No 1276 of 2011.
136 Ibid [27].
137 *In The Matter Of The Interpretation Of Clause 1(K), Before Justice Adrian Saunders*. Adrian Saunders J is now the President of the Caribbean Court of Justice (CCJ). The CCJ has replaced the Privy Council as the final appellate court in Barbados, Belize, Dominica and Guyana.

sponsorship contract, which addressed the question whether a player could enter into a promotional contract as a member of the team. The contentious clause read as follows:

> The employee ... shall ...
>
> (k) Not at any time after his selection and during the Series undertake, participate in or endorse any advertising *as a member of the Team* without permission of the Board, such permission not to be unreasonably withheld. [Emphasis added].

This clause had to be construed against the backdrop of Cable & Wireless's entry in 2001 into a sponsorship agreement with CWI ('the Board'), with an option to renew. In that agreement, the parties 'agreed that the Board would not be allowed to permit any third party to use cricketers, contracted to the Board as part of the West Indies team, in any promotional, marketing or advertising activity'.[138] Pursuant to the above,

> the Board's contracts with players, selected for each series, precluded each individual cricketer, after his selection, and during the series for which he was contracted, from undertaking, participating or endorsing any advertising as a member of the team without the permission of the Board.[139]

The matter took on added interest since Cable & Wireless negotiated and concluded a number of player endorsement contracts with individual cricketers soon after signalling its intention not to renew its agreement with CWI. Saunders J concluded*:*

> the plain and literal interpretation of clause 1 (k) leaves intact the right of a contracted player to endorse goods and products in some capacity otherwise than as a member of the West Indies cricket team. He may do so for example in his capacity as a member of a national team or in his individual capacity.[140]

This arbitral decision underscored the crucial lesson that sponsorship contracts must be carefully and lucidly drafted, with the definition of rights and obligations being specific, concise and easily discernible.

#### *2.9.4.2 The Stanford T/20 sponsorship controversy*

November 2008 witnessed one of the most high-profile sporting disputes in the Caribbean since the turn of the millennium. This dispute involved Texan entrepreneur, Sir Allen Stanford,[141] CWI and Digicel, the then primary sponsors of regional cricket.[142] The dispute surrounded sponsorship and branding rights, as the Stanford Superstars comprised 12 players who were either current or past West Indies players. This was the heart of Digicel's case as they argued that the team selected was in essence a West Indies cricket team, over whom Digicel exercised sponsorship rights based on the five-year deal with CWI to the tune of almost USD $20 million. The negotiations were rather interesting since Stanford made a three-limbed offer: pay the legal costs of Digicel, do not engage a rival sponsor and give Stanford the major branding rights.

The London Court of International Arbitration (LCIA) ruled in favour of Digicel, with the case turning significantly on the interpretation of a particular clause in the sponsorship

138 Judgment of Saunders J [4].
139 Ibid [5].
140 Ibid.
141 Stanford was subsequently convicted of criminal charges, including fraud and the operation of a Ponzi scheme.
142 Sandals Resort became the primary sponsors of West Indies cricket in the middle of 2018.

agreement between Digicel and CWI. Said agreement placed restrictions on CWI promoting a cricket match, tournament or competition on behalf of a third party if such tournament involved a team that 'represents, purports to represent or may reasonably be perceived as representing the West Indies'. Predictably, the significant number of past or current West Indies players who were on the Stanford team was instructive in the LCIA finding that the WICB was run out well short of its crease.

#### *2.9.4.3 The 'Soca Warriors' arbitration*[143]

The contractual dispute involving the national senior men's football team of Trinidad and Tobago (affectionately called 'the Soca Warriors') was watched by a large audience. At the heart of the impasse was whether there was a binding contract between the Soca Warriors and their national governing body, the Trinidad and Tobago Football Federation (TTFF), regarding World Cup bonuses. The corollary to this central issue was whether, if such a contract existed, there was a breach of that contract and what remedies were available.

The parties exercised the option to invoke an arbitral process via the Arbitration Act Chapter 5:01 of Trinidad and Tobago. During the course of the High Court litigation and the subsequent ADR process, a key factor arising was the role and impact of confidentiality in arbitration proceedings and whether either party could set aside the arbitration agreement based on alleged breaches of confidentiality. In this case, the Soca Warriors, as claimants, filed a High Court action seeking payment of monies owed to them by virtue of their participation in the FIFA World Cup Germany 2006. The TTFF applied for a stay of the High Court proceedings, pursuant to section 7 of the Arbitration Act of Trinidad and Tobago. Eventually, the parties agreed to refer the dispute to final and binding arbitration under the UK Arbitration Act 1996. Ian Mill QC was the sole arbitrator appointed by the then Sports Dispute Resolution Panel (SDRP).[144] Due to the confidentiality provisions in the agreement to arbitrate, the ruling of the SDRP was not published. But it became public knowledge, when the SDRP decision was leaked to the media soon after it was made, that the Warriors were entitled to 50% of revenues derived from the 2006 World Cup campaign.

Thereafter, the TTFF applied for the stay of proceedings to be lifted and for the matter to continue in the High Court. They also sought to have the arbitration agreement set aside. The reason for this application, the TTFF argued, was 'an alleged breach of confidentiality by the claimants as a result of which the defendants claim to have suffered prejudice and lost confidence in the arbitration proceedings'.[145] The main issue for Rampersad J's consideration was 'whether the disclosure of the award was a fundamental breach of the terms of the arbitration agreement such that the agreement ought reasonably to be set aside'.[146]

The court took into account two salient factors:

(1) whether the said breaches of confidentiality were so fundamental to the agreement that they warranted a setting aside thereof; and
(2) whether the disclosures were of the type that went to the root of the agreement therefore entitling the defendants to treat such breaches as a repudiation of the whole agreement.[147]

143 Case: CV 2007–02238.
144 Now called 'Sports Resolutions UK'.
145 Ibid 4 per Devindra Rampersad J.
146 Ibid 8.
147 Ibid 10.

In addressing these matters, the court noted that 'the breaches occurred *after* the process had been complete and an award had been rendered'[148] (emphasis added). Thus: 'the breaches complained of by the defendants did not go to the root of the arbitration agreement, and in these circumstances the agreement remains irrevocable in accordance with Section 3 of the Trinidad and Tobago Arbitration Act 1950'.[149] Moreover, it also held that: 'the arbitrator's award is final and binding on the parties and the dispute to which the award relates is barred (from retrial) by issue estoppel'.[150] Although the TTFF did appeal to the Court of Appeal of Trinidad and Tobago, even from the first instance judgment, onlookers would be reminded of the basic yet fundamental expectation that contractual obligations must be adhered to, and would not easily be circumvented, except with good lawful cause.

The Soca Warriors decision brings to the fore the question of the appropriateness of the various forms of ADR, especially arbitration and mediation. Other modes of ADR, like conciliation, expert determination and early neutral evaluation are in the early stages of their own growth and evolution, both generally and in the sporting context.

Newmark's perspective is worthy of consideration for parties contemplating using ADR services as he identifies particular occasions when mediation is unsuitable as a conflict resolution mechanism. He observes that doping disputes, for instance, are 'not suitable for mediation. The reason is that doping is a quasi-criminal matter ... A private dispute resolution process aimed at compromise is therefore wholly inappropriate.'[151] The rationale behind this thinking is justifiable when one considers that disciplinary matters are not meant to be the subject of negotiation. They are geared both to serve as a punishment for offenders and as a disincentive to potential wrongdoers. This was a live issue in *Dwaine Chambers v British Olympic Association*[152] where, *inter alia*, Chambers claimed that the British Olympic Association (BOA) by-law prohibiting British athletes found guilty of a doping violation from participation in future Olympic Games was an unreasonable restraint of trade. In the context of sport dispute resolution, this was not a matter for mediation or negotiation. The urgency of the impending 2008 Beijing Olympics, the pressure on the BOA to be seen as resolute in the anti-doping fight and the desire for Chambers to be an advocate for penitent athletes who felt deserving of a second chance all were salient factors making either arbitration or litigation appropriate to resolve that dispute.

The abovementioned *Modahl*[153] decision is another case in point. Again, a binding decision was needed in the circumstances of that case, another doping case, but the ultimate financial cost both to Modahl and to the then British Athletics Federation (BAF) presented a strong case for ADR. As a result of that litigation, the BAF went into administration, while Modahl herself reportedly had to sell her home to assist in settling her legal fees. The route of arbitration would likely have been a viable option since arbitration tends to combine the binding force of litigation with the speed of mediation.

Still, in places like the Czech Republic, hope in good-faith negotiations has not been lost. Numerato and Persson have noted that 'in the Czech Sailing Association, where governance is based on strong internal networks of friendship with a communitarian nature, disputes are sometimes resolved through negotiation and direct communication'.[154] It is submitted, though,

148 Ibid 11.
149 Ibid 13.
150 Ibid 15.
151 Christopher Newmark, 'Is Mediation Effective for Resolving Sports Disputes?' [2000] 5(6) International Sports Law Journal 37.
152 [2008] EWHC 2028 (Law Com) (Law Com D).
153 *Diane Modahl v British Athletics Federation* [2002] 1 WLR 1192.
154 Dino Numerato and Thomas Persson, 'To Govern or to Dispute? Remarks on the Social Nature of Dispute Resolutions in Czech and Danish Sports Associations' (n 109).

that the reality of today's sports business industry often demands formal resolution mechanisms. Admittedly, even the strongest bonds of camaraderie are trumped by economic considerations.

The indubitable reality is that disputes are here to stay. The work of the court of Arbitration for Sport, the Sports Dispute Resolution Centre of Canada, Sport Resolutions UK, Just Sport Ireland, the FIBA Basketball Arbitral Tribunal, the Sports Tribunal of New Zealand and the Sports Arbitration Tribunal of Asia provides cogent evidence of the need for sport-based ADR bodies on the global stage.

While various educational seminars have taken place in recent years throughout the Caribbean, the region is yet to witness the establishment of a sports-specific dispute resolution tribunal, therefore, leaving Caribbean athletes with the option, where the applicable rules permit, to avail themselves of the services of CAS, whose costs, unfortunately, are prohibitive for most of them.

## CONCLUSION

> Public trust in international sports federations was burned to the ground in 2015 due to financial excesses and corruption scandals. 2016 might be the year where autonomy of sport is replaced by true freedom of association.[155]

Andersen's observations now resonate loudly among key stakeholders who have been compelled to assess whether the autonomy of sport, as Dick Pound[156] stated, was 'an outdated relic from an earlier era'.[157] Pound holds the view that the 'right to "autonomy" in the sense of making and administering sport must be earned through responsible conduct, not mere assertion of a former and now irrelevant status'.[158]

There seems to be little basis for disagreeing with Pound that responsible conduct is the heartbeat of autonomy, a concept long-touted as being one of the key pillars in fostering good governance. Only time will tell whether the sports movement can be trusted to regulate itself adequately, while simultaneously promoting and practising the highest ethical standards of administration, oversight and management. In the interim, onlookers are expected to be watching closely to see whether all participants, on and off the track, will choose to play according to the rules.

155 Jens Sejer Andersen, 'The Year that Killed the Autonomy of Sport' (*PLAY THE GAME*, 23 December 2015) www.playthegame.org/news/comments/2015/021_the-year-thatkilled-the-autonomy-of-sport/.
156 Dick Pound was the Chairman of the WADA Independent Commission.
157 Jens Sejer Andersen (n 155).
158 Ibid.

# CHAPTER 3

# SPORTS CONTRACTS

## 3.1 INTRODUCTION

Sports contracts are a commonplace reality in the sporting world today. In fact, it can be argued that all sporting relationships begin and end with a contract as being the instrument in issue.

Not only have international superstars like Usain Bolt, Brian Lara, Tim Duncan and Dwight Yorke, amongst others, capitalized on sports contracts throughout their distinguished careers. So too have an emerging group of regional sportspersons, including Raheem Sterling, Patrick Husbands, Shelly-Ann Fraser-Pryce, Kirani James, Adonal Foyle, Daren Sammy and Chris Gayle, amongst others, whose rapid rise to success is on account of prudent contractual engagements as much as it is on account of their prodigious talent and sporting prowess.

While Caribbean athletes have, particularly in recent years, been the primary beneficiary of well-negotiated contracts that advance their commercial interests, increasingly, regional coaches and agents have also cashed in, with varying degrees of success. Although the details of contractual arrangements entered into by regional coaches and agents have generally not been made public, it is clear that with the increasing commercialization of sports and the related increase in the value of elite players, both coaches and agents stand to benefit handsomely.

Notwithstanding the positive strides made by Caribbean sportspersons to date in so far as the effective exploitation of their unique skills and expertise through contracts are concerned, this is certainly not an area that is free from legal hiccups and heartaches. From agents thwarting their fiduciary duties owed to players, to players and coaches unilaterally and prematurely terminating their contracts with clubs, this is an area of Commonwealth Caribbean Sports Law that ebbs and flows.

Against the backdrop of the increasing importance of contractual engagements in sport in the Commonwealth Caribbean, and the tensions and challenges which arise in this connection, this chapter attempts to explore the theoretical and practical underpinnings of contract law as applied to the sporting context in the Caribbean. More specifically, it will seek to address, from a distinctly Caribbean perspective, a number of important subject matters, including basic principles of contract law and how they are applied in the sporting context; how sports contracts are typically interpreted; common terms that could be found in players', coaches' and agents' contracts; how tribunals treat the breach and termination of sporting contracts; and the remedies that are available when a sufficiently serious breach of a sports contract is found to exist. It also addresses the controversial doctrine of restraint of trade as applied in the sporting context.

While this chapter attempts to provide nuanced insights into the application of contract principles to the resolution of sporting disputes in the region, it does not, however, attempt to do so exhaustively. In this regard, where long-standing principles of contract law apply, the chapter will only cursorily address these principles, though not in a manner than robs the first-time reader of the practical application of said principles. By contrast, on more nuanced points, the chapter provides in-depth analyses, informed not only by decided cases and legislation, but also provocative social and academic commentary.

## 3.2 BASIC PRINCIPLES OF CONTRACT LAW

Although, in the past, sports contracts were largely oral in nature, they have increasingly been put in writing in recent years, as both players and clubs have become more apprehensive about losing millions of dollars as a result of a lack of certainty over contractual obligations.[1]

Irrespective of whether a sports contract is oral or written, certain foundational principles of contract law invariably apply. These principles, according to the court *McGill v The Sports and Entertainment Media Group*,[2] effectively mean that in order for a contract to be enforceable, several requirements must be satisfied. At the elementary level, there must be an offer by one party, and acceptance of that offer by another party. It is only upon acceptance of an offer can there be said to be a contract, at least in principle, though the contract's ultimate validity is dependent on its fulfilment of other requirements, namely intention to create legal relations and adequate consideration. In the normal course of things, where professional players are involved, the requirements of intention to create legal relations and consideration are not in issue, since, according to their Lordships in *Walker v Crystal Palace Football Club*,[3] an employer–employee relationship exists whereby the player, in consideration for payment from a club, agrees to ply his trade in accordance with directions provided by the club. Things, however, become muddier in terms of the enforcement of a contract when an amateur player is involved, particularly when he voluntarily provides his service without receiving any consideration. In such cases, it is unlikely that it can be said that an enforceable contract is in existence, since there would be questions over whether there is an intention to create legal relations[4] and whether there exists adequate consideration.

In addition to the foregoing requirements, it is instructive to note that, in principle, in order for a contract to be enforceable, the terms of said contract must be sufficiently certain[5] so that both parties understand their respective rights, roles and responsibilities, and the overall nature and scope of the contract. In this regard, the terms must at least identify the parties to the contract; the subject matter of the contract; the consideration involved or at least a method for arriving at said consideration; and the obligations by which the relevant parties are bound. A fuller articulation of these requirements, from a Caribbean perspective, can be found in Kodilyne's text, *Commonwealth Caribbean Contract Law*.[6]

Another important requirement that must be satisfied, as illustrated below, is that of contractual capacity. Contractual capacity speaks to the ability of a sportsperson to enter into an enforceable sports contract, thereby being bound by the terms of said contract, and, in this regard, also being able to enforce said contract as against the other party.

## 3.3 CONTRACTUAL CAPACITY

Most players who have attained the age of majority, provided that they are not under a mental illness or drunk at the time of entering the contract, can be said to have the requisite capacity

1 For example, see *Rooney v Tyson*, 956 F Supp 213 (NDNY 1997) where controversial boxer, Mike Tyson, had orally agreed to employ his coach 'until he chose to retire'. This raised serious questions regarding the certainty of that term of the contract since it was argued that it intimated an indefinite period of employment.
2 [2016] EWCA Civ 1063.
3 [1910] 1 KB 87.
4 *Smith v South Australian Hockey Association Inc* (1988) 48 SASR 263 (at the time the player was suspended for hitting a hockey umpire, he was playing purely as an amateur and receiving no remuneration for his participation. As a result, it was held that that there was no intention to create legal relations in respect of the contract between Smith and the hockey association. In short, there was no binding contract between the parties).
5 *McGill v The Sports and Entertainment Media Group* (n 2) [49]–[51].
6 Gilbert Kodilinye and Maria Kodilinye, *Commonwealth Caribbean Contract Law* (Routledge, 2013).

to enter into a binding sports contract. Where a minor, that is, a person under the age of 18, proposes to enter into a sports contract, however, the question invariably arises as to whether or not he has the requisite capacity to so contract.

It is a foundational principle of contract law that where a minor enters into a contract, that contract is voidable at his election.[7] This effectively means that, at any time before he attains the age of majority or within a reasonable time thereafter, he can refuse to proceed with the undertakings arising under the contract, though the other party at all times remains bound by said contract, if he or she is an adult. This rule is intended to afford minors the opportunity to escape the lasting binding consequences of contractual agreements that they entered into while a minor, perhaps not at the time appreciating the nature of the decision they would have made or the consequences associated therewith.

This general rule is, however, subject to an important exception. In short, where a minor enters into a contract for necessaries, he or she is bound by said contract, provided that he or she obtains a benefit from said contract. Where the contract contains terms, some of which are beneficial to him and others not beneficial, the question is whether, taken as a whole, the contract is to his advantage. The burden of showing benefit is always on the party seeking to uphold the contract. Thus, in *Roberts v Gray*,[8] where the minor had entered into a contract to go on tour with a professional billiard player, but later reneged on his promise to do so, the Court of Appeal found that the contract was binding on him, since it was a contract for necessaries, and it was indeed for his benefit.

Contracts for necessaries are not restricted to contracts for food and clothing, but extend to contracts for education, training and apprenticeship, provided that they benefit the minor.[9] However, trading contracts, such as the one in *Shears v Mendeloff*,[10] which precluded a minor, who was a professional boxer, from taking any engagements under any other management without his manager's consent, are not considered contracts for necessaries, and are thus voidable, at the minor's election.

The modern *locus classicus* on the question of capacity in the sporting context is *Proform Sports Management Ltd v Proactive Sports Management Ltd.*[11] In that case, Proform Sports Management had entered into a representation (management and agency) agreement with Wayne Rooney, who was at the time a little over 15 years old, in 2000, for a term of two years. At the time Rooney entered into that agreement, he did not have the benefit of legal advice. In fact, his father, Wayne Rooney Senior, also signed the Proform agreement, under which Proform was obliged to act as Rooney's exclusive agent and to carry out all the functions in respect of personal representation on behalf of his work as a professional football player in consideration of a management fee equal to 5% on the player's earnings under his player contract and transfers. Among other things, the agreement obliged Rooney not to appoint any other agents, and not to negotiate playing contracts and transfers covered by the agreement. At the time, Rooney was engaged with Everton Football Club, which provided him with the opportunity to receive professional football training.

In June 2002, a letter was written to Proform, signed by Wayne Rooney and by his parents, which requested that the footballer be released from all obligations under the terms of the representation agreement with immediate effect. In July 2002, a similar letter was sent to X8 Ltd, which had by then effectively taken over Proform's business. In that letter, Wayne Rooney and his parents indicated that Rooney had decided to sign with Proactive Sports Management. The

7 Glenn Wong, *Essentials of Sports Law* (ABC-CLIO, 2010) 379.
8 [1913] KB 520.
9 'Children and young persons' (*Legaleze.co.uk*, 2015) www.legaleze.co.uk/members/MS_children.aspx.
10 (1914) 30 TLR 342.
11 [2006] EWHC 2812 (Ch).

document, which was expressed to be a representation agreement between Rooney and Proactive, sought to afford Proactive Sports Management the power to manage Rooney's commercial and business affairs. The defendants later, however, contended that this purported agreement was void, and then sought legal advice in September 2002. Counsel for the defendants wrote to Proform in September 2002 indicating the defendants' intention to avoid the Proform agreement by reason of Rooney's minority. Rooney, having been provided with advice by counsel, then purportedly entered into a player representation agreement in September 2002 with Proactive Sports.

However, within 24 hours of signing the September agreement, Proactive reconsidered its position and decided that it would be better if they did not represent Rooney until the period originally set out in the Proform agreement expired, which was December 2002. Later, Proactive entered into a player representation agreement with Wayne Rooney in December 2002, three days after the expiry of the Proform agreement. Proactive then began to represent Rooney in his commercial affairs.

The defence, amongst other things, challenged the validity and/or enforceability of the Proform agreement. In particular, it asserted that that agreement was voidable as a contract with a minor, that the agreement was not necessary for Rooney when he entered into it and that it did not contain any obligation on Proform to provide Rooney with training, and, in any event, if the Proform agreement was analogous to a contract for necessaries or of apprenticeship, it was not for Rooney's benefit.

Two questions accordingly arose on the facts. The first was whether the contract between Wayne Rooney and Proform fell within the class of contracts analogous to contracts for necessaries and contracts of employment, apprenticeship or education. And, if this question was answered in the affirmative, whether this particular contract was one that was beneficial to Wayne Rooney.

The court considered that although a contract for 'necessaries' extends to contracts for the minor's benefit and, in particular, to contracts of apprenticeship, education and service, Rooney's contract with Proform was a trading contract rather than a contract for necessaries. Indeed, at the time when it was signed, Rooney was already with a club, Everton, that was providing him with training. As such, he had no need for any training that was provided by Proform. Because the Proform agreement contained nothing that could be said to be analogous to instruction, education or training, nor did it permit Rooney to make a start as a footballer or enable him to earn a living, the minor, Rooney, was entitled to treat the contract as voidable.

Although decided in this manner on the facts, it is submitted that this case could easily have been otherwise decided had it been the case that the contract was one for necessaries (including education, training and apprenticeship) and for the benefit of the minor. Had this been the situation, Rooney would likely have been bound by the contract with Proform, and possibly (jointly/severally) liable in the tort of inducing breach of contract, where he breached his contract with Proform Sports Management by the September letter, in order to enter into a contract with Proactive Sports Management.

## 3.4 INTERPRETATION OF SPORTS CONTRACTS

When interpreting a sports contract, courts attempt to give the natural and ordinary meaning of the words contained therein in order to give effect to the true intention of the parties.[12] The

12 Alan Sullivan, 'The Role of Contract In Sports Law' (2010) 5(1) Australian and New Zealand Sports Law Journal 3.

court, in essence, seeks to ascertain how a reasonable person, having regard to all the circumstances of the case, would interpret the text of the agreement.[13] In so doing, the court is minded to adopt a common-sense approach, having regard to the genesis of the transaction, the background, the context and the market in which the parties were operating at the time as known to both parties.[14] These principles have been confirmed in a number of Caribbean cases.[15]

Even in cases of poorly drafted contracts, the court will not attempt to be so technical in its approach when interpreting the text of said contracts as to lose the true meaning and intent of what the parties agreed.[16] Where there is some ambiguity, the court will seek to give an interpretation that best reflects the true intention of the parties, and thereby avoid unjust, capricious or unreasonable commercial outcomes.[17] If, however, despite best efforts at interpreting a contract, the terms remain uncertain, the court will likely rule that such a contract is unenforceable.

There are times when courts/tribunals are called upon to interpret a multiplicity of agreements to which a party might be bound at the same time. This might arise, for example, where the player signs a membership form to represent a domestic club in a competition.[18] The contract between the club and the player might make reference to the rules of the national governing body, and may even also make reference to the rules of the international federation. This is particularly the case in anti-doping disputes where, by virtue of agreeing to play professionally, one is implicitly bound by the anti-doping rules of the World Anti-Doping Agency (WADA),[19] which arises because of interlocking contracts between the player and the club, the club and the national governing body, and the national governing body and the international federation.[20] In such cases, the tribunal will consider only relevant surrounding circumstances that can be ascertained from the terms of the document itself when interpreting said contracts.[21]

The texts of international Sports Law instruments, like the WADC, should be interpreted as independent and autonomous texts and not by reference to the existing laws or statutes of signatories or governments.[22] According to Paul David, this means that the focus in interpreting these international instruments should be on the principles of interpretation that are common to all legal systems.[23] In other words, such international treaties should not 'be interpreted by reference to presumptions and technical rules of interpretation applied in construing domestic

13 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, 656.
14 *Zhu v The Treasurer of the State of New South Wales* (2004) 218 CLR 530, 559.
15 *Johnson Alexander (Trading as HES Health and Environmental Solutions) v Grand Bay Paper Products Ltd* Claim No T&T CV2012–05137, per Peter Rajkumar J [71]–[74]; Morrison JA in *Goblin Hill Hotels Ltd v John Thompson* SCCA *No* 57/2007 (delivered 19 December 2008) and Smith JA in *Clacken v Causwell* SCCA 111/2008 (delivered 2 October 2009)*; Dwight Clacken v Lynne Clacken* Claim No 2008 HCV 01834 (Jamaica).
16 *Croatia Soccer Football Club Ltd v Soccer Australia Ltd* (1997) NSWSC (unreported, 23 September) 119.
17 *Australian Broadcasting Commission v Australasian Performing Rights Association Ltd* (1973) 129 CLR 99, 109.
18 A sporting body's power to discipline a participant in the sport which the sporting body controls or regulates is derived from the contract between it and the athlete in question. See *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302, 1307.
19 CAS 2006/A/1165 *Christine Ohuruogu v UKA & IAAF,* award of 3 April 2007 [20]. The CAS stated, 'the relationship between UK Athletics Limited and Ohuruogu is contractual in nature. Ohuruogu agreed to be subject to the UKA's new (anti-doping) regime when she signed the form that contained those procedures.'
20 *International Rugby Board v Troy* CAS 2008/A/1664. Here, the International Rugby Board (IRB) was a signatory to the WADC. This obliged it to ensure that it and its constituent members had in place anti-doping rules materially identical with the WADC. The Australian Rugby Union (ARU) was a member of the IRB and had agreed to be bound by its rules including having in place anti-doping rules materially identical with those of the WADC. Troy, who was an amateur rugby union player playing in the Newcastle District Rugby Union competition, signed a membership form with the ARU agreeing to observe the ARU's anti-doping by-laws. The CAS held that Troy was bound by those anti-doping by-laws and ultimately found Troy had committed anti-doping offences.
21 *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2009] NSWSC 17.
22 World Anti-Doping Code (WADC), Article 24.3.
23 Paul David, *A Guide to the World Anti-Doping Code* (Cambridge University Press, 2017) 162–164.

statutes or contracts', but rather should be interpreted in a manner which emphasizes uniformity, and achieves comity, and is 'consistent with broad principles of general acceptation'.[24]

In the majority of cases, however, the text of ordinary contracts, as opposed to international Sports Law instruments, would be in issue, and thus it is important to bear in mind the CAS's exhortation in the case of *Fulham FC (1987) Ltd v FC Metz*:[25]

> When the interpretation of a contractual clause is in dispute, the judge [should] seek the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract. When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith. The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant, but on how a reasonable man would have understood his declaration.
>
> ...
>
> In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct of the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations and any subsequent conduct of the parties.[26]

## 3.5 TERMS OF SPORTS CONTRACTS

The terms of sports contracts are in most cases expressly stated in the written or oral agreement concluded between the parties (referred to as 'express terms'). However, there are some terms, even if not expressly included in a sports contract, which are nonetheless implied in order to give efficacy to the employment relationship.[27] These implied terms are summed up in the duty of mutual fidelity.[28] The duty of fidelity has been interpreted to mean that both parties must act in good faith, in a manner that advances their respective rights and obligations under the contract.[29] This effectively means that both parties should not engage in conduct which has or is likely to have the effect of breaching the trust and confidence reposed in both parties by virtue of them voluntarily agreeing to enter into a binding contractual arrangement.[30] Breach of this implied term amounts to a fundamental breach of the contract, entitling the innocent party to terminate the contract.

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24 *Fothergill v Monarch Airlines Ltd* [1981] AC 259*; J.I. McWilliam Co Inc v Mediterranean Shipping Co SA* [2005] 2 AC 423, 437*; El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyds Rep 537, 559.

25 CAS 2005/A/896, award of 16 January 2006.

26 Ibid [23]–[24], [26].

27 See Carla-Anne Harris-Roper and Nathalie Corthesy, *Commonwealth Caribbean Employment and Labour Law* (Routledge, 2014) chapter 4.

28 David Thorpe, 'The obligations of mutual fidelity between athletes and their employers' (2012) 22 Sports Law eJournal 1.

29 *Blyth Chemicals v Bushnell* [1933] HCA 8 (the court stated that to breach the duty of fidelity, the conduct of one party must of itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises).

30 *Woods v WM Car Services (Peterborough)* [1981] IRLR 347. The court explained that, 'there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.' The court also stated that, 'an employer who persistently attempts

### 3.5.1 Common terms in players' contracts

The terms of players' contracts are highly variable, largely depending on the circumstances of the parties, the nature of the sport in question and whether they form part of a collective bargaining agreement,[31] standard form contract or individually negotiated contract. Naturally, some parties to sports contracts are meticulous in drafting the terms of said contracts, so that they are clear as to what their respective rights and obligations are, especially in the event of a breach. These contracts are in most cases carefully negotiated by clubs which have strong commercial backing and players who are particularly adept at their craft, and represented by competent agents and attorneys. Indeed, these well-drafted contracts are often precise in nature, leaving no issue to be determined by guesswork, and are generally the work of well-paid attorneys-at-law. There is, however, another category of contracts, which are basic in their orientation, less prescriptive than professionally drafted contracts, and are generally the result of the average club/player formulating what is essentially a framework agreement to govern their relationship. Although this latter category of contracts is arguably most often concluded by Caribbean athletes, there has been a notable paradigm shift in recent years, signified by an ever-increasing number of athletes entering into detailed, precise and, indeed, multimillion dollar contracts.

In general, sports contracts contain a number of common terms, which reflect the fact that there is a certain degree of convergence in the nature and scope of sports contracts. Examples of these common terms include:

- A clause specifying that the agreement represents a contractual relationship between the club and the player. The names of the parties must be correctly identified or, at the very least, descriptions must be given that leave no doubt to whom reference is being made;
- A clause specifying the duration of the contract, including commencement date and expiration date;
- A clause outlining the obligations by which the player is bound. These obligations might be generic in nature or the parties may prefer to give specifics so that there is little room for doubt. Among other things, a player may be obliged to:
  - attend all training sessions and team meetings of the club;
  - obey all reasonable directions of the coach, president, or other senior officials of the club;
  - play in all matches in which he is selected to play or as otherwise directed by the club, unless a duly qualified medical practitioner rules him unfit to play;
  - play to the best of his ability in every match, having regard to his unique skills and expertise;
  - comply with all reasonable requirements of the club relating to preparation for matches, attendance at social functions, behaviour and dress;

to vary an employee's conditions of service (whether contractual or not) with a view to getting rid of the employee ... does an act in a manner calculated or likely to destroy the relationship of confidence and trust between employer and employee. Such an employer has therefore breached the implied term. Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract.'

31 Such as concluded by the West Indies Players Association (WIPA) and Cricket West Indies (CWI). This agreement was the subject of interpretation by Rahim J in *West Indies Players' Association v West Indies Cricket Board Inc T&T HC*, CV2011–04679.

- not play for or train with any other club or team in respect of the same sport or other sport without first obtaining the consent in writing of the club;
- do everything reasonably necessary to obtain and maintain the best possible physical condition so as to render the most efficient service to the club and to submit from time to time and, as and when required by the club, to a complete a thorough medical fitness test and examination;
- maintain membership of recognized hospital and medical benefits fund which provides hospital, medical and dental benefits coverage and includes ambulance subscription;
- not engage in conduct that brings the person or sport into disrepute;
- not engage in any dangerous activity which in the opinion of the club may affect the player's ability to perform his obligations under this contract without first obtaining the consent in writing of the club; and
- wear only such items of apparel as may be approved of or prescribed by the club/league.

- A clause indicating the layers of rules and regulations by which the player is bound, including club rules, league rules and the rules of the sport's governing body and international federation;
- A clause outlining the obligations by which the club must abide. Among other things, the club may be obliged to:
  - make payments to the player in respect of his salary and other benefits;
  - provide the player each year with copies of all the rules that affect the player and of the terms and conditions of any policy of insurance in respect of or in relation to the player with which the player is expected to comply;
  - promptly arrange appropriate medical and dental examinations and treatment for the player at the club's expense in respect of any injury or illness;
  - comply with all relevant statutory provisions relating to industrial injury and any regulations made pursuant thereto;
  - maintain and observe a proper health and safety policy for the security, safety and physical well-being of the player when carrying out his duties under the contract;
  - give the player every opportunity, compatible with his obligations under the contract, to follow any course of further education or vocational training that he wishes to undertake and give positive support to the player in undertaking such education and training; and
  - release the player as required for the purposes of fulfilling the obligations in respect of representative matches to his national association.

- A clause addressing how players' image rights are to be treated;
- A clause detailing the amount of remuneration and other benefits to which the player is entitled, and other relevant terms of payment;
- A clause addressing the question of termination, including what amounts to a breach (e.g. gross misconduct), the consequences of a breach, and the process through which the agreement could be brought to an end (e.g. notice in writing, reasons for termination and period of notice);
- A 'buy-out' or 'sell-on' clause specifying the transfer fee (in the case of professional football) that must be paid by a new club that wishes to 'buy' the player;
- Clauses detailing how injury to the player, any grievance and disciplinary issues are to be resolved;

- A clause specifying the applicable law governing the contract in question;
- A clause outlining the dispute resolution process that must be followed in the event of a breach of contract or the terms of the contract falling for interpretation. Typically, in an effort to ensure the speedy resolution of matters in an amicable and confidential manner, the contract will provide for arbitration. The parties may also indicate the method of selecting the arbitrator(s), or may simply indicate the dispute resolution body to which reference of the case must be made, such as the FIFA Dispute Resolution Chamber or the CAS ordinary or, in some cases, appellate, division.[32] In those cases where a privatized method of dispute resolution is not chosen, the court may be called upon to interpret said contract in the event of a dispute between the parties.

Perhaps the most contentious of the aforementioned clauses are the clauses that speak to remuneration, termination for breach of contract and conduct that brings the person/sport into disrepute. The question of how the court/tribunals have treated these issues is addressed later in this chapter under the subject matters of breach of contract and remedies and in Chapter 8, which addresses emerging issues in Commonwealth Caribbean Sports Law.

### 3.5.2 Common terms in coaches' contracts

Hugely successful coaches, like Glen Mills who guided Usain Bolt and Yohan Blake to international acclaim, are typically in demand in the modern era of sports. Their main role is to provide guidance and instruction to players so as to enable them to fully maximize their potential, and hence become highly successful athletes. In this context, coaches have increasingly become well-sought-after professionals, whose net-worth can range from thousands to millions of dollars.

Coaches, like players, have increasingly seen the importance of entering into carefully drafted sports contracts, in recognition of their commercial value and in an effort to circumvent misgivings that may arise as a result of skewed contractual undertakings. These contracts are highly varied in nature, and their scope and quality of draftsmanship really depend on the financial backing and professionalism that each party brings to the negotiating table. While a number of these contracts are individually negotiated, there are a number of coaches who rely on standard form contracts, which share some commonality with individualized contracts.

Typically, the following terms may be found in coaches' contracts:

- A clause specifying that the agreement represents a contractual relationship between the club and the coach. The names of the parties must be correctly identified or, at the very least, sufficient descriptions in reference to the parties in question;
- A clause specifying the duration of the contract, including commencement date and expiration date;

32 CAS 2013/A/3263 *Azovmash Mariupol Basketball Club v Luca Bechi*, award of 14 March 2014, [51]. The CAS noted that if there is no term in the contract allowing for reference to the CAS to resolve a contractual dispute, it will not assume jurisdiction. See also CAS 2008/A/1708 *Football Federation Islamic Republic of Iran (IRIFF) v Fédération Internationale de Football Association (FIFA)*, award of 4 November 2009 (the CAS held that in order for a decision to be appealable before CAS, three conditions should be met: first, there must be a 'decision' of a federation, association or another sports-related body; second, the parties must have agreed to the competence of the CAS and, third, the (internal) legal remedies available must have been exhausted prior to appealing to CAS).

- A clause indicating the obligations by which the coach is bound. These obligations might be generic in nature or the parties may prefer to give specifics so that there is little room for doubt. Among other things, a coach may be obliged to:
  - assist, guide and encourage players to enhance their skills set and performance by employing proven tactical knowledge and expertise;
  - supervise all training sessions and team meetings of the club;
  - execute all reasonable directions given by the club's management with respect to the preparation, supervision and selection of the team;
  - supervise and give directions to players at all matches in which the team is engaged;
  - comply with all reasonable requirements of the club, including attendance at social functions, press conferences, behaviour and dress;
  - not provide instruction or supervision to any other club or team in respect of the same sport or any other sport without first obtaining the consent in writing of the club;
  - do everything reasonably necessary to ensure that members of the team comply with health and safety requirements;
  - obtain and maintain the best possible physical condition so as to render the most efficient service to the club;
  - not engage in conduct that brings the person or sport into disrepute; and
  - wear only such items of apparel as may be approved of or prescribed by the club/league.
- A clause indicating the layers of rules and regulations by which the coach is bound, including club rules, league rules and the rules of the sport's governing body;
- A clause outlining the obligations by which the club must abide. Among other things, the club may be obliged to:
  - make payments to the coach in respect of his salary and other benefits;
  - comply with all relevant statutory provisions relating to health and safety; and
  - provide all necessary equipment and infrastructure to enable the coach to effectively fulfil his obligations.
- A clause detailing the amount of remuneration and other benefits to which the coach is entitled, and other relevant terms of payment. Usually, a liquidated damages clause, dealt with in more detail in a subsequent section of this chapter, is included. Liquidated damages clauses are enforceable only if they represent a genuine pre-estimate of loss in the event of a breach, and should not be imposed as a penalty;[33]
- A clause addressing the question of termination, including what amounts to a breach (e.g. gross misconduct), the consequences of a breach, and the process through which the agreement could be brought to an end (e.g. notice in writing, reasons for termination and requisite period of notice);
- Clauses detailing how any grievance and disciplinary issues are to be resolved;
- A clause specifying the applicable law governing the contract in question; and
- A clause outlining the dispute resolution process that must be followed in the event of a breach of contract or the terms of the contract falling for interpretation. Typically, the

33 Martin Greenberg and Djenane Paul, 'Coaches' Contracts: Terminating A Coach Without Cause and the Obligation to Mitigate Damages' (2013) 23 Marq. Sports L Rev 339.

contract will provide for arbitration. The parties may indicate the dispute resolution body that is to be petitioned in the case of a dispute.

Coaches' contracts, when they do fall for interpretation, are interpreted in similar manner to players' contracts. Tribunals tend to consider the natural and ordinary meaning of the words used in the contract in question in an attempt to determine what the reasonable person, in the situation of the parties, believed that the parties intended. Examples of breaches of coaches' contracts are discussed in a subsequent section of this chapter.

## 3.6 PLAYER TRANSFERS

There is often a great degree of excitement, fascination, intrigue and wonder when it is announced, as it often is, that a player is transferred from one club to another for a transfer fee that usually extends into the hundreds of millions. A high-profile recent example is that of Paris Saint-Germain's signing of Brazilian forward Neymar for a world record fee of 222 million euros (£200m) from Barcelona, which smashed the previous record set when Paul Pogba returned to Manchester United from Juventus for £89 million in August 2016.[34]

A transfer arises where a player, who is in an existing contractual relationship with his club and is thus a registered player with that club (A), wishes to be transferred from that club (A) to another club (B).[35] Contrary to popular belief, the money paid to facilitate the transfer, referred to as a 'transfer fee', is not paid directly to the player, but rather to the club (A), which, in effect, contracts with the other club (B) to allow its player to exclusively play for that other club, even before their contract with the player expires.[36]

This process usually occurs during the 'transfer window', which usually opens on 1 January and closes on 31 January and then again on 17 May – 9 August, at least in the context of the English Premier League.[37] The decision by a club to pay millions of dollars just to have an extraordinary player transferred to it depends on a number of factors, including the club's existing financial position, the quality, experience and potential of the player, the marketability of the player, the existence of other clubs lined up to purchase the player, and, indeed, the club's need for the player.[38] A typical clause contained in the contract between the two clubs might indicate:

> An agreement made this day the 5th of June 2018 between CLUB A and CLUB B, whereby it is mutually agreed that the registration of the player L. be transferred from CLUB A to CLUB B, on condition that CLUB B receives the International Transfer Certificate, for a transfer fee of 20,100,000 EURO (twenty million and one hundred thousand EURO). The transfer fee shall be paid as follows:
>
> 1 10,100,000 EURO (ten million one hundred thousand EURO on 15 July 2018); AND
> 2 10,000,000 EURO (ten million EURO on 15 July 2018).

34 'Neymar: Paris St-Germain sign Barcelona forward for world record 222m euros' (*BBC Sports*, 3 August 2017) www.bbc.com/sport/football/40762417.
35 Miriam Quick, 'How does a football transfer work?' (*BBC Capital*, 29 August 2017) www.bbc.com/capital/story/20170829-how-does-a-football-transfer-work.
36 CAS 2012/A/2875 *Helsingborgs IF v Parma FC spA*, award of 28 February 2013.
37 'When does the transfer window open? When is Deadline Day?' (*Sky Sports*, 1 January 2018 www.skysports.com/football/news/11095/11146974/when-does-the-transfer-window-open-when-is-deadline-day.
38 Eberhard Feess and Gerd Muehlheusser, 'Transfer fee regulations in European football' (2003) 47(4) European Economic Review 645.

The receiving club, namely club B, will then draw up an agreement between itself and the player, outlining the terms and conditions to which both parties will be bound, which is an entirely separate agreement from the transfer agreement, outlined above, which is concluded between the two clubs.

On the terms of the above example, the receiving club in question (club B) will be required to pay the sums outlined by the dates specified in the contract, failing which club A can bring an action seeking to recover the payment due to it in accordance with the terms of said contract.[39]

With the extraordinary large sums of money in transfer fees, often quoted in pounds sterling or euros, which we frequently hear about in the media, one may be inclined to believe that player transfers only occur in the metropolis. However, right here in the Caribbean, there has been a growing number of player transfers, though this has in large part been limited to the Trinidad and Tobago (TT) Pro League and the Jamaican Red Stripe Premier League. By way of example, Carlos Edwards, a TT Pro League player, signed with Wrexham of the Football League for £250,000 in 2000.[40] This was later followed by Dennis Lawrence's signing with Wrexham for £100,000, transferring from TT Pro League Club, the Defence Force.[41] In 2004, Kenwyne Jones was sold to Southampton of the English Premier League for a nominal fee, reported to be £100,000, with the Pro League club claiming an additional sell-on clause. After Jones was sold to Sunderland of the Premier League in 2007 for £6 million, W Connection FC, a TT Pro League Club, secured a percentage of the transfer fee in the region of USD $1 million.[42]

Player transfers in Trinidad and Tobago are governed by Article 35 of the constitution of the Trinidad and Tobago Football Federation, which provides that an amateur or non-amateur player who is registered with a club in membership with an affiliate of the Federation can qualify to be registered for a club of another affiliate or association once the latter has received a transfer certificate issued by the Federation. That said, the Federation may refuse to issue the transfer certificate if the player who wishes to be transferred has not fulfilled his contractual commitment to the club he is leaving or the new club with which the player wishes to be registered refuses to include a clause permitting the release of the player whenever called upon by the Federation to play for the national team (senior or age group). An additional consideration that must be borne in mind is the controversial stipulation in the TTFF constitution that where a registered player receives a professional contract for which his last club receives a transfer fee, the Federation is entitled to 20% of the said fee, which fee must be paid within seven days of its receipt by the old club.

The legality of restrictions on player transfers was considered in the landmark Sports Law case of *Union Royale Belge v Bosman*.[43] Here, the then applicable rules on player transfers provided that a professional footballer who was a national of an EU Member State could not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club had paid to the former club a transfer, training or development fee. On the facts, Bosman was a player for RFC Liège in the Belgian First Division in Belgium, whose contract had expired in 1990. He wished to move to Dunkerque, a French club, but Dunkerque refused to meet his Belgian club's transfer fee demand, so Liège refused to release Bosman, thereby resulting in Bosman being precluded from benefiting from a lucrative contract with Dunkerque.

39 CAS 2014/A/3586 *Al-Masry* SC *v Warri Wolves FC*, award of 11 December 2014.
40 Rob Griffiths, 'Wrexham FC's top 20 signings: Carlos Edwards' (*Dailypost.co.uk*, 5 June 2015) www.dailypost.co.uk/sport/football/football-news/wrexham-fcs-top-20-signings-9392420.
41 Ibid.
42 Peter Smith, 'Kenwyne Jones announces retirement from football at age of 33' (*Stokesentinel.co.uk*, 21 November 2017) www.stokesentinel.co.uk/sport/football/football-news/kenwyne-jones-stoke-city-atlanta-809254.
43 Case C-415/93.

In an action before the then European Court of Justice (ECJ), Bosman argued that the then applicable rules breached Article 48 of the then European Economic Community (EEC) Treaty by restricting his freedom of movement, as he was effectively prevented from exercising his right to move to another club, even after his contract with RFC Liège had expired. The court, in agreeing with Bosman, found it to be a breach of the EEC Treaty that the new club was required to still pay the fee in issue even after the player's contract with his old club had expired, under pain of penalties, which included it being struck off for debt. The practical effect of this ruling is that clubs can no longer block a move or demand a fee from a player or from the destination club, if the player has left at the end of their contract with the original club.

## 3.7 TRAINING COMPENSATION

The importance of developing young players is reflected in FIFA's Regulations on the Status and Transfer of Players (RSTP) and, in particular, in the regulations concerning the payment of training compensation. Article 20 and Annex 4 RSTP set out the system whereby, on registering as a professional for the first time, the club with which the player is registered (the new club) is responsible for paying training compensation within 30 days of registration to every club with which the player has previously been registered, in accordance with the player's career history as provided in the player passport, and that has contributed to his training starting from the season of his 12th birthday to his 21st birthday, or earlier in some cases. Accordingly, for the first time a player registers as a professional, the training compensation payable is calculated by taking the training costs of the new club multiplied by the number of years of training, in principle from the season of the player's 12th birthday to the season of his 21st birthday. In the case of subsequent transfers, training compensation is calculated based on the training costs of the new club multiplied by the number of years of training with the former club.

As a general rule, the relevant costs to be taken into account when calculating the amount of the training compensation are those that would have been incurred by the new club. In principle, the effective training costs of the former club are not relevant. Training compensation is considered to be a reward and an incentive, rather than a refund of the actual training costs incurred in training young players. The aim of the training compensation is to stimulate solidarity within the world of football, not the reimbursement of actual training costs.[44] According to the CAS in *FC Karpaty v FC Zestafoni*:

> The FIFA training compensation system ensures that training clubs are adequately rewarded for the efforts they have invested in training their young players. The objective of training compensation is thus to ensure that training clubs are sufficiently compensated for the cost incurred in training their young players. This concept is aimed at maintaining the competitive balance between clubs and allows them to continue training and developing players in the knowledge that they will be adequately compensated for their efforts. Training compensation therefore plays an important role in the development of young players and in maintaining the stability and integrity of the sport.[45]

The basic rule is that training compensation is due, even after an employment contract expires and regardless of whether a new contract was offered to the player by the training club. Article 6 of Annex 4 to the FIFA Regulations, however, provides for an exception to this general rule for the specific category of 'players moving from one association to another inside the territory

44 CAS 2015/A/3981 *CD Nacional SAD v CA Cerro,* award of 26 November 2015.
45 CAS 2014/A/3553, award of 6 October 2014 [83].

of the EU/EEA'. In view of Article 6(3) of Annex 4 to the FIFA Regulations, no training compensation is payable to the player's training club if the player is transferred at the end of his contract to another EU/EEA club and if the training club did not offer the player a 'new' contract before the expiry of his current contract, though there are some cases in which, even though the player's former club did not offer a 'new' contract to the player, the training club can still 'justify that it is entitled to such compensation'.[46]

In the Caribbean, the question of whether clubs routinely receive training compensation has not been a matter that has been ventilated in the public domain,[47] though there are examples where training compensation has been offered, for example by Southampton to W Connection FC when it signed young Trinidadian midfielder Kenwyne Jones in April 2004.[48]

## 3.8 SPORTS AGENTS

The rapid commercialization of sports in the last few decades has led to a marked expansion in the number of professional and, in some cases even some amateur, athletes retaining agents. Although sports agents are today regarded with some degree of esteem, this was not always the case. In fact, for a long time, agents were viewed as 'parasites',[49] who were not to be trusted both because of their oft unscrupulous activities and their potential role in empowering athletes to negotiate better contracts with leagues and clubs. For this reason, in the first half of the twentieth century, athletes almost exclusively negotiated their own contracts, which was often detrimental to their own commercial success, since they did not, in most cases, have specialized commercial acumen. Given the virtual ban on agents–athletes relationships during this period, athletes were often limited to two choices – accept the contract as proposed or do not ply their trade. As pointed out by Stacey Evans, 'this "take it or leave it" style of negotiating created a lack of player autonomy'.[50]

With the passage of time and the rapid expansion in the monetary value of athletes, the practice of completely restricting athlete–agents relationships gradually subsided. This occurred in the United States in 1966 when baseball players formed the Major League Baseball Players' Association in order to protect their rights as professionals. By 1970, the Players' Association had negotiated for its constituents to have the right to select agents of their choice, largely to represent them in complex contractual negotiations. The court's intervention in the case of *L.A. Rams Football Club v Cannon*[51] also meant that by the latter half of the twentieth century, it had become a universally accepted fact that 'athletes need agent representation in order to protect their interests and match the negotiating skill of a general manager or member of a professional team'.[52]

In the Caribbean, the West Indies Players' Association (WIPA) is the official player representative body for cricketers in the West Indies, and is an affiliate of the Federation of International Cricketers' Association (FICA). As the exclusive representative and bargaining agent of

46 CAS 2014/A/3710 *Bologna FC* 1909 *SpA v FC Barcelona*, award of 22 April 2015.
47 See useful commentary, Lasana Liburd, 'Training compensation: What FIFA says you're owed for developing talent' (*wired868.com*, 6 October 2014) https://wired868.com/2014/10/06/training-compensation-what-fifa-says-youre-owed-for-developing-talent/.
48 'Jones set to sign new Saints deal' (*BBC Sport*, 28 February 2006) http://news.bbc.co.uk/sport2/hi/football/teams/s/southampton/4759084.stm.
49 Stacey Evans, 'Sports Agents: Ethical Representatives or Overly Aggressive Adversaries' (2010) 17 Jeffrey S Moorad Sports LJ 91.
50 Ibid.
51 185 F Supp 717 (SD Cal 1960).
52 Ibid 719.

players selected for national and West Indies teams, WIPA is the authorized and collective voice of all West Indian cricketers, past and present.

WIPA was established in 1973, and incorporated in 2003 under the Companies Act of Trinidad and Tobago 1995. The association was established during a visit to the United Kingdom by the then West Indies cricket team. Sir Garfield Sobers, Lance Gibbs, Rohan Kanhai (then captain), and Deryck Murray comprised the earliest committee members, with the latter two serving as the initial president and secretary, respectively. Since then, there have been a number of players who served as WIPA presidents: Courtney Walsh, Dinanath Ramnarine and Wavell Hinds, the incumbent.

WIPA's raison d'etre has been to serve as the West Indian players' representative body. WIPA was established in an era when territories were still under British rule, and cricket, like other institutions, was managed and controlled by the plantocracy and the ruling white class. The then cricket board administration saw the emergence of this unionized body of cricketers as an attempt to whittle down the monopoly it exercised over players. As such, there were veiled threats to players contemplating joining the body. In fact, players were indirectly told that joining the body would mean jeopardizing their position as players, that is, the possible consequence of being 'dropped' from the team. Nevertheless, players recognized the need for a body that would serve players' interests and well-being and soldiered on.

Former West Indies player and former WICB president, Revd Sir Wesley Hall, set relations between players and the WICB on an industrial relations platform, and the association has sought to ensure that this continues to be enshrined in a memorandum of understanding (MOU) and collective bargaining agreement (CBA).[53]

### 3.8.1 The expertise of sports agents

Today, sports agents come from all walks of life, and have been retained by a number of leading Caribbean sportspersons, including Usain Bolt, Dwayne Bravo and Kirani James. In fact, no particular type of expertise or education is required to become a sports agent, since this is an area of the law that has not received any legislative intervention in the Caribbean to date. While some have argued that attorneys-at-law should be favoured as sports agents primarily because of their ethical training and the obligations of the legal profession to which they must abide,[54] others are of the view that once an individual is 'street smart' in the business of sports, that is exemplary at networking and contract negotiation, that individual is best suited for the job as an agent.

### 3.8.2 The role of sports agents

Although there is a prevailing view that sports agents' primary task is contract negotiation on behalf of athletes, this appears to be a parochial view in light of evolving dynamics in this area. Indeed, the typical agent–athlete contract today contains provisions that are well beyond contract negotiation, including soliciting and arranging product endorsements on behalf of the athlete, speaking engagements, and other uses of the player's name and image for commercial purposes; promoting the athlete's career through public relations, media coverage, and charitable activities; providing financial management services such as selecting accommodation, modes of transportation and even insurance policies; resolving conflicts that arise, especially

53 'About Us' (West Indies Players Association, 2018) www.wiplayers.com/about-us/.
54 Stacey Evans (n 49).

in respect of conduct that could potentially bring the sport into disrepute; representing the athlete in salary or grievance arbitration matters; and even counselling the player in times of difficulty.[55]

### 3.8.3 Sports agents' fiduciary duties

Irrespective of whether a lawyer or a 'hustler'[56] represents an athlete as an agent, and regardless of whether the scope of the agent's duty is restricted to contract negotiation or is more liberal in nature, that individual is in a fiduciary relationship with the athlete (the 'principal'),[57] to which the law attaches certain legally enforceable obligations, as succinctly enunciated by Barry, Skinner and Engelberg.[58]

At common law, sports agents are obliged to carry out, generally in person and with reasonable dispatch, the business they have agreed to undertake with reference to their terms of appointment and the instructions of the principal. Where no definite instructions have been given to the agent or where the agent has discretion, the general rule is that the agent should 'follow the ordinary, normal course or customs of such a [sport]'.[59]

Second, sports agents are under an obligation to exercise proper care, skill and diligence in the carrying out of their undertakings.

Third, it is the duty of sports agents to keep accurate accounts of all their transactions and to avoid both the improper mixing of the principal's property with their own and payments made to the agent on the principal's behalf. Failure to keep proper accounts and the failure to be prepared to produce them to the principal at any time can give rise, in the case of a dispute, to a presumption in favour of the principal's grievance.[60]

Fourth, sports agents are obliged to use the materials and information obtained in their capacity as an agent solely for the purposes of the agency and not to use that information in any manner inconsistent with good faith towards the principal such as, for instance, by divulging it to third parties.

Fifth, sports agents should not enter into any transaction that is likely to result in their duty towards their principal being in conflict with their own interests. This is subject to situations where the agent has first made the 'fullest' disclosure of the exact nature of their interest to the principal. Where non-disclosure occurs, the integrity of any 'non-disclosed' transaction is immaterial, and the agreement is voidable at the principal's option.

Finally, sports agents must not acquire any secret profit or benefit from his agency other than that in the principal's reasonable contemplation at the creation of the agency relationship. Put simply, any profit or benefit accruing to the agent above that contemplated by the agreement between the agent and principal should be revealed to the principal. This would include all profits and the value of all related benefits being paid over to the principal. Where there has

55 William Simons, *The Cooperstown Symposium on Baseball and American Culture*, 2007–2008 (McFarland, 2009) 220.

56 The term 'hustler' is used in some Caribbean jurisdictions to describe a person who does not possess formal qualifications to undertake the particular task in question, but who nonetheless demonstrates professional acumen, largely due to his commercial awareness, strong relationships with stakeholders and negotiation skills.

57 Kenneth Shropshire, 'Sports Agents, Role Models and Race-Consciousness', 6 Marquette Sports Law Journal 267 (1996).

58 Michael Barry, James Skinner and Terry Engelberg, *Research Handbook of Employment Relations in Sport* (Edward Elgar Publishing, 2016) 151.

59 Ibid.

60 Ibid.

been a bribe by the agent or he has acted in a way prejudicial to the principal's interest, there will be a breach of the agency relationship.[61]

In practice, the courts have demonstrated a zero-tolerance approach toward breaches of the athlete–agent fiduciary duties. From a Caribbean perspective, perhaps the best illustration of the court's robust approach to this question is the case of *Imageview Management Ltd v Kelvin Jack*.[62] In that case, Jack, Trinidad and Tobago's international goalkeeper, wished to play professionally in the United Kingdom. The close of the transfer window was only a week or so away, so he asked Berry, who would later become his agent, to negotiate with Dundee United a placement on his behalf. Berry agreed that he (via Imageview) would act as his agent. Although initially there was no written contract of agency, one was later signed in 2004, which reflected the earlier oral agreement. The contract, in part, provided for a two-year term, and that Jack was to pay Imageview 10% of his monthly salary if Imageview successfully made arrangements for him to sign with a UK club. Imageview agreed, *inter alia*, to provide 'advice and representation in connection with any contract or renewal of a contract which the Player might wish to enter into'. It further provided that Imageview was to 'use its reasonable endeavours to promote the Player and act in his best interests'.

Berry contacted Dundee United, and later negotiated a contract for Jack to play for the club for two years. At the same time, he agreed that Dundee United would pay Imageview a fee of £3,000 for getting Jack a work permit. Such a permit was needed because Jack was a Trinidadian, non-EU citizen. Interestingly, Berry did not tell his principal, Jack, about this work permit contract. Imageview duly obtained a work permit for Jack and Dundee United paid the £3,000 fee, though, as it was later found by the Recorder, the actual value of the work done in getting the permit was £750. Jack signed and played for Dundee United and began paying the 10% due under his agency contract with Imageview. About a year later, in 2005, when Jack asked about arrangements with respect to his work permit, Berry told him that it was none of his business. When Jack eventually found out about the secret profit made by his agent, he stopped paying the commission. Imageview brought an action against Jack claiming unpaid agency fees in the sum of £3,203.07, but Jack defended the claim, himself claiming back the agency fees he had already paid as well as the full £3,000 received by Imageview from Dundee United or, alternatively, the 'excess' above the real value of the work done in respect of the work permit, namely £2,250.

At the outset, both the Recorder and the High Court accepted that Imageview (through Berry), in negotiating a deal for itself with Dundee United, had a clear conflict of interest, since the more it got for itself, the less there was for Jack. The High Court, in this connection, recognized that the law imposes on agents high standards, and that footballers' agents are not exempt from these standards. Put more bluntly, an agent's own personal interests come entirely second to the interest of his client, so that if an agent undertakes to act for an athlete, he must 'act 100%, body and soul, for him ... [he] must act as if [he] were him ... [he] must not allow [his] own interest to get in the way without telling him'.[63]

The court found that an undisclosed but realistic possibility of a conflict of interest is a breach of an agent's duty of good faith to his principal. That said, to avoid such a breach, all the agent has to do is to make full disclosure and obtain the consent of his principal;[64]

61 Ibid.
62 [2009] EWCA Civ 63.
63 Ibid [6].
64 *Rhodes v Macalister* (1923) 29 Com Cas 19. It was held in this case that an agent must not take remuneration from the other side without both disclosure to and consent from his principal. If he does take such remuneration he acts so adversely to this employer that he forfeits all remuneration from the employer, although the employer takes the benefit and has not suffered a loss by it.

that is, he must 'give the player details of any side-deals that may form part of his transfer arrangements'.[65]

In tracing the development of this area of law, the court noted that the law as to an agent's duty of fidelity where there is a realistic possibility of a conflict of interest 'goes back a long way, [though] the courts have found it necessary to restate it from time to time'.[66] The court cited with approval the dicta of Cotton LJ in *Boston Deep Sea Fishing v Ansell*,[67] who was of the view that:

> Where an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives to his employer ... power and authority to dismiss him from his employment as a person who by that act is shewn to be incompetent of faithfully discharging his duty to his principal.[68]

The court also cited with approval the dicta of Bowen LJ in *Boston*, when he unreservedly stated:

> An agent employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction, it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it.[69]

On the question of intention, the court in *Imageview* was of the opinion that it did not matter whether Berry thought that it was alright to make the side deal, as he may have done if a practice of side deals existed in the world of football agents. In matters touching the agency relationship, agents cannot so act since the principal bargains, in the employment context, for the exercise of the 'disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit'.[70] It does not matter whether the principal has suffered damage or not;[71] once an agent is employed by a principal, he must, regardless of his intent, avoid any activity that will amount to a conflict of interest.

But are there any exceptions to the strict duty of the agent to his principal? In *Imageview*, their Lordships appeared to suggest that not everything that is acquired in the course of an agency relationship by an agent can be made the subject of account to the principal. The test is whether acquisitions on the agent's own account would be inconsistent with his undertaking to act for his principal. It will be inconsistent where the benefit is acquired within the scope of the activities that the agent has undertaken to pursue on his principal's behalf or where the agent uses his position or connection with the principal to obtain a benefit; or obtains one while

65 Ibid.
66 *Imageview v Kelvin Jack* (n 62) [8].
67 (1888) 39 Ch D 339. Here, a managing director of a company, in placing orders for vessels for his company, secretly agreed with the shipbuilders to receive a commission, which amounted to a breach of the director's fiduciary duty to his principal. His lordship lamented that 'if a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty. It is not an honest act, and, in my opinion, it is a sufficient act to shew that he cannot be trusted to perform the duties which he has undertaken as servant or agent. He puts himself in such a position that he has a temptation not faithfully to perform his duty to his employer.'
68 Ibid 357.
69 Ibid 364.
70 *Imageview v Kelvin Jack* (n 62) [18].
71 *Rhodes v Macalister* (1923) 29 Com Cas 19 [28] per Scrutton LJ.

holding himself out to another party as representing the principal.[72] In other words, where the agent's remuneration is to be paid for the performance of several *inseparable* duties, if the agent is unfaithful in the performance of any one of those duties by reason of his receiving a secret profit in connection with it, it may be that he will forfeit his remuneration. However, where the several duties to be performed are *separable*, the receipt of a secret profit in connection with one of those duties would not, in the absence of fraud, involve the loss of the remuneration that has been fairly earned in the proper discharge of the other duties.[73]

On the facts, the court in *Imageview* accepted that while there may well be breaches of a fiduciary duty that do not go to the whole contract, and that would not prevent the agent from recovering his remuneration,[74] that is, where there is an honest breach of contract, this matter was simply not such a case. This was a scenario where a secret profit obtained because Berry/Imageview was Jack's agent, and there was accordingly a breach of a fiduciary duty because of the obvious and real conflict of interest. The profit was not only greater than the work done, but was related to the very contract that was being negotiated for Jack. For this reason, given that a conflict of interest was shown, the agent's right to remuneration vanished.

Citing policy considerations, the court concluded that because the agent had betrayed the trust reposed in him, notions of equity and conscience were brought into play, and that the objective of deterrence required that the commission already paid by Jack be forfeited and, further, Jack needed not pay any more agency fees and was, in fact, entitled to repayment of the fees already paid by him. Although Berry tried to rely on the rule that an agent who has acted in breach of fiduciary duty and against whom an account of profits is ordered may nevertheless be given an allowance for skill and effort in obtaining the profit which he has to disgorge where it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour that has produced it, the court did not so find in his favour, noting that this is a power that is exercised sparingly, out of concern not to encourage fiduciaries to act in breach of their fiduciary duties.

The *Imageview* case demonstrates that the court adopts a zero-tolerance approach to agents breaching their duty of fidelity to athletes, which should hopefully serve as a deterrent against agents engaging in surreptitious activities in the Caribbean. Unfortunately, the experience in other jurisdictions has proved that agents, despite the harshness of the rules described above, still frequently get themselves into a tangled mess. For example, in *Detroit Lions, Inc v Argovitz*,[75] running back, Billy Sims, had at the time been entering the last year in a three-year contract with the Detroit Lions when he was offered a USD $3.5 million contract extension by the managers of the Lions. His agent, Argovitz, however had a significant financial interest in the Houston Gamblers, and so wanted Sims to sign with the Gamblers. For this reason, he did not relay to his principal the news of the contract extension. Argovitz was held liable for having breached his fiduciary duty of fidelity to his principal, since he failed to act in his principal's best interest and had, in fact, manipulated Sims' contract negotiations with the Lions in light of his own interest in the Gamblers. A similar decision was arrived at in *Brown v Woolf*,[76] a case in which an athlete successfully argued that his agent, who had made sure that he (the agent) received his 5% agency fee, had negotiated a contract for his principal with a new team in the National Hockey League without having conducted any investigation into the financial stability of the new team. Where the new team fell into financial difficulties and eventually defaulted on its financial obligations toward the athlete, the athlete was able to successfully claim damages against the agent.

72 *Imageview v Kelvin Jack* (n 62) [31].
73 Ibid [51] citing *Hippisley v Knee Bros* [1905] 1 KB 1.
74 Ibid [43] citing *Keppel v Wheeler* [1925] 1 KB 577, 592 per Atkin LJ.
75 No 84–1360, 1985 U.S. App. LEXIS 14360, 1 (6th Cir June 6, 1985).
76 554 F Supp 1206 (SD Ind 1983).

Given the prevailing scepticism associated with sports agents, it is perhaps not surprising that NBA superstar, LeBron James, reportedly fired his agent and hired three of his friends to take over management duties.[77] This might also perhaps explain why, under Article 12(2) of the FIFA Players' Agents Regulations, an express, clear and unequivocal two-year time limit is imposed on the commitments assumed between agents and clubs and agents and players. According to the CAS, this is not merely intended to protect the weak parties in a transaction, i.e. the players and not the clubs, but it is also intended to protect the clubs' interests against possible abuses by their management, which involve the engagement of agents for long periods.[78] Even further, this may also explain why national member associations of FIFA have increasingly required agents who represent players to be licensed, failing which they may violate FIFA's regulations if they purport to represent a player.[79]

### 3.8.4 Agents' remuneration

It must be borne in mind that mutual obligations often exist in contracts between players/clubs, on the one hand, and agents on the other. As confirmed by the CAS, this effectively means that, in accordance with the general principles of *bona fide* and *pacta sunt servanda*, a player/club that knowingly enters into a valid agency contract with an agent must fulfil its obligations toward the agent, unless the agent is remunerated twice for his services rendered in the same transaction or has breached his fiduciary duties. In short, where a club has freely undertaken to pay a commission to an agent for the intermediary services rendered with a view to having a player sign an employment contract with it, the club must pay the commission agreed to the agent if the player finally signs an employment contract with the club.[80]

More generally, it is also instructive to note that there is no cap on the amount of an agent's remuneration when that person has been contracted by a club/player. The new FIFA Regulations on Working with Intermediaries, which came into effect on 1 April 2015, only recommend that the remuneration due to the intermediary be at 3% of the player's basic gross income. An adjudicating body may not, however, reduce an allegedly excessive agent's fee, having regard to the need to give a degree of deference to the parties' right to freedom of contract. That said, to determine if the remuneration is excessive, the adjudicating body must assess all the requisite elements of the arrangement, which are objectively relevant, and take into account the concrete circumstances of the matter before it. In a case where it is undisputed that the agent properly fulfilled his contractual obligations arising from the agency agreement, the principle of *pacta sunt servanda* must be respected and the terms and conditions, which the parties freely agreed on, must be fulfilled.[81]

## 3.9 BREACH OF SPORTS CONTRACTS

Most sports contracts are performed according to their terms up unto their natural expiration or until they are terminated by mutual agreement.[82] These contracts are said to be discharged

77 'LeBron James fires agent, 3 friends to take over' (*CBC Sports*, 11 May 2005) www.cbc.ca/sports/basketball/lebron-james-fires-agent-3-friends-to-take-over-1.534715.
78 CAS 2008/A/1665 *J. v Udinese Calcio SpA*, award of 19 May 2009.
79 CAS 2012/A/3039 *Trevor McGregor Steven v FIFA*, award of 29 August 2013.
80 CAS 2012/A/2988 *PFC CSKA Sofia v Loïc Bensaïd*, award of 14 June 2013.
81 CAS 2015/A/4112 *Saudi FC Al-Ittihad Jeddah Club v Eduardo Uram*, award of 15 January 2016.
82 For example, Ottis Gibson, former West Indies cricket coach, mutually agreed with CWI in 2014 for his contract to be terminated earlier than its natural date of expiration. See 'Windies Board terminates

either by performance or consent, which raises no jurisprudential challenges since there cannot be said to be a breach.

There are other cases, however, where the performance of the contract in question is impeded by some act or omission on the part of one party which goes to the very root of the contract, thereby allowing the injured party, in light of the breach, to treat the contract as terminated, though, in some cases, he may choose to affirm the contract and still possibly claim damages for the breach.

When considering the question of breach of a sports contract, it is important to bear in mind that the event complained of must be such that the injured party cannot, in good faith, be expected to continue the employment relationship.[83] Indeed, while the question of whether a contract is breached depends on the overall circumstances of the case, and, in particular, the nature of the breach, CAS jurisprudence confirms that where the conduct complained of represents a 'serious breach of confidence' or trust, there can be said to be an unjustified breach.[84]

The notion of a 'serious breach' effectively means that the breach goes to the very root or essence of the contract, and is akin to the common law concept of a fundamental breach. Only a breach that is of a certain severity justifies the injured party exercising his right to terminate the contract without prior warning. In principle, the breach is considered to be of a certain severity when there are objective criteria that do not reasonably permit an expectation that the employment relationship between the parties be continued.[85] Should the breach be of a minor severity, CAS jurisprudence stipulates that it can still lead to an immediate termination, but only if it was repeated, despite a prior warning. Nonetheless, the severity of the breach cannot lead, by itself, to a termination for just cause. What is decisive is that the facts adduced in support of the immediate termination indicate a *loss of trust* that is the basis of the employment contract.[86] In other words, the event that leads to the immediate termination must *so significantly shatter the trust* between the parties that a reasonable person could not be expected to continue to work with the other party who is responsible for the breach.[87]

There are several examples of a breach of contract in the sporting context, which may justify the injured party terminating the contract:

- late payment of remuneration by a club to a player, particularly if it is repeated;[88]
- non-payment by a club of a player's salary over a prolonged period (for example, three months), despite written notice sent to the club by the player;[89]
- reduction of the player's salary because of the player's allegedly poor performance, when it cannot be proved that the player acted in bad faith or engaged in misconduct;[90]
- bad faith and lack of interest in the player, for example by not making necessary and reasonable arrangements for the player to ply his trade;[91]

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Ottis Gibson's coaching contract' (*Jamaica Observer*, 19 August 2014) www.jamaicaobserver.com/sport/Windies-Board-terminates-Ottis-Gibson-s-coaching-contract.

83 CAS 2008/A/1447 *E. v Diyarbakirspor*, award of 29 August 2008.

84 CAS 2007/A/1210 *Ittihad Club v Sergio Dario Herrera*, award of 3 July 2007.

85 CAS 2015/A/4042 *Gabriel Fernando Atz v PFC Chernomorets Burgas*, award of 23 December 2015.

86 CAS 2014/A/3706 *Christophe Grondin v Al-Faisaly FC*, award of 17 April 2015.

87 CAS 2013/A/3261 *FC Aris Limassol v Jiří Mašek*, award of 27 August 2014.

88 CAS 2008/A/1447 *E. v Diyarbakirspor*, award of 29 August 2008.

89 CAS 2007/A/1210 *Ittihad Club v Sergio Dario Herrera*, award of 3 July 2007.

90 CAS 2012/A/2844 *Gussev Vitali v C.S. Fotbal Club Astra & RPFL*, award of 7 June 2013 (it seems likely, from the CAS's reasoning in this case, that a player would be in breach of his contract where his poor performance arises as a result of misconduct or bad faith).

91 CAS 2014/A/3706 *Christophe Grondin v Al-Faisaly FC*, award of 17 April 2015.

- making a middle-finger gesture, which has the effect of bringing the sport into disrepute;[92]
- illicit absenteeism by a player, which may arise where there is unjustified non-appearance at training or leaving of the club for several days in circumstances where the club could reasonably assume that it is not in the player's intention to return and that his decision is final.[93] This is particularly true if the player is summoned to return to work or to justify his non-appearance (for instance by means of a medical certificate), but he does not comply or is unable to provide a just cause. When the player's intention has not been explicitly expressed, the judge must evaluate if, in the light of the circumstances, the club could reasonably and in good faith believe that the player's absence constitutes an abandonment of post. If the player's attitude is equivocal, the club must issue a formal notice, inviting him to carry out his work;
- knowledge by the player of a pre-existing medical condition that could impede his performance, but failure to disclose such to the club, which is treated as an act of bad faith.[94] However, CAS jurisprudence makes it clear that although a club could stipulate, as a condition for them entering into a contract with a player that said player satisfactorily passes medical examinations, it cannot, having regard to Article 18(4) of the applicable FIFA Regulations on the Status and Transfer of Players, submit the validity of the contract to the positive results of a medical examination. In other words, a clause included in a contract with the player purporting to afford a club the right to terminate a player's contract in the event of him not satisfactorily passing medical examinations is invalid, and thus unenforceable.[95]

There are, of course, a number of other situations that may constitute a breach of a sports contract but that, in the interest of space, cannot be elaborated upon here. That said, there are a few cases that demonstrate breach of contract from a Caribbean perspective. By way of example, in March 2012, the arbitrator, Seenath Jairam, awarded damages for loss of retainer, breach of contract and loss of publicity/reputation in circumstances where former West Indian cricketer, Ramnaresh Sarwan, was held to have been treated unfairly against the backdrop of the then selection and appraisal process.[96] The specific circumstances of the case were that in 2010, the then CWI CEO, Dr Ernest Hilaire, sent a brief communiqué to Sarwan immediately after the West Indies' Test series in Australia, telling Sarwan, who had only recently been injured, that the WICB had done a review of the tour and was concerned about his 'attitude and approach to fitness and physical preparation'. While, in the letter, Hilaire did not highlight specific incidents, he nonetheless expressed the hope that Sarwan would attain a higher level of commitment and application as a contracted player and a member of the West Indies cricket team. When Sarwan called up Hilaire for clarification, Hilaire refused to let Sarwan know what he meant by his words in his letter and, further, reportedly stated that if Sarwan did not change his attitude, his career would end. Sarwan noted that he was shocked that no one from the management team or the WICB had sent him a report expressing any concern, and he accordingly found the release to be a breach of the WICB's MOU with players, and his subsequent non-selection for the team unfair. Arbitrator Jairam agreed with Sarwan, and awarded damages for, among other things, breach of contract, since invariably, CWI's comments and his non-selection shattered the trust and confidence reposed in their contractual undertakings.

92 CAS 2015/A/4095 *Bernardo Rezende & Mario da Silva Pedreira Junior v Fédération International de Volleyball (FIVB)*, award of 6 October 2015.
93 CAS 2013/A/3261 *FC Aris Limassol v Jiří Mašek*, award of 27 August 2014.
94 Ibid.
95 Ibid.
96 Nagraj Gollapudi, 'Sarwan wins case, $161,000 damages from WICB' (*ESPN*, 13 September 2012).

A similar ruling was arrived at by Jairam in a case involving former West Indian cricketer, Narsingh Deonarine, who was awarded TT$500,000 in circumstances where, following the 2010 Australian tour, CWI expressed concerns about Deonarine's attitude to fitness and physical preparation, without detailing specifics, which ultimately adversely impacted his selection to the regional team.[97]

In a related case, similarly decided by Arbitrator Jairam, West Indies opening batsman, Lendl Simmons, was awarded US$117,203 in damages in circumstances where he was rendered jobless, despite having a valid contract with CWI between 1 October 2009 and 30 September 2010. The circumstances of the case were that, notwithstanding the fact that Simmons was facing no disciplinary action, he was prevented by the CWI from procuring and exploiting his trade after he was not selected to play for the West Indies for several ODI series, including ODI series against Zimbabwe (March 2010), the World Twenty20 (April 2010), West Indies A against Zimbabwe (May 2010) and Bangladesh (May–June 2010), the South Africa series (June–July 2010) and West Indies A tour of England and Ireland. Jairam found it to be a breach of contract that the player was rendered jobless, refusing to accept the explanation by Clyde Butts, the then West Indies chairman of selectors, that the player had 'issues' other than those related to performance.[98]

Meanwhile, in the football context, former Jamaican Coach, Bora Milutinovic, brought a claim for USD $3 million in damages after his contract with the Jamaican Football Federation was terminated with immediate effect just one year into his four-year contract as a result of an unspecified breach of contract. Although the details of the breach were never made public, it has been reported that a Swiss Federal Tribunal rejected Milutinovic's final appeal, and confirmed he would receive compensation of less than $20,000.[99]

More recently, Darren Bravo threatened to institute legal proceedings for breach of contract in circumstances where CWI responded to him describing CWI President, Dave Cameron, as a 'big idiot' (and refusing to delete the tweet) by repudiating his selection to represent the West Indies in the Zimbabwe/Sri Lanka tri-nation series in 2016.[100] In response, CWI indicated that it was justified in cancelling Bravo's contract because he had engaged in 'inappropriate and unacceptable behaviour', contrary to his contractual obligations, thereby bringing 'himself, WICB or any official or the game of cricket into disrepute'. Bravo's tweet came against the backdrop of him being offered a grade C, rather than a grade A, contract, in keeping with CWI's apparent policy regarding the impact of past performances on the grade of contract players are awarded.

## 3.10 INDUCING A BREACH OF CONTRACT

A breach of contract can be effected where such a breach is induced. Although, in recent years, this cause of action has been increasingly relied upon in the sporting context, it is incorrect to assume that it is a sports-specific cause of action, as illustrated in *Lumley v Gye*,[101] a case in which

97 Vinode Mamchan, 'Arbitrator awards Deonarine $.5m as WICB loses 15th matter to WIPA' (*Trinidad and Tobago Guardian*, 29 September 2012) www.guardian.co.tt/sport/2012-09-28/arbitrator-awards-deonarine-5m-wicb-loses-15th-matter-wipa.

98 Nagraj Gollapudi, 'Sarwan wins case, $161,000 damages from WICB' (*ESPN*, 13 September 2012) www.espncricinfo.com/westindies/content/story/582015.html.

99 'Milutinovic loses $3m bid damages from Jamaica' (*Trinidad and Tobago Guardian*, 28 July 2011) www.guardian.co.tt/sport/2011/07/28/milutinovic-loses-3m-bid-damages-jamaica.

100 'Bravo axed over tweet, given ultimatum to apologise' (*Jamaica Observer*, 12 November 2016) www.jamaicaobserver.com/news/Bravo-axed-over-tweet–given-ultimatum-to-apologise_80309?profile=1503.

101 [1853] EWHC Law Com J 73.

the defendant was held liable for inducing an opera singer to breach the exclusivity clause in her singing contract with the claimant.

To successfully invoke this cause of action, five requirements must be satisfied. The claimant must prove that:

- a contract existed between himself/itself and the player;
- the third party had knowledge of the contractual relationship between the claimant and the player;
- the third party had the requisite intention[102] to secure a breach of the contract between the claimant and the player;
- the player did in fact breach his contract with the claimant as a consequence of being induced to do so by the third party; and
- damage was caused to the claimant as a result of the third party inducing the player to breach his contract with the claimant.

These conditions were held to have been satisfied in the case of *McGill v The Sports and Entertainment Media Group.*[103] In that case, the appellant, Anthony McGill, a licensed football agent, complained that, in April 2007, he entered into a binding oral agreement with the player, Gavin McCann, a former professional footballer, to act as his exclusive agent so as to get him a new contract, whether with Aston Villa (his existing club) or a new club. Pursuant to this oral contract, McGill put together a deal for the transfer of the player to Bolton, which Bolton indicated it would in principle be willing to accept. At that stage, however, the Sports and Entertainment Media Group ('SEM'), which also provided agency services, found out about the proposed deal from the player, and induced the player to breach his contract with the appellant by dispensing with his services, thus enabling SEM to take over the proposed deal and finalize it on essentially the same terms as McGill had already negotiated. In this way, SEM obtained an agent's commission of £300,000 from Bolton when the deal was completed, without having had to do any real work to earn it. Conversely, McGill was deprived of the similar fee that he claimed he could have expected to earn upon completion of the deal had his contract with the player been allowed to run its course. Although the court, on appeal, found that the oral agreement between the player and McGill was concluded in blatant contravention of the Football Association rules, which required that representation agreements between a licensed agent and either a club or a player had to be made in a standard written form containing the entire agreement between the parties, it nonetheless considered that the FA Regulations had no statutory force, and that, on the facts, the defendants, SEM, had in fact induced the player to breach his contract with McGill. More specifically, the court held that SEM had gotten wind of the player's planned move, and McGill's role in it, and had decided to try and get involved as agent itself, with the result being that SEM then persuaded the player to dismiss McGill as his agent, representing to him that, if he did so, SEM would act as agent for Bolton when the deal was concluded, so the player would not be liable for any income tax in respect of the agency fee paid to SEM by Bolton. In short, in light of the fact that the terms of the oral contract between the player and McGill was communicated by the player to SEM and SEM subsequently induced the player to breach his contract with McGill by inducing him to dismiss McGill as his agent and by inducing

102 It must be proved that the defendant (third party) acted with the desire to cause a breach of contract, or with substantial certainty that a breach would result from his/its conduct. The decision of Lord Denning in *Emerald Const. Co v Lowthian* [1966] 1 All ER 1013, makes it clear that it is unlawful for a person to procure breach of contract knowingly, or recklessly, indifferent to whether it is a breach or not.

103 [2016] EWCA Civ 1063.

the player to appoint SEM as his agent in McGill's place, there was an unlawful inducement for which the defendants were liable.

According to Steven Rosenhek and Brad Freelan, where direct inducement resulting in a breach of contract has occurred, the claimant can recover pecuniary damages against both the player and the third party, although the claimant cannot be paid twice for the same damage suffered.[104] That said, it appears that the court will assess damages for inducing breach of contract 'at large'; that is, it will assess a global figure approximating to the harm it thinks the claimant has suffered. In most cases, the player and third party will be jointly and severally liable, and this will be reflected in the award of damages.

In a decision delivered by FIFA's Dispute Resolution Chamber (DRC) in 2009, it was found that Chelsea FC was liable for inducing Gael Kakuta to breach his contract with French club RC Lens.[105] The circumstances of the case were that RC Lens had retained the services of Kakuta since he was eight years old, and had provided him training and the opportunity to ply his trade for a number of years, until Chelsea induced him to breach his contract, at age 16, in order to enter into a more lucrative contract with them. In this context, the DRC found Chelsea and Kakuta to be jointly and severally liable, and imposed a fine of €780,000, as well as a restriction of four months on Kakuta's eligibility to play in official matches. Chelsea was also banned from registering any new players, either nationally or internationally, for the two next entire and consecutive registration periods following the notification of the decision, and ordered to pay RC Lens training compensation in the amount of €130,000.

Interestingly, in 2010, after the matter had been submitted to the CAS, Chelsea, Lens and Kakuta reportedly concluded a confidential agreement, under which Lens accepted compensation of €910,000 from Chelsea. The CAS, in a statement, said that it had ratified the agreement reached by Chelsea FC, Racing Club de Lens and the French football player, Gael Kakuta, and related that the original contract between the player and RC Lens was, in any event, not valid.[106] For this reason, the CAS concluded that the player could not be said to have terminated his agreement with Lens prematurely and without just cause, since there was actually no justiciable inducing of the player to breach his contract with Lens. As a consequence, the sanctions imposed upon Chelsea FC and the player by the FIFA Dispute Resolution Chamber were lifted.

The 2010 ruling raises the question as to whether the CAS was correct in its approach to ruling that there was no actionable tort of inducing a breach of contract in Kakuta's case. Perhaps the most sensible way to explain the decision, in the absence of it being explicitly rationalized by the CAS, is to contend that because the purported act of inducing the breach of contract occurred while Kakuta was a minor, it could not be said that he breached his contract, since said contract was voidable in any event any time before Kakuta had attained the age of majority. Had Kakuta been an adult at the time when the purported inducement occurred, it could be rationally concluded that there was an actionable inducement.

This approach found favour with the court in England and Wales in the previously mentioned case of *Proform Sports Management Ltd v Proactive Sports Management Ltd.*[107] In this case, the claimant had entered into a representation agreement with Rooney, then a 15-year-old footballer, for two years. Prior to the expiration of the contract with Proform Sports, Rooney, through

104 Steven Rosenhek and Brad Freelan, *The Torts of Duty of Good Faith Bargaining, Inducing Breach of Contract and Intentional Interference with Economic Interests* (Fasken Martineau DuMoulin LLP, 2010) 12.

105 'Kakuta: DRC decision reached' (*FIFA.com*, 3 September 2009) www.fifa.com/about-fifa/news/y=2009/m=9/news=kakuta-drc-decision-reached-1097777.html.

106 Owen Gibson, 'Chelsea transfer ban lifted by court of arbitration for sport' (*The Guardian*, 4 February 2010 www.theguardian.com/football/2010/feb/04/chelsea-transfer-ban-lifted-gael-kakuta.

107 [2006] EWHC 2812 (Ch).

his parents, requested that Proform Sports release him from his contractual obligations since he had found another agent, Proactive Sports Management, whom he believed would better advance his professional interests. In consequence, Proform brought an action alleging that Proactive was liable for inducing breach of contract in circumstances where, before the culmination of Rooney's contract with Proform, he entered into a similar contract with Proactive, allegedly in breach of his original agreement.

The court considered that Proactive was not liable for inducing a breach of contract. The court felt that because Rooney's contract with Proform was determinable, given that he was a minor at the time, Proactive could not incur liability by inducing Rooney to determine the contract lawfully. In other words, there could be no breach by Proactive, in light of the fact that Rooney's contract with Proform was not a contract for necessaries, and was accordingly voidable, at the election of Rooney, any time before he attained the age of majority. In the words of Hodge J:

> If the contract is one which the minor is entitled to avoid, then it does not seem to me that liability for the tort of wrongfully interfering with, or of inducing the breach of, the contract should arise. I can see no justification for holding a defendant liable for the tort in such circumstances, notwithstanding the fact that the contract remains valid until avoided. The fact that it can be avoided should be, in my judgment, in principle a defence to any claim for the tort of wrongful interference with, or wrongfully procuring a breach of, the contract.[108]

Notwithstanding the discussion above, it would seem that two outstanding questions remain, in relation to which there is some degree of uncertainty. The first is whether the defence of justification can be successfully mounted as a defence to a claim of inducing a breach of contract, while the second is whether inducements not resulting in actual breach of contract are compensable. To the first question, courts/tribunals appear to suggest that even though justification is clearly a defence, 'it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification" and most attempts to do so would probably be mischievous'.[109] That said, where the defence is raised, courts/tribunals are likely to consider several factors, including, according to Steven Rosenhek and Brad Freelan, the nature of the contract broken, the position of the parties to the contract, the grounds underlying breach, the means employed to procure the breach, the relationship of the person procuring the breach to the person who breaks the contract, and the object of the person procuring the breach.

In respect of the second question, it would appear, based on the decision of Lord Jenkins in *DC Thomson & Co v Deakin*,[110] that if a third party, with knowledge of a contract between a player and another, has dealings with the player that the third party knows to be inconsistent with the contract, he has committed an actionable interference, even if the third party does not initiate breach of the contract. This decision, however, should not be construed as indicating a trite principle of law as the question was decided upon *obiter dicta* in this case.

## 3.11 REMEDIES

Where a breach of a sports contract has been committed, the injured party has several options at his disposal. At the lowest level, the club may choose to reprimand the player or impose

108 Ibid [33].
109 *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 Law Com D 598 per Romer LJ.
110 [1952] Ch 646.

a fine, as illustrated in the Chris Gayle 'don't blush baby!' saga,[111] which is discussed further in Chapter 8. On the moderate end of the continuum, the club may choose to suspend the player, such as where Trinidad and Tobago Knight Riders' William Perkins was suspended for the remainder of the 2016 edition of the Caribbean Premier League (CPL), in circumstances where, during a random search operation, Perkin's player/match official access pass was obtained from a third party,[112] which intimated engagement in a corrupt practice. The club may also repudiate the player's contract, such as where, as alluded to earlier in this chapter, Darren Bravo's contract to play in a tri-series in Zimbabwe was repudiated in circumstances where he called the CWI President 'a big idiot'.[113]

At the more extreme ends of the spectrum, there can be an award of damages against a player/club who is found to be in breach of a contractual obligation, and, more controversially, the imposition of an injunction to restrain a player/club from engaging in a particular activity.

### 3.11.1 Damages

Damages are the primary remedy sought by injured parties who allege that there has been a breach of a sports contract.[114] As routinely affirmed by the CAS, these damages serve a 'positive interest'; namely, to put the injured party in the position he would have been had the contract been performed according to its terms.[115] This is sometimes referred to in common law jurisdictions as damages on a *restitutio in integrum* basis.[116]

Damages are primarily compensatory in nature. As such, they not only attempt to compensate the injured party for unfulfilled obligations accruing prior to the breach of contract, such as outstanding remuneration,[117] but also future loss of earnings,[118] loss of profits and even loss of a chance. As a rule, this includes amounts corresponding to the remaining value of the contract, less what the injured party has saved because of the termination of the employment relationship, or what he earned from other work, or what he has intentionally failed to earn.[119]

Naturally, before a claim for damages can be sustained in respect of a breach of a sports contract, the normal rules of causation and remoteness have to be satisfied. On the question of causation, it must be proved that the defendant, by his act or omission, caused the breach complained of and, second, in relation to remoteness, the damages to which an injured party are entitled are only those that may fairly and reasonably be considered arising naturally from the breach of contract or such damages as may reasonably be supposed to have been in the contemplation of both the parties at the time the contract was made.[120] Thus, in *E v Diyarbakirspor*,[121] where a Slovenian football player signed a one-year contract with a Turkish club, but was not paid for three consecutive months, despite him giving repeated notice to the club, the CAS

111 'Chris Gayle fined after he apologises for "don't blush baby" remark at female reporter' (*The National*, 5 January 2016) www.thenational.ae/sport/chris-gayle-fined-after-he-apologises-for-don-t-blush-baby-remark-at-female-reporter-1.186395?videoId=5620020761001.
112 'CPL suspends Perkins' (*Trinidad Express*, 3 August 2016) www.trinidadexpress.com/20160803/sports/cpl-suspends-perkins.
113 'Darren Bravo sent home from Zimbabwe tri-series' (*ESPNCricinfo*, 12 November 2016) www.espncricinfo.com/story/_/id/18029896/west-indies-darren-bravo-sent-home-zimbabwe-tri-series.
114 See generally Gilbert Kodilinye and Maria Kodilinye, *Commonwealth Caribbean Contract Law* (n 6) chapter 14.
115 CAS 2010/A/2145 *Sevilla FC SAD v Udinese Calcio SpA*; CAS 2010/A/2146 *Morgan De Sanctis v Udinese Calcio SpA*; CAS 2010/A/2147 *Udinese Calcio SpA v Morgan De Sanctis & Sevilla FC SAD,* award of 28 February 2011, [18].
116 CAS 2013/A/3123 *Steel Azin Club v Ljubisa Tumbakovic,* award of 17 January 2014.
117 CAS 2007/A/1210 *Ittihad Club v Sergio Dario Herrera,* award of 3 July 2007 [26].
118 CAS 2005/A/902 & 903, *Mexès & AS Roma v/ AJ Auxerre,* N 136; diss. CAS, *Webster Decision*, N 141.
119 CAS 2015/A/4346 *Gaziantepspor Kulübü Derneği v Darvydas Sernas,* award of 5 July 2016, [103].
120 *Hadley v Baxendale* [1854] EWHC J70.
121 CAS 2008/A/1447, award of 29 August 2008.

held that the player was entitled to an amount in damages reflecting the outstanding amount payable under the contract, since there was a breach of the contract without just cause.

While there are relatively simple cases where the process of assessing the quantum of damages is not particularly technical, there have, in recent years, been an increasing number of cases decided upon by the CAS that demonstrate that the assessment of damages can be a complicated process, requiring a certain degree of sophistication. This is particularly the case in disputes that necessitate the application of FIFA regulations. By way of example, in *Webster v Heart of Midlothian*,[122] the professional footballer was sued in damages after he prematurely terminated his contract with Scottish club, Heart of Midlothian, in order to sign with a new club, Wigan Athletic. The CAS found that because the parties in question had not specified in their contract the amount of compensation payable in the event of premature termination by either party, the 'most appropriate criterion' was the remuneration remaining on the existing contract, because it applied equally to club and player, and it correlated to the player's value. This 'residual value' approach effectively allowed the level of compensation payable to the injured club to be adjusted having regard to the fact the amount that was payable on the remainder of the contract between the parties, which in this case amounted to £150,000. The CAS, in refusing to accede to a request that the amount of compensation payable be linked to the remuneration and benefits due under the player's new contract, concluded that such an approach is 'potentially punitive', and might have also had the effect of unjustly enriching Hearts.

By contrast, in subsequent cases, the CAS has categorically stated that while the residual amount in remuneration owed under an existing contract 'may provide a first indication' of the amount of compensation payable to an injured party, the remuneration due under the new contract should generally provide a fuller indication of how the player is valued by his new club and the market, and could reveal the player's motivation for terminating. By way of example, in the *Matuzalem* case,[123] Matuzalem Francelino da Silva, a Brazilian professional football player, was signed with Shakhtar Donetsk, a Ukrainian football club, for a fixed term of five years, effective from 2004 until 2009. In 2007, the player notified Shakhtar Donetsk of the fact that he unilaterally terminated their contractual relationship with immediate effect. In the same month, he signed a new contract with Real Zaragoza, which was for a fixed term of three seasons, in consideration for a salary of 10,000 euros 14 times a year, a sign-on fee of 2,180,000 euros per season and unspecified match bonuses. It was undisputed that the player unilaterally and prematurely terminated the contract without just cause or sporting just cause, though the exact amount to be awarded in damages was disputed.

The CAS held that because of the unilateral and premature termination of the contract, and thus the lack of any just cause, the player and Real Zaragoza were jointly and severally liable to pay compensation to Shakhtar Donetsk. Relying on Article 17 of the FIFA Regulations, the CAS considered a number of factors in arriving at a just quantum of damages, namely:

- the amount of fees and expenses paid or incurred by the former club and, in particular, those expenses made to obtain the services of the player (including payments to agents). Such expenses had to be amortized over the whole term of the contract. On the facts, Shakhtar Donetsk was not able to convince the CAS that such payments were linked to the transfer of the player, and they were thus not recoverable;

122 CAS 2007/A/1300.

123 CAS 2008/A/151 *FC Shakhtar Donetsk (Ukraine) v Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*; CAS 2008/A/1520 *Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) & FIFA*.

- extra replacement costs that a club incurs to replace a player who has left prematurely, including ordinary expenses for scouting services and/or the hiring of a new player in substitution of the other player, which requires not only that the players are playing in more or less the same position on the pitch (it is hard to prove that a forward would substitute a goalkeeper or a defender), but also that the club decided to hire the new player because of the termination by the other player. Furthermore, the club will be asked to prove that there is a link between the amount of the transfer fee paid for the new player and the premature termination by the other player. On the facts, Shakhtar Donetsk was not able to convince the CAS that the transfer of another player, Castillo, and the payments made for this transfer were linked to the gap left by Matuzalem or that the costs of hiring the alleged replacement player were increased by the termination of Matuzalem;
- additional objective criteria, such as the damage incurred by the club, which – because of the premature termination – is no longer in the position to fulfil some obligations towards a third party, like a sponsor or an event organizer to whom the presence of the player was contractually warranted;
- the specificity of the sport, which is used by the CAS to verify that the solution reached is just and fair not only under a strict civil (or common) law point of view, but also taking into due consideration the specific nature and needs of the football world (and of parties being stakeholders in such world) and reaching therefore a decision that can be recognized as being an appropriate evaluation of the interests at stake, and does so fit in the landscape of international football. The asset comprised by a player is obviously an aspect that cannot be fully ignored when considering the compensation to be awarded for a breach of contract by a player;
- the time remaining on the existing contract. On the facts, the player terminated the agreement with Shakhtar Donetsk after three seasons, with two more seasons being part of the agreement;
- whether the contractual breach falls within the protected period.[124] Breaches and terminations within the protected period are considered a particularly serious form of unlawful behaviour. However, on the facts, it was undisputed that the termination of the contract with Shakhtar Donetsk was made by the player upon expiry of the protected period applicable to him;
- the status and the behaviour of the player involved, with particular attention placed on the behaviour of the party that did not respect the contractual obligations. On the facts, the player, by accepting an increase of his salary in 2007 and deciding shortly afterwards to leave Shakhtar Donetsk, had offended the good faith of the club. In fact, the player left the club just a few weeks before the start of the qualifying rounds of a competition that was obviously very important to Shakhtar Donetsk, namely the UEFA Champions League; and
- the law of the country governing the employment relationship between the player and his former club. This will be under ordinary circumstances the law of the country of the club of which the employment contract has been breached or terminated, respectively.

In a later case involving professional goalkeeper Morgan De Sanctis,[125] who had prematurely terminated his five-year contract with Italian club, Udinese Calcio SpA, in order to join Sevilla

124 In the chapter 'definitions' of the FIFA Regulations on the Status and Transfer of Players, 'protected period' is defined as 'a period of three entire Seasons or three years, whichever comes first, following the entry into force of a contract, if such contract was concluded prior to the 28th birthday of the Professional, or to a period of two entire Seasons or two years, whichever comes first, following the entry into force of a contract, if such contract was concluded after the 28th birthday of the Professional.'

125 CAS 2010/A/2146 *Morgan de Sanctis v Udinese Calcio SpA*; CAS 2010/A/2147 *Udinese Calcio SpA v Morgan de Sanctis & Sevilla FC*.

FC, the CAS accepted the proposition in *Matuzalem* that the amount the new club is willing to pay the player in breach gives the best indication of what a theoretical replacement player would be paid, but found that, on the facts, concrete evidence with respect to De Sanctis's value could not be ascertained. As such, the CAS could not apply exactly the same calculation as it had applied in *Matuzalem*, and accordingly used a different method of calculating the requisite compensation, namely the value of De Sanctis's replacement costs only, rather than the estimated value of the player. The CAS, however, cautioned that it did not 'seek to depart from the *Matuzalem* jurisprudence, but wish[ed] to emphasize that there is not just only one calculation method and that each case must be assessed in the light of the elements and evidence available to each CAS panel'.[126]

#### *3.11.1.1 Damages on a loss of a chance basis*

Damages may be awarded on a loss of a chance basis in circumstances where the defendant's breach of contract deprived the claimant (club, player, coach or agent) of the opportunity to obtain a benefit and/or avoid a loss. This basis for the award of damages has its origins in the case of *Chaplin v Hicks*,[127] in which the court awarded damages to the claimant in circumstances where the defendant's breach of contract prevented her from taking part in the final stage of a beauty contest, where she stood the chance of being one of 12 finalists who could win a place in a chorus line.

Although Lord Reid in *Davies v Taylor*[128] was of the view that 'you can prove a past event happened, but you cannot prove that a future event will happen', the court has not found this to be an impediment to evaluating the existence of a chance to obtain a benefit and/or avoid a loss, which can sometimes be virtually 100%, sometimes virtually nil or somewhere in between.[129]

To successfully establish a loss of a chance, the claimant must prove that, but for the defendant's wrongful conduct, he had a chance to obtain a benefit or avoid a loss, and that the chance lost was real and not merely speculative. While there are some cases when it is plainly obvious that a claimant has lost a chance, for example, where, but for the negligence of the defendant, the claimant would certainly have obtained a benefit or avoided a loss, there are other, borderline cases, where the claimant's loss depends, not on what he would have done, but on the hypothetical acts of a third party.

This issue arose in the aforementioned case of *McGill v The Sports and Entertainment Media Group*,[130] where the appellant, a licensed football agent, alleged that he had lost a chance to enter into a written agreement with a professional footballer through which he could have earned a handsome commission, by virtue of the fact that the Sports and Entertainment Media Group ('SEM') had induced the player to breach his contract with the appellant, and thereby act as his agent in negotiations with a new football club, Bolton Wanderers. The court considered that this case fell within a special class of cases where the appellant's loss depended on the hypothetical acts of a third party (the player). In these difficult cases, the court outlined the appropriate approach that should be followed:

> The key principle, for present purposes, is that where the claimant's loss depends, not on what he would have done, but on the hypothetical acts of a third party, the claimant first needs to prove

126 Ibid [86].
127 [1911] 2 KB 786.
128 [1974] AC 207.
129 Ibid 213.
130 [2016] EWCA Civ 1063.

> (to the usual civil standard) that there was a real or substantial, rather than a speculative, chance that the third party would have acted so as to confer the benefit in question, thereby establishing causation; but that the evaluation of the lost chance, if causation is proved, is a matter of quantification of damages in percentage terms.[131]

In other words, the claimant must prove, as a matter of causation, that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damages, the range lying somewhere between something that just qualifies as real or substantial, on the one hand, and near certainty, on the other. On the facts, the court concluded that there was a real and substantial chance that, but for the interference by SEM, the player would have entered into a written agreement with McGill that, when it materialized, would have resulted in McGill obtaining a 5% or 10% commission. Although the case was ultimately remitted to the High Court, the Court of Appeal found that McGill was entitled to an award of damages on the basis of loss of the opportunity to earn a fee under a written agency agreement when the player's transfer to Bolton was completed.

In light of this decision, it would appear that, in future, players, agents and coaches, amongst other sportspersons in the Caribbean, may be awarded damages for loss of a chance in circumstances where they are deprived of a real and substantial opportunity of obtaining a benefit or avoiding a loss because of the act/omission of another party. Indeed, although there has been no reported Caribbean sport-related case to date where damages on a loss of a chance basis has been awarded, such damages have been submitted for judicial consideration in the ongoing litigation between *Thema Williams v Trinidad and Tobago Gymnastics Federation* (TTGF). The dispute, which is now before the Supreme Court of Trinidad and Tobago,[132] involves one of Trinidad and Tobago's leading gymnasts claiming damages against the TTGF for loss as a result of breach of contract, unfair treatment and the consequent rescission of the athlete's agreement, which was allegedly done in bad faith and/or was tainted by bias, and several breaches of the principles of natural justice. The circumstances of this case are that prior to the World Artistic Gymnastics Event in Glasgow, Scotland, there was an agreement between the athletes and the TTGF that the highest scoring athlete at this event would proceed to compete at the Olympic Test Event. In this event, which took place in October 2015, Williams scored the highest of all other contenders from Trinidad and Tobago. The Federation apparently hesitated in making an official announcement, but the Trinidad and Tobago Olympic Committee (TTOC) subsequently officially announced that Williams would move on to the Olympic Test Event. Williams was finally selected to proceed to the Rio Olympic Test Event 2016.

By agreement dated 25 January 2016, known as the 'Athlete Agreement for the Test Event at Rio/Olympic Games 2016', it was acknowledged that Williams' performance in the 2015 World Championships in Glasgow, Scotland qualified her as the athlete slated to compete for Trinidad and Tobago in the Rio Olympic Test Event 2016. That agreement set out the terms and conditions of Williams' participation in the said event as well as the Federation's powers and duties in respect of the athlete.

Soon thereafter, a story emerged and received public attention that Williams posted revealing photographs of herself on social media. The TTGF subsequently sent written correspondence to Williams stating that the matter was being referred to the Disciplinary Committee.

131 Ibid [60].
132 *Thema Williams v Trinidad and Tobago Gymnastics Federation* TT HC Claim No CV2016–02608.

After many weeks, the TTGF, however, allowed the status quo to prevail, after widespread protest that Williams' rights were being infringed.

Williams apparently travelled to Rio de Janiero in order to compete in the Rio Olympic Test Event 2016, but on 16 April 2016, the President of the TTGF, David Marquez, communicated to Williams's coach that 'the Federation had unanimously decided to pull Thema from the Test Event' and that 'arrangements [were] being made to have the alternate Marissa [sic] Dick compete'.

The claimant argued that the decision of the President of the TTGF decision was in breach of part I clause 3 of the athlete agreement, which provides that in order for an athlete to be withdrawn, the head of the delegation must excuse that athlete. The head of the delegation must also consult with the athlete's coach and medical practitioner before making the decision to withdraw the athlete from the event. More specifically, Williams contended that the power to withdraw was to be exercised, by the head of the delegation, who was obliged to consult with certain named officials before making a decision, including a medical expert and/or her coach, whom TTFG did not consult.

Apart from the alleged breach of contract, Williams argued the decision by the TTGF to withdraw her was tainted by bias, in that the Vice President of the TTGF, Ricardo Lue Shue, was the coach of Marisa Dick, who was selected and sent to the Rio Olympic Test Event 2016 to replace Williams at short notice.

Although, at the time of writing, the final outcome of this case is still being awaited with bated breath, it will be interesting to see whether the final outcome would include an award of damages on a loss of a chance basis, not only in respect of the fact that Williams was unable to compete in the Rio 2016 Olympics, a first-time achievement for this sport, but also in respect of the fact that she had turned down a full gymnastics scholarship from Michigan State University, which she would have taken up had the opportunity to represent Trinidad and Tobago in the 2016 Olympics not become a legitimate expectation.[133]

#### *3.11.1.2 Liquidated damages*

In order to avoid the exigencies of complex and lengthy litigation on the question of the quantum of damages to be awarded to an injured party in circumstances where there is a breach of contract, sports contracts increasingly make provision for liquidated damages. Liquidated damages represent a covenanted genuine pre-estimate of loss flowing from a contractual breach without cause by one party or the other. To have effect, the clause must not only explicitly provide for the pre-estimated amount and/or method of calculating this amount, but it must not amount to a penalty; that is a payment of money 'in terrorem' (threatening) the offending party. Among other things, a liquidated damages clause will be held to be a penalty, and therefore unenforceable, if the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.[134] The court is not particularly concerned with the wording used by the parties, but the nature and effect of the clause in question.

133 Lasana Liburd, 'Thema moves on TTGF; gymnast seeks damages and relief for wrongdoings' (*Wired868.com*, 24 April 2016) https://wired868.com/2016/04/24/thema-moves-on-ttgf-gymnast-seeks-damages-and-relief-for-wrongdoings/.

134 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1*; Phillips (Hong Kong) Ltd v Attorney General of Hong Kong* [1993] UKPC 3.

In the sporting context, a typical liquidated damages clause might read:

> The parties have bargained for this liquidated damages provision, giving consideration to the following:
>
> (a) this is an agreement for personal services; and
> (b) the parties recognize that a termination of this Agreement by the CLUB prior to its natural expiration could cause the PLAYER/COACH to lose benefits, compensation, and/or outside compensation relating to his employment at the CLUB, which damages are difficult to determine with certainty. Therefore, the parties have agreed upon this liquidated damages provision.
>
> In case this Contract is terminated by the CLUB without cause, the CLUB shall pay liquidated damages to the PLAYER/COACH calculated on the basis of the monthly remuneration payable to the PLAYER/COACH multiplied by the number of months left until the expiry of the initial term of the Contract, and, in case of extension of the Contract, to the end of the extended term of the Contract, unless the Parties have agreed a different compensation.
>
> Similar liquidated damages shall be paid by the CLUB to the PLAYER/COACH in case of early termination of this Contract by the PLAYER/COACH due to a material breach by the CLUB of this Contract.
>
> The aforementioned payment shall be made in a lump sum on the sixtieth (60th) day after the effective date of termination.[135]

Some liquidated damages clauses may also limit the amount of liquidated damages the club is required to pay. In such a case, the contract may provide:

> The Club's liability for total payments made to PLAYER/COACH above shall be limited to a maximum cumulative amount of Five Million Dollars, (USD $5,000,000), paid as liquidated damages for termination of this Agreement by the CLUB without cause.

Some sports contracts also state that, upon acceptance of amounts stated as liquidated damages, the player/coach has absolutely no further obligation to mitigate if the agreement is terminated by the club without cause.

As a general rule, if a court upholds a liquidated damages provision, the injured party may not seek compensatory damages.[136] However,

> unless a contract provides that liquidated damages are to be the exclusive remedy for a breach, a liquidated damages provision does not preclude other relief to the non-breaching party, if the actual damages are caused by an event not contemplated by the parties in the liquidated damages clause.[137]

If the parties have not agreed on a specific amount in a way as described above, the compensation for a unilateral breach and a premature termination will be calculated in the usual manner that courts calculate unliquidated damages, that is, on a *restitutio in integrum* basis.

An instructive illustration of the operation of the unliquidated damages clause in the sporting context can be seen in the CAS case of *ZAO FC Lokomotiv v Leonid Stanislavovich Kuchuk &*

135 See examples in Martin Greenberg and Djenane Paul, 'Coaches' Contracts: Terminating a Coach Without Cause and the Obligation to Mitigate Damages' (2013) 23 Marquette Sports Law Review 339.
136 *Harris v Conrad*, No 7251, 1984 WL 21876, 4 (Del Ch 18 September 1984).
137 *Draper v Westwood Dev. Partners, No* Civ. A. 4428 – MG, 2010 WL 2432896, 3 (Del Ch 3 June 2010*;* revised 16 June 2010).

*Football Union of Russia (FUR)*.[138] In that case, a Russian Football club, ZAO FC, had entered into a contract with Leonid Stanislavovich Kuchuk, a Belorussian professional football coach, to coach its first team. The contract was entered into in 2013, and was expected to be valid for a fixed period of two years until 2015. Although the coach's first season went well, the team's performances in his second year of coaching were dismal, with the team even dropping out of UEFA's Europa League at the play-off stage. In late 2014, the president of ZAO FC cancelled the first team's training scheduled by the coach and met with the coach before addressing the players of the first team. Incidentally, during the president's meeting with the coach, he arranged for one of the club's longest serving coaches to lead the training of the first team. Later that day, the coach arrived at the training ground in order to direct the afternoon's training of the first team, but was denied access to the training ground by a security guard. The coach deduced from all these facts that he had been suspended from work as he was not allowed to enter the club's premises, and the club had actually published an article on its official website saying that he was 'suspended from work'. The coach later received a letter from the ZAO FC indicating that his duties as head coach had been temporarily transferred to another coach. Against this backdrop, the coach claimed that the club had unilaterally terminated his contract without reasonable excuse and in the absence of misconduct on his part. The CAS agreed, finding that because the coach's contract was unilaterally terminated, the coach was entitled to compensation under the liquidated damages clause included in the contract between the parties. In short, the court upheld clause 8.2 of the employment contract, which provided that compensation, in the event of a termination without cause, was to be equal to the monthly remuneration of the coach multiplied by the number of months remaining till the expiration of the initial contractual term, which amounted to 1,841,597 euros.

On the question of whether there should be a reduction applied to this amount to reflect the fact that the coach had moved on, and entered into a new contract with another club, no reduction was made by the CAS because the liquidated damages clause did not contemplate such a reduction. The clause was specifically drafted to provide a method for calculating compensation, which was to be respected, irrespective of external factors, such as the coach joining a new club.

## 3.12 MITIGATION

A party who is adversely affected by a breach of contract is under an obligation to take reasonable steps to mitigate the effects and loss related to the breach.[139] This principle applies both to players and clubs. With regard to its application to players, the CAS has ruled that, in accordance with the general principle of fairness, the injured player must act in good faith after the breach by the club and seek other employment, showing diligence and seriousness. This principle is aimed at limiting the damages deriving from the breach as well as avoiding a possible breach committed by a club turning into an unjust enrichment for the injured player. Thus, where a player intentionally fails to earn, the duty to mitigate should not be considered

138 CAS 2015/A/3946, award of 28 January 2016.

139 Gilbert Kodilinye and Maria Kodilinye *Commonwealth Caribbean Contract Law* (n 6) 267. See also a number of Caribbean cases on this point: *Sydney Dunn and Gloria Dunn v Roderick Bishop* [2014] JMSC Civ 80, [15]. Here, the court considered that 'an award of damages as compensation for a breach of contract is qualified by a principle which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.' *Ernest Trotman Camille Richards Trotman v Tecu Credit Union Co-Operative Society Ltd* TT CV 2010–01135 [14].

satisfied. This would arise in circumstances where the player deliberately fails to search for a new club or unreasonably refuses to sign a satisfactory employment contract, or when, having different options, he deliberately signs a contract with worse financial conditions, in the absence of any valid reason to do so.[140] Where this occurs, the mitigated amount shall be deducted from the amount used as the basis to calculate the compensation due; that is, the party in breach shall not compensate the mitigated amount as this would lead to unjust enrichment of the party suffering from the breach.[141]

Where the player signs a new employment contract with worse financial conditions, but is shown to have exercised a serious commitment to limiting his damages and improving his financial conditions from time to time by signing that contract, there cannot be said to be bad faith, and so no deductions from the compensation to be awarded will be made since there is no failure to mitigate. In this context, a club cannot argue that a player failed to mitigate by failing to obtain a more remunerative alternative employment contract to further mitigate his loss, if he has indeed demonstrated reasonable efforts.[142]

The obligation to mitigate does not apply only to players when they are suffering an unjustified termination of their contract by a club, but also to clubs that are claiming compensation for the damage caused by an unjustified termination by a player. In this regard, as a matter of principle, the club will have to take reasonable measures to find a replacement player, and 'cannot simply lay back and claim at a later stage that it did not have enough players for that specific role'.[143] The club has to find a replacement that is, from a sporting and an economic point of view, reasonable. Where the club has not or has not fully complied with the duty to mitigate its loss, the tribunal will, as mentioned above, consider this and possibly reduce the amount due as compensation.

It is instructive to note that the burden rests on the injured party to show that the other party intentionally refused to sign other employment contracts or otherwise intentionally failed to reduce his damage.[144]

A vivid illustration of the abovementioned principles can be gleaned from the decision of *Gaziantepspor Kulübü Derneği v Darvydas Sernas*.[145] In that case, Darvydas Šernas, a Lithuanian professional football player, entered into an employment contract to play professional football for Gaziantepspor Kulübü Derneği, a professional football club based in Turkey. Under the contract, which was valid for three years (2013–2016), the footballer agreed to be paid 100,000 euros for the first season, then incrementally rising to 450,000 euros at the end of the fourth season. The contract contained a special provision, which stipulated that in the event the club failed to comply with a part of its payment obligation for at least 60 days, the player shall notify the club in writing. If the club did not pay the outstanding amounts within 30 days upon the receipt of the written notice, the player was entitled to terminate the employment contract with cause.

In 2014, the player sent a formal notice to the club, reminding it of its failure to respect its financial obligations and claiming the payment of the outstanding amount of 150,000 euros, which was overdue at that time for February–April 2014. Despite sending several other letters,

140 CAS 2015/A/4346 *Gaziantepspor Kulübü Derneği v Darvydas Sernas*, award of 5 July 2016, paras 102–107.
141 CAS 2012/A/2874 *Grzegorz Rasiak v AEL Limassol*, award of 31 May 2013, para 211.
142 CAS 2014/A/3597 *AC Omonia Nicosia v Iago Bouzon Amoeda*, award of 22 August 2014 [51].
143 CAS 2008/A/1519 *FC Shakhtar Donetsk (Ukraine) v Mr Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA*; CAS 2008/A/1520 – *Mr Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v/ FC Shakhtar Donetsk (Ukraine) & FIFA*.
144 CAS 2015/A/4206 *Hapoel Beer Sheva FC v Ibrahim Abdul Razak*; CAS 2015/A/4209 *Ibrahim Abdul Razak v Hapoel Beer Sheva FC*, award of 29 July 2016, [242].
145 CAS 2015/A/4346, award of 5 July 2016.

the club did not respond, thereby necessitating the player sending a formal termination letter to the club claiming damages against the club. The player thereafter entered into a contract with a Polish club with a monthly salary of 1,000 euros.

Before the CAS, the club argued that the player violated the obligation to mitigate his loss by deliberately accepting worse financial conditions (1,000 euros per month) after the termination of the employment contract with them. By contrast, the player averred that he made all reasonable efforts to mitigate his loss and had, in fact, managed to sign a new employment contract soon after the termination of his employment contract. He also argued that he continued to improve his financial condition by signing new contracts with other clubs.

The CAS agreed with the player, finding that accepting worse financial conditions, in comparison to the employment contract, was not the result of his deliberate choice, but was rather the result of the emergency situation due to the premature termination because of the club's breach. In other words, the player was sufficiently diligent and actually managed to find a new contract soon after the termination of the employment contract, and had shown a serious commitment in limiting his loss and improving his financial conditions from time to time by signing other contracts. This meant that no deductions to the compensation awarded to him could be made on account of a failure to mitigate.

## 3.13 INJUNCTIONS[146]

Common law courts have, in general, ruled for over a century that a contract for personal services cannot be enforced through specific performance where a breach has occurred. That said, the court in *Lumley v Wagner*[147] indicated that it was empowered, in equity, where damages are an inadequate remedy, to restrain a party who has breached a contract from engaging a third party to ply his or her trade. In that case, the court, while acknowledging its inability to compel the opera singer to perform at her employer's theatre, nonetheless granted an injunction that had the effect of preventing her from performing for other theatres that might have requested her services for the duration of her pre-existing contract. In the sporting context, the court in *Philadelphia Ball Club v Lajoie*[148] and *Central New York Basketball, Inc. v Barnett*[149] imposed negative injunctions to restrain the respective baseball and basketball players from joining other clubs, and rationalized these decisions by holding that the respective players possessed

146 Note that to succeed in the grant of an interim injunction, the traditional American Cynamid principles apply; there must be a serious issue to be tried and, if there is, the court must consider where the balance of convenience lies. Delay in bringing a claim for an injunction may defeat the application. See *Stevenage Borough Council Football Club v Football League Ltd* (unreported) 23 July 1996. Here, the claimant had shown that the Football League rules were objectionable in two ways as being an unreasonable restraint of trade, but was nevertheless refused relief on the grounds of its delay in making the application. The application was one that would have, if successful, entitled it to promotion and therefore consigned a Football League club to demotion. It had argued that it was reasonable for it to delay challenging the rules until it knew whether in fact it would receive any benefit from the challenge if it succeeded, which meant it had to wait until it had won its league and the time when the objectionable criteria for promotion came into play. See also *Dwain Chambers v British Olympic Association* Law Com D, 18 July 2008, who unsuccessfully sought an interim injunction to set aside British Olympic Association by-laws that had the effect of preventing him, as an athlete who had previously served a period of ineligibility, from participating in the 2008 Beijing Olympic Games. Apart from delay that the court held to have defeated the application, Mackay J found that: 'I am not able on this evidence to find that the claimant's prospects of proving that there was a reviewable restraint of trade here, or that if there was the byelaw was not proportionate viewed in its context, are such as to give me the degree of assurance I would require to justify the relief that is claimed.'

147 [1852] EWHC (Ch) J96.

148 202 Pa 210, 51 A 9B (1902).

149 181 NE 2d 506 (1961).

talents and abilities of a special, unique, unusual and extraordinary character, which could not be easily replaced.

Although, in some cases, it can be argued that compelling a party to perform his side of the bargain provides contractual stability and contributes to business efficacy, a number of reasons have been advanced as to why only a negative injunction is possible in sporting cases, which primarily involve contracts for personal services. The first is that it would be difficult to ensure compliance since the athlete may engage in suboptimal performances as a result of being compelled to play for his club. Geoffrey Rapp is, however, of the view that this is an oversimplification of the issue, given the uniqueness of sports.[150] More specifically, according to Rapp, a player would not set out, in the modern era, to deliberately lower his standards, not only because this might jeopardize his future commitments with other clubs, but also because, instinctively, players are competitive and would find it subconsciously difficult to be deliberately lax in their performance. That said, a second argument advanced is that to impose an injunction would be difficult to monitor judicially, since the court might repeatedly be called upon to evaluate compliance with pre-existing obligations with which the player does not wish to comply in the first place. To this, Rapp has argued that judicial monitoring should not be an impediment to the granting of an injunction in this modern era of sport, where players' careers are meticulously documented using statistics, so that it is fairly straightforward to recognize when there is a sudden drop in performance.[151] The final argument that the imposition of an injunction would result in involuntary servitude, inconsistent with the constitution, has not been tested, and therefore, according to Rapp, is merely a speculative argument.[152]

While American and English courts have remained dogged in their approach to imposing only negative injunctions in appropriate cases, but not specific performance, at least one South African case suggests that there might be a movement away from the notion that a party contracted to perform personal services cannot be compelled to perform these services. In *Santos Professional Football Club (Pty) Ltd v Igesund*,[153] the Cape Provincial Divisional Court ordered the first respondent to continue to serve as head coach for the appellant's teams for the remainder of his fixed-term football coaching agreement. The court arrived at this conclusion for a number of reasons. First, the contract in question was unique in nature and thus not an ordinary contract of employment, since clause 9 expressly granted the right to sue for specific performance in case of a breach.[154] Second, the coach was given full reign under the contract to coach and select the appellant's teams, thereby effectively prohibiting the club from interfering in any way whatsoever in the coaching, selection and substitutions of the team. As such, to grant specific performance would not have meant the restoration of a very close working relationship between the first respondent and the club owner on a day-to-day basis. Third, the first respondent was on equal bargaining position with the club when he entered the contract, as appears from the large sum of money he was being paid. In other words, he could not be compared to an ordinary servant in an archetypal master–servant contractual relationship. The court also pointed to the fact that it would have been almost impossible to prove and quantify the damage that would have resulted from the loss of the coach.

150 Geoffrey Christopher Rapp, 'Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law' (2006) 16 Marquette Sports Law Review 261.
151 Ibid.
152 Ibid.
153 (2002) 23 ILJ 2001 (C).
154 Tjakie Naudé, 'Specific Performance Against An Employee Santos Professional Football Club (Pty) Ltd v Igesund' (2003) 120(2) South African Law Journal 269 (the author has argued that the inclusion of this clause might offend public policy, since it attempts to restrict the court from exercising a purely equitable jurisdiction in determining whether or not to make an award of specific performance of a contract).

Interestingly, the court felt that specific performance, as opposed to damages, is the primary remedy available for breach of contract, thereby rejecting English law on this question. More specifically, the court rejected the contention that specific performance should not be granted where an award of damages will adequately compensate the aggrieved party, since, as it was held, a claimant is entitled to select a remedy. The court also rejected the contention regarding the difficulties of supervising performance of its decree, intimating that if there is an intentional refusal to perform, contempt proceedings may follow. Furthermore, the court considered that although there is a long-standing rule derived from English law that contracts of service are generally not enforceable against an employee, it pointed to cases, even in England, where indirect performance has been imposed, including *Lumley v Wagner*.[155]

Moreover, the court considered that, on the facts, prior to the contract being breached by the coach, there was no breakdown in the relationship between the coach and the club, as the coach's principal reason for wanting to leave was so that he could obtain a more lucrative contract with a competitor. This, the court held, was to be distinguished from other cases where the person's reason for leaving has everything to do with the club or its owner, and there is thus fear and distrust as between the parties. This was also not a case, as mentioned earlier, where the club had close control and supervision of the coach, so that even if there was a breakdown, it might not necessarily have caused hardship to the coach.

As pointed out by Tjakie Naudé, this is, indeed, a revolutionary case, with serious implications for both law and policy in this difficult area of contract law.[156] It is not, however, likely that this decision will be followed in future cases, since it is inherently based on an extraordinarily unique contract.

That said, the question arises as to whether this approach would find favour in Caribbean sporting jurisprudence. While the answer to this question is far from clear, it is perhaps slightly less speculative to argue that, at the very least, a negative injunction, in the same vein as *Lumley v Wagner*, could be imposed by regional courts where a player, for example, refuses to perform his contractual obligations to his club. One instance in which consideration could, at the very least, have been given to the granting of such an injunction had the matter been litigated arose in 2014 when West Indies cricket players pulled out of their tour to India, leaving the BCCI to contemplate bringing legal proceedings against CWI for USD $42 million in compensation. In what Basil Loeb would describe as a classic 'player holdout' situation,[157] West Indies cricketers refused to continue with their tour of India after the fourth one-day international, as a result of a protracted payment structure dispute between the players, the WICB and West Indies Players' Association (WIPA). The contention surrounded the question of whether all of the West Indies players had agreed to forego sponsorship payment in order to enhance the pay structure of 90 regional first-class cricketers. The debacle began on 19 September 2014 when the WICB and WIPA signed a new bargaining agreement and memorandum of understanding (MoU) aimed at bringing stability to the system of cricket in the region. On 7 October 2014, however, West Indies players threatened to sit out the first ODI against India and claimed that Wavell Hinds, President of WIPA, had 'hoodwinked' them while signing the MoU. Although on 8 October 2014, West Indies played the first ODI, then captain Dwayne Bravo asked Hinds and other WIPA officials with conflict of interests to tender their resignation immediately. Later, on 11 October 2014, Bravo wrote to WICB president, Dave Cameron, seeking 'urgent intervention' over payment issues between the board, the players, and WIPA. By 15 October 2014, the

155 [1852] EWHC (Ch) J96.
156 Ibid.
157 Basil Loeb, 'Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done' (2001)11 Marquette Sports Law Review 275.

growing impasse between the players and WIPA had intensified, with the players and WIPA exchanging emails. Interestingly, Hinds denied all claims made against him and said that senior West Indies players had expressed '100% support' towards the resolution, though Bravo denied that any such resolution was passed. On 16 October 2014, the WICB said that it would 'engage' only with the WIPA, and not the players, to resolve the issue, but upon completion of the fourth ODI on 17 October 2014, news broke that the rest of the tour had been abandoned.

Although the Indian cricket team subsequently toured the West Indies against the backdrop of claims that the BCCI would sue CWI for the millions lost in income as a result of the abandoned tour, it does not appear that the matter was litigated nor is there any indication as to what agreement was ultimately reached between the BCCI and CWI to settle the amount claimed. What is interesting, however, is that at no point in the dispute when threats were issued by the players to abandon the tour did CWI contemplate bringing a legal suit in court for an injunction to, at the very least, restrain the players from participating in other forthcoming tournaments, which many of them ultimately featured in, namely, Australia's Big Bash and the Indian Premier League (IPL). One argument that arises in this connection is that it is likely that the injunction would have been of little practical utility, even if granted, since those other tournaments only commenced after the scheduled completion of the Indian tour. Any injunction granted would thus only have been up until the completion of the Indian tour, which would not have in any event affected the players' ability to ply their trade in other leagues. That said, if the South African approach in *Santos*, discussed above, were to have been adopted, notwithstanding the extraordinarily unique contract in the *Santos* case, the players might very well have been compelled to complete the tour of India.

## 3.14 RESTRAINT OF TRADE

The doctrine of restraint of trade is not unique to the sporting context. In fact, long before the advent of professional sports, the doctrine was applied to employment and other commercial arrangements in order to regulate restrictions placed on employees and merchants.[158] Indeed, by the late nineteenth century, Lord McNaughten, in the seminal decision of *Nordenfelt v Maximum Nordenfelt Guns and Ammunition Co. Ltd*,[159] had already authoritatively commented that 'all restraints are contrary to public policy, unless the restraint was reasonable'.

As pointed out by Denning MR in *Petrofina (Great Britain) v Martin*,[160] a restraint of trade arises where a term of a contract between a sportsperson and a club or league or other measure 'interferes with the free exercise of [the athlete's] trade ... by restricting him in the work he may do for others, or the arrangements which he may make with others'.

Restraints may come in many different forms, including disciplinary measures,[161] regulatory restrictions in respect of both on and off-field conduct and certain contractual undertakings related to endorsements and sponsorship. Although, instinctively, the term 'restraint' casts a negative light on the legality of these measures, this is not necessarily an accurate approach, since restraints may either be lawful or unlawful. While lawful restraints are permissible, unlawful restraints are not and, if subject to judicial scrutiny, their existence may render clubs, leagues

158 James Johnson, 'Restraint of Trade Law in Sport' (2009) Sports Law eJournal http://epublications.bond.edu.au/slej/10.
159 [1894] AC 535.
160 [1966] Ch 146.
161 Annette Greenhow, 'Anti-Doping Suspensions and Restraint of Trade in Sport' (2008) Sports Law eJournal 1.

and other similar establishments subject to a declaration and/or injunction in appropriate cases. Indeed, the 'mere threat to invoke the doctrine of restraint of trade by disgruntled players is a powerful catalyst for radical overhaul of systems that hitherto were regarded as set in concrete'.[162]

The rapid development in the doctrine of restraint of trade in the sporting context in recent years has raised some interesting questions of both theoretical and practical importance. Among the questions raised, in this connection, are – what exactly does it mean for an athlete to be engaged in a 'trade'? What are the conditions that must be satisfied in order for a case of restraint of trade to be successfully countenanced by the court? And what does the existing corpus of jurisprudence tell us about the operation of the doctrine of restraint of trade in the sporting context, particularly from a Commonwealth Caribbean perspective?

Before examining these questions in further detail, it is important to bear in mind the salient words of Scott J in *Gasser v Stinson*:[163]

> The policy underlying the restraint of trade law is that people should be free to exploit for their financial gain the talents and abilities that they may have. I would accept that restraint of trade law would not be applicable to activities that were undertaken for no financial reward at all (for example, school sport ...) nor is it in my opinion in point that a particular ban may deprive a would-be competitor of a chance of building up a reputation and to later exploit it for commercial gain. But in a sport which allows competitors to exploit their ability in the sport for financial gain and which allows that gain to be a direct consequence of the participation in competition, a ban on competition is, in my judgment, a restraint of trade.

### 3.14.1 'Trade'

It is a foundational principle of contract law that an athlete is to be regarded as engaged in a 'trade' if he or she receives payment for competing in a sport, regardless of whether it is on a part-time or full-time basis.[164] This axiomatic principle has been repeatedly acknowledged by the Court of Justice of the European Union (CJEU), which has held that once a player is engaged in a sport that has an economic dimension, he or she is to be treated as engaged in a 'trade' for the purposes of EU law.[165] Although most cases have to date spoken to the need for there to be some economic dimension of an athlete's engagement with a club or league, the Court in *Eastham v New Castle Football Club*[166] went as far as to suggest that even if the athlete is not officially a member of the league, but is nonetheless subject to a mandatory penalty, he is in a 'trade'.

The case of *Dwain Chambers v British Olympic Association*[167] is instructive on the latter point. Here, Dwain Chambers, a then leading British 100 metres athlete, had tested positive in 2003 for the banned substance, Tetrahydrogestrinone ('THG'), for which he served a mandatory two-year ban. Chambers, who had subsequently qualified for selection (the by-law apart) for the 2008 Beijing Olympic Games, was prevented from participating therein on the ground that the by-laws prevented athletes who had previously served a mandatory ban for using a prohibited substance from representing the United Kingdom at the Games. Chambers mounted his

162 Gavin Little and Philip Morris, 'Challenging sports bodies' determinations' (1998) Civil Justice Quarterly 128.
163 (1988) Law ComD, unreported.
164 *Buckley v Tutty* (1971) 125 CLR 353.
165 Case C-13/76 *Dona v Montero* (1976) ECR 1333*; Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* (1995) C-415/93.
166 [1964] Ch 413.
167 Law Com D 18 July 2008.

challenge to the by-law under three heads on the basis, *inter alia*, that it was an unlawful restraint of trade. Mackay J, in rejecting Chambers' request for an interim injunction to set aside the relevant rules, found that although the athlete was engaged in a 'trade', he could not

> on th[e] evidence find that the claimant's prospects of proving that there was a reviewable restraint of trade here, or that if there was the byelaw was not proportionate viewed in its context, are such as to give me the degree of assurance I would require to justify the relief that is claimed.[168]

## 3.14.2 Threshold conditions

The courts have to date adopted a tripartite approach to determining the legality of restraints imposed upon athletes. In short, it must be established that a legitimate interest is being served by the restraint, the restraint is reasonable in the circumstances and the restraint is in the public interest. A failure by a club or league to satisfy one of these elements invariably means that the restraint will be struck down as being unlawful.

### *3.14.2.1 Legitimate interest*

The burden of proof rests upon the party, usually a club or league, seeking to enforce a restraint to establish that said restraint serves a legitimate interest. Although the concept of a 'legitimate interest' is fluid in nature, the courts have to date identified an admittedly evolving range of interests which can be considered as 'legitimate', including protecting the integrity of sport, protecting the financial well-being of sporting teams, and clubs or leagues and protecting the public's confidence in sports.[169]

In *Gasser v Stinson*,[170] the court accepted that the imposition of an automatic ban by the International Amateur Athletics Federation (IAAF) on the athlete subsequent to her being tested for a banned substance served a legitimate interest, namely deterring athletes from taking performance-enhancing drugs, thereby ensuring a drug-free sport. The imposition of the ban, in this context, was accordingly held to be a lawful restraint of trade.[171]

In so far as protection of the financial well-being of sports is concerned, the case of *Greig v Insole*[172] is instructive. In that case, several Test cricketers, including the claimant, Tony Greig, Clive Lloyd (former West Indies cricket captain) and Deryck Murray (former West Indies wicket keeper) were disqualified from participating in International Cricket Conference (ICC) organized Test matches in circumstances where they agreed to play in the World Series Cricket (WSC) competition organized by Australian businessman Kerry Packer. Although West Indian cricketers Lloyd and Murray were not claimants in the matter, they nonetheless were subject to the ICC's rules, which resulted in Lloyd resigning as captain and Murray being dropped from the third Test against Australia in 1977.[173] The ICC argued that the rules did not constitute

168 Ibid [54].
169 Sam Chadwick, 'Restraint Of Trade in Australian Sport – Was the AFL's hand forced on Ben Cousins?' (2010) Sports Law eJournal 1.
170 (1988) Law Com D, unreported.
171 See also *Robertson v Australian Professional Cycling Council* (Unreported, Supreme Court of NSW Equity. Division, Waddell CJ, 10 September 1992). The court, while accepting the legitimacy of protecting the integrity of the sport, was concerned that the ban imposed was excessive in the circumstances.
172 [1978] 1 WLR 302.
173 Michael Malec, *The Social Roles of Sport in Caribbean Societies* (Psychology Press, 1990) 74; Rob Steen, *Floodlights and Touchlines: A History of Spectator Sport* (A&C Black, 2014) 217.

an unlawful restraint of trade because, among other things, they sought to protect the financial well-being of Test cricket, an argument that was accepted by the court. However, on the question of the reasonableness of the ban, the court found that the rules imposed by the ICC went beyond what was reasonable and necessary in the circumstances to achieve the intended objective, and were, in fact, contrary to the public interest. The rules were thus struck down as constituting an unlawful restraint of trade.

Another objective often sought to be relied upon by clubs and leagues is that of ensuring public confidence in sports. Admittedly, this is an important objective, as without the support of a captive audience, athletes, clubs, leagues and others intimately involved in sport will find their success in sports invariably curtailed. One of the earliest illustrations of the court countenancing the need to protect public confidence in sports arose in the case of *Beetson v Humphreys*.[174] In that case, a New South Wales rugby player and coach were respectively prohibited from commenting in the media on decisions of referees and administrators that they considered to be questionable, notwithstanding the fact that they earned money from publishing, and had in fact been so publishing, their views in newspaper columns over a number of years. Although Hunt J ultimately found that the limit placed on players and coaches in this connection were completely unnecessary to protect the league's interest, his lordship was nonetheless prepared to accept that attaining and retaining players in the game, especially the youth, protecting referees and other officials from unfavorable comments and ensuring that the officials' lives were not made difficult by exposing them to public criticism were all legitimate interests that could be protected by reasonable restraints.

In the Caribbean context, the question of inappropriate comments made in the public domain that are critical of sporting officials has arisen in practice, though this has not resulted in litigation. By way of example, after the West Indies cricket team was victorious in the ICC World T20 competition in Kolkata, India, in April 2016, several of its leading cricketers, including Daren Sammy and Dwayne Bravo, were reprimanded for what the ICC described as 'inappropriate' and 'disrespectful' comments made by the cricketers on live television.[175] Sammy had criticized Cricket West Indies for disrespecting the players in the run up to the T20 competition, while Bravo described Cricket West Indies' president, Dave Cameron, as 'immature', 'small-minded' and 'arrogant'.[176] In this context, the ICC gave 'serious consideration' to levelling code of conduct charges against the players, which could have resulted in fines and/or bans being imposed, since their comments apparently brought the sport into disrepute. Although the matter did not subsequently escalate into litigation, it nonetheless confirms that protecting public confidence in sports is, indeed, a legitimate objective that can be protected by reasonable restraints.

In short, although a legitimate objective is crucial to establishing the lawfulness of a restraint, it is merely one piece of the puzzle, and, in this regard, the threshold of the reasonableness of a restraint has to be met by the party seeking to enforce the restraint.

### *3.14.2.2 Reasonableness*

For a restraint that serves a legitimate objective to be regarded as being lawful, it must be established that the restraint is in fact reasonable in the circumstances. What is reasonable is highly

174 Unreported, Sup Ct of NSW, Hunt J, 30 April 1980.

175 West Indies players reprimanded for World T20 outbursts' (*ESPNCricInfo*, 25 April 2016) www.espncricinfo.com/ci-icc/content/story/1003487.html.

176 'WICB: Sammy's comments inappropriate' (*Barbados Today*, 4 April 2016) www.barbadostoday.bb/2016/04/04/wicb-sammys-comments-inappropriate/.

dependent upon the facts of each case, for what is reasonable in one sport may not be reasonable in another. At an elementary level, however, it is instructive to note that the question of reasonableness is determined by reference to the parties. In this connection, although the court will allow restraints that afford adequate protection to the party in whose favour it is imposed,[177] such restraints, according to *Greig v Insole* and *Beetson v Humphreys*, must not be more than what is necessary in the circumstances to protect the interests being relied upon.

An examination of the notion of 'reasonableness' cannot be adequately completed simply by reference to the interests of the club or league; the interests of the athlete, as a matter of necessity, must also be considered.[178] Indeed, Gibbs J in *Amoco Australia v Rocca Bros Motor Engineering*[179] has made it clear that it is certainly permissible to consider the effect that the restraint has on the athlete when evaluating the question of reasonableness. This view was echoed by Sheppard J in *Adamson v New South Wales Rugby League*,[180] when he opined that one must examine the consequences and potential consequences upon the athlete, since the court's role at this prong of the test is to ensure that there is adequate consideration of the damage to the club's or league's interest as against the cost of imposing the restraint on the athlete.

The question of reasonableness necessitates a consideration of several matters, including whether there is inequality of bargaining power as between the athlete and the club or league; whether the restraint is supported by adequate consideration; the limited career span of an athlete; exposure of the athlete to career-ending injury; the possibility of the athlete being subject to inter-club trades while still bound by an existing contract; the athlete's reputation; and the general or partial scope of the restraint in question.[181] While these matters do not suggest that this stage of the test involves a balancing exercise between the interests of the respective parties, they serve to ensure that the club or league discharges their burden of proof with respect to the reasonableness of the restraint.[182]

The reasonableness of the restraints imposed on a minor was considered in the case of *Proactive Sports v Rooney*.[183] Wayne Rooney, a then terrific 17-year-old footballer who would later go on to be a world-renowned footballer, had set up a company, Stoneygate Limited, to which he assigned his image rights. Stoneygate then appointed the claimant, Proactive Sports, to be Rooney's image rights agent, effectively negotiating third party contracts for him in respect of apparel and sponsorship and endorsement deals. As a term of the contract between the parties, Proactive Sports was entitled to commission at the rate of 20% for its work over a period of eight years. In 2008, Rooney decided to revoke the agreement with Proactive Sports, and entered into another contract with another agent, in the process refusing to pay Proactive Sports further commission. Proactive Sports brought an action alleging that the defendant had unlawfully repudiated the contract. They accordingly claimed the unpaid commission.

In the High Court, it was held that the terms imposed by the contract between Rooney and the claimant amounted to an unlawful restraint of trade. While the court was prepared to accept that a legitimate financial interest was pursued by the agency, it nonetheless found that the terms of the arrangement were not reasonable in the circumstances for a number of reasons. Among the factors which led the court to this conclusion were the fact that the eight-year period over which Rooney was supposed to have been bound was likely to have been half of his

177 *Herbert Morris v Saxelby Parker* [1916–17] All ER 305.
178 David Thorpe, 'The Use of Multiple Restraints of Trade in Sport and the Question of Reasonableness' (2012) 7(1) Australian and New Zealand Sports Law Journal 63.
179 133 CLR 288.
180 (1991) 31 FCR 242.
181 *Peters (WA) v Petersville Ltd* [1999] FCA 1245.
182 *Adamson v New South Wales Rugby League* (1991) 31 FCR 242, per Sheppard J.
183 [2007] 1 All ER 542.

playing career; he was only 17 at the time of entering into the contract; he and his parents did not receive adequate legal advice and they were not sophisticated in business dealings; and the 20% commission for a period of eight years was excessive.

On appeal, the Court of Appeal agreed with the lower court's ruling, finding that, having regard to the substance of the agreement between the parties, the restraints imposed 'sterilized' Rooney's capacity to apply his trade as a footballer, and were accordingly unreasonable. Like the High Court, the Court of Appeal recognized as instructive in this connection the substantial imbalance of power between the parties and the lengthy duration of the contract, which tipped the court into finding that Rooney could not be forced to perform the remaining obligations under the contract, albeit that the claimant was entitled to restitution on a *quantum meruit* basis.

As highlighted by Ed Boden and Jessie Woodhead, the *Proactive* case is important not only in so far as the question of reasonableness is concerned, but also in dictating the modus operandi of clubs and agents when dealing with players, especially minors. In this context, the authors have expressed that there is a need for clubs, leagues and agents to avoid non-negotiable arrangements; ensure that the athlete (and his or her parents, if a minor) obtains professional and independent advice; ensure that lengthy contracts are avoided; and ensure that a fair remuneration is negotiated.

On another note, where multiple restraints are imposed on an athlete, the higher is the possibility that, cumulatively, they would be regarded as unreasonable, since 'the more onerous the restraint, the more difficult it is to satisfy the court that it was no more than reasonably necessary'.[184] By way of example, in *Adamson v New South Wales Rugby League*, in order to enable the worst performing clubs to employ the best players and to prevent the stronger clubs from obtaining the services of an unfair proportion of the better players at the expense of weaker clubs, the New South Wales Rugby League introduced an internal draft system and salary caps. The former required clubs to acquire the services of players coming off contract in reverse order to how the club finished in the previous year's competition, whereas the latter imposed restrictions on the amount in remuneration any one player could receive for his services. The league argued that the internal draft system and salary caps were necessary, in combination, to ensure that clubs did not compete for players' services by offering more money than they could afford to pay, whilst protecting weaker clubs, but the court held that the internal draft system was an unlawful restraint of trade as it was not reasonable in the circumstances. The court's rationale for so ruling was that the restraint prevented players from playing with the club of their choice; this was unreasonable, since, according to Wilcox J, 'there could seldom be a greater restraint upon trade than restricting an employee's freedom from choosing his employer'. Although the question of multiple restraints has not been litigated upon in the Caribbean, it would be interesting to see how a regional court or tribunal may rule if a situation arises where, in the context of the CPL, an internal draft system and salary caps are introduced.

It would appear from the *Adamson* decision that the court does not take kindly to the imposition of multiple restraints by clubs or leagues where, collectively, these restraints are more than necessary to achieve their intended objective. This view is buttressed by the decision of *Eastham v Newcastle United Football Club (NUFC)*.[185] In that case, the court found the 'retain and transfer' system which operated in English football to be unreasonable. Here, Eastham was contracted by NUFC, but when his contract came to an end, he requested a transfer to another club. At the time of the dispute, the English Football League rules were such that a club was permitted to retain players, even after the expiration of these players' existing contracts. These

184 *Adamson* (n 180).
185 [1964] Ch 413.

rules were challenged by Eastham, who argued that they amounted to an unlawful restraint of trade. The court agreed, finding that the retention system, which effectively prevented the player from applying his trade with another club upon the expiration of his existing contract, was unreasonable in the circumstances, and thus an unlawful restraint of trade. In short, if the club was not prepared to rehire Eastham, it had to let him go.[186]

In other jurisdictions, the courts have been equally minded to find an unlawful restraint of trade where a club or league fails to discharge its burden of proving that the restraints imposed were reasonable in the circumstances. For example, in *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*,[187] Bosman challenged before the European Court of Justice the pre-1995 European football transfer system, which entitled clubs to prevent footballers from being transferred to other clubs, unless the holding club received adequate compensation, as being an unlawful restraint of trade. Bosman, a professional footballer, who had entered into a contractual relationship with Royal Club Liege (RCC) in Belgium, was offered a new contract with RCC just before his existing contract with them was slated to expire, albeit that his proposed salary was to be reduced by about 75%. Bosman requested, but without success, to be made a free agent so that he could contract with a French club, US Dunkerque (USD), but this was ultimately refused by RCC, who were concerned that USD might not have sufficient funds to pay to them so as to facilitate the transfer of the player. As a consequence, Bosman was only able to contract with a semi-professional club, which resulted in his earnings being substantially reduced. The ECJ ultimately found that that the transfer system, in restricting Bosman's ability to obtain opportunities after his existing contract with RCC had expired, constituted an unlawful restraint of trade. In other words, a player must be free to transfer to another club once his existing contract expires, a view which has subsequently been countenanced by the Australian court in *Buckley v Tutty*,[188] a case in which it was held that clubs cannot demand transfer fees for their athletes once their contract with those athletes has expired.[189]

### *3.14.2.3 Public interest*

The final element of the test for establishing a lawful restraint of trade requires a consideration of the public interest. Whereas the burden of proof is on the club or league to establish that a restraint is reasonable as between the parties, the burden of proof is on the athlete to establish that the restraint is not reasonable in the public interest.[190] Lord Diplock in *Petrofina (Great Britain) v Martin*[191] has explained that when considering this prong of the test, once must necessarily countenance the *liberty* of the athlete to trade with whom he pleases and in such manner as he thinks fit as well as the need to ensure *prosperity* in the context of the expansion of the total volume of trade. Against this backdrop, it has been found that it is not in the public interest to enforce admission policies that are capricious in nature[192] nor to impose rules that have the effect of depriving the community from seeing elite sportsmen displaying their skills.[193]

Although there has been a relative dearth of litigation in the Caribbean on the question of the public interest in respect of restraints imposed on players, a recent example involving Cricket West Indies (CWI) illustrates the challenges that inevitably arise in this area. In the

186 Simon Boyes, 'Sport in court: assessing judicial scrutiny of sports governing bodies' (2017) Public Law 363.
187 C-415/93.
188 (1971) 125 CLR 353.
189 This does not prevent a club from requesting transfer fees if the athlete is currently engaged in a contract to play for his existing club, but wishes to play for another club.
190 *Beetson v Humphreys* (Unreported, Sup Ct of NSW, 30 April 1980) per Hunt J.
191 [1966] Ch 146.
192 *Nagle v Feilden* [1966] 2 Law Com 633.
193 *Greig v Insole* [1978] 1 WLR 302.

later part of 2016, Insignia Sports, the company that manages several of West Indies leading cricketers, including Kieron Pollard, Daren Sammy, Dwayne Bravo and Chris Gayle, criticized the Cricket West Indies' (CWI) unprecedented move to impose a 20% levy on players' contracts with overseas T20 tournament organizers, including Cricket Australia (CA) and Cricket South Africa (CSA).[194] CWI had refused to issue a 'no-objection certificate' (NOC) that would otherwise have enabled Pollard, who at the time had not been contracted by the CWI, to play in the Cricket South Africa's T20 tournament. This was on account of the fact that CSA had refused to agree to the levy imposed by CWI. CWI's then CEO, Michael Muirhead, defended the WICB's position as justified in the public interest, despite claims that the imposition of the levy amounted to an unlawful restraint of trade. Muirhead, in defending CWI's move to redistribute fees collected for an NOC in contracts to players who only play T20, noted that:

> CWI, having invested in developing a player's talent, is not able to realize a return on its investment if the player is not available to play in local tournaments, which would allow lesser experienced players the opportunity to face a more experienced and skilled opposition, thereby improving on the standard and competitiveness of the domestic tournaments ... in the end, it compromises the standard of the WICB's international team and that team's performance internationally ... the primacy of international cricket is threatened.[195]

Insignia Sports, however, insisted that it was contemplating challenging CWI's move, since the move represented, 'a blatant restraint of trade on a player (Pollard) who ha[d] not been selected by [CWI] for the upcoming tri-series, [and who] d[id] not have a contractual tie to the [CWI] permitting such a restriction'. This view was also expressed by the Federation of International Cricketers' Associations (FICA), which described the WICB's decision as a 'restraint of trade', and warned that it could attract legal challenges. Following the introduction of the new policy, it is understood that the Bangladesh Cricket Board was considering a 10% payment, whereas Cricket South Africa rejected CWI's proposal.

Although no definitive conclusion can be arrived at with respect to the court's likely approach to resolving the CWI vis-à-vis T20 players saga, one thing is clear – the court is minded to consider the liberty and prosperity of the players, though it is not immune to entertaining the argument that depriving a player of 20% of funds obtained by playing in overseas leagues in order to develop local talent is certainly in the public interest.

More generally, in principle, it is instructive to note that a restraint that is reasonable between the parties may nonetheless be unreasonable in terms of the public interest, although it is not an easy threshold to prove that this is the case. Nonetheless, Sam Chadwick is of the view that, in monopoly cases and where the parties are in unequal bargaining positions, it might be possible to argue that a restraint that is reasonable as between the parties is nonetheless unreasonable in terms of the public interest.[196]

## CONCLUSION

This chapter has demonstrated that sports contracts form the basis of legal relationships between players, coaches, agents, clubs and governing bodies. These contracts outline the obligations by which all parties are bound, and stipulate how termination is to be effected as well

194 Colin Benjamin, 'Pollard barred from Ram Slam as WICB imposes NOC levy' (*ESPNCricInfo*, 7 November 2016) www.espncricinfo.com/story/_/id/17995888/kieron-pollard-barred-sa-t20-league-wicb-imposes-noc-levy.

195 Roger Seepersad, 'WICB defends player release levy' (*Trinidad Daily Express*, 8 November 2016) www.trinidadexpress.com/20161108/sports/wicb-defends-player-release-levy.

196 Sam Chadwick, 'Restraint of Trade In Australian Sport – Was the AFL's hand forced on BenCousins?' (2010) Sports Law eJournal 1.

as the nature of the remedies at the disposal of the injured party in the event of a breach of contract. While most areas of contract law discussed hitherto appear to be settled, there are indeed some vexing issues that remain. As indicated earlier, perhaps the main theoretical challenges that arise in this connection are how to interpret contractual terms that appear to be vague in their orientation, such as the 'no disrepute clause', which is addressed in Chapter 8, as well as the precise contours of inducing a breach of contract. Other important issues discussed in this chapter that might see further development in future include the contentious issue of when a breach justifying termination is an appropriate course of action in light of recent CAS jurisprudence, and the evolving importance of the duty to mitigate. Instructive also is the discussion on the court's power to compel players to perform certain positive obligations, which is an area in relation to which new life has been breathed following the South African decision of *Santos*. It has also addressed the important doctrine of restraint of trade, providing a nuanced and multiple jurisdictional perspective on the challenges and complexities in the application of this doctrine.

Overall, this chapter illustrates that far from being a settled area, contract law is truly alive and well in the twenty-first century, at least in the sporting arena in the Caribbean.

# CHAPTER 4

# INTELLECTUAL PROPERTY AND THE PROTECTION OF SPORTS RIGHTS

## 4.1 INTRODUCTION

The global sporting industry has witnessed tremendous growth over the last two to three decades as it relates to spectator interest, participation and television viewership. However, it is probably in the realm of sports business that the most phenomenal growth has taken place. Sports governing bodies, especially at the international level, have depended on sponsorship, media rights, merchandising and ticket sales, in particular, as their main sources of revenue. Some of the most lucrative global sporting events include the Olympic Games, cricket's Indian Premier League (IPL), the National Basketball Association (NBA) finals, the National Football League's (NFL) Superbowl and FIFA's senior men's World Cup. It has been suggested that one of the key factors leading to the success of the joint 2026 bid from Canada, Mexico and the United States for that edition of the World Cup was the promise of a USD $11 billion profit.[1]

Against this backdrop, this chapter will offer an introduction to intellectual property rights in sport and will proceed to present a detailed analysis of two of the major themes that arise today in the business of sport, namely ambush marketing and image rights. While there is a dearth of Commonwealth Caribbean case law in both areas, there has been meaningful development regarding both actual and proposed legislative intervention to address gaps in the law. Regional statutes and international instruments will be examined as they relate to assessing the threat of ambush marketing to sports rights holders, while the discussion on image rights will include an international comparison between the applicable law in the United States, the United Kingdom, Europe and the Caribbean. The chapter will close with a brief discussion on how sports broadcasting rights can be protected with special emphasis on the case of *Television Jamaica Ltd v CVM Jamaica Ltd*, which arose for judicial consideration at the time of the 2015 IAAF World Championships.

## 4.2 INTELLECTUAL PROPERTY RIGHTS IN SPORT

> Intellectual Property (IP) rights (patents, industrial designs, trademarks, copyright, etc) are usually associated with industry, typically the manufacturing industry. IP rights give exclusivity to the IP owner for a limited period of time. But organizers of sports activities are utilizing IP laws to take advantage of the interest in particular sports. Sports activities started as a hobby or a pastime event to enable participants to enjoy the sports or as a form of physical exercise. Now certain games have evolved into giant international events, or more appropriately international businesses with their own 'tailor-made' law. Such international events even challenge sovereign laws of countries.[2]

As highlighted in the above excerpt, intellectual property (IP) rights grant exclusivity to the owner for a particular period of time. Within the context of sport, the dominant and most relevant IP rights are copyright, trademark, patents and the related theme of image rights, which

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1 'North American World Cup Bid Projects $11 billion Profit for FIFA' (*New York Times*, 8 May 2018): www.nytimes.com/2018/05/08/sports/2026-world-cup.html.

2 'Report of the Cabinet-appointed Committee to Enable the Protection and Commercialization of Sports-Related Intellectual Property in Trinidad and Tobago' (Government of Trinidad and Tobago, 2017) 7.

will be considered in detail later in this chapter. Although it is beyond the scope of this book to offer a comprehensive analysis of every aspect of intellectual property,[3] a brief introduction to IP rights in sport will lay the groundwork for this chapter's focus on sports rights protection.

## 4.3 DEFINING INTELLECTUAL PROPERTY

Cornish's definition of intellectual property (IP) as cited in the third edition of *Sports Law*[4] offers a useful starting point in the assessment of the relationship between sport and IP rights:

> Bill Cornish has defined intellectual property (IP) as 'the application of ideas and information that are of commercial value. IP is a product of the mind-the-intellect-and has economic value in that, like any other kind of property, it may be bought, sold, licensed, assigned or otherwise exploited. The body of law that recognizes and protects this species of property is known as IP law and the rights that IP gives rise to are known as IP rights. (IPRs). IPRs essentially comprise trade mark rights, copyright, patent rights and design rights. In the sports context, perhaps the most important IPRs are trademarks and copyright, although the other IPRs enjoy some significance too.[5]

In the context of sport, Gardiner et al placed predictable emphasis on copyright and trademarks, while, as mentioned above, a case can be made for the inclusion of patents and image rights as part of the central elements of sports-related IP. Summaries of the first three main aspects of IP follow.

## 4.4 COPYRIGHT

Gardiner et al launched their overview of copyright law in a concise, yet helpful, way by stating that copyright literally means the right to copy something, in which copyright exists.[6] The Copyright Act of Grenada,[7] for instance, defines copyright in the following manner: 'Copyright is a property right which subsists in literary and artistic works that are original intellectual creations in the literary and artistic domains.'[8] Section 5(2) of the Act adds that: 'Works shall be protected by the sole fact of their creation, and irrespective of their mode or form of expression, as well as of their content, quality and purpose.' Under the Grenadian definition, for copyright to subsist in a work, there is no registration requirement. Copyright protection arises on the creation of the work, provided that the work is original. Similar language is used in copyright legislation throughout the Caribbean.[9]

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3 Readers are directed to specialist publications on intellectual property for a more detailed exposition of this topic such as William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell, 2013).

4 Simon Gardiner, Mark James, John O'Leary and Roger Welch, Ian Blackshaw, Simon Boyes and Andrew Caiger, *Sports Law* (3rd edn, Cavendish Publishing, 2006).

5 Ibid 400.

6 Ibid 408.

7 Act No 21 of 2011.

8 Ibid section 5(1).

9 Anguilla Copyright Act, section 2; Antigua and Barbuda Copyright Act 2003, section 6(1); Bahamas Copyright Act, Chapter 323, section 6(1); Barbados Copyright Act, Chapter 300, section 6; Belize Copyright Act Ch.252, section 7(1); Bermuda Copyright and Designs Act 2004, section 7; Dominica Copyright Act 2003, section 5; Guyana Copyright Act 1956, section 2; Jamaica Copyright Act 1993, section 6(1); St. Christopher and Nevis Copyright Act Ch. 18.08, section 6(1); St. Lucia Copyright Act 1995, section 7(1); St. Vincent and the Grenadines Copyright Act 2003, section 5(1); Trinidad and Tobago Copyright Act Ch. 82.80, section 5(1).

In Jamaica, under its 1993 Copyright Act, whose most recent amendment occurred in 2015,[10] copyright applies to original literary, dramatic, musical or artistic works as well as sound recordings, films, broadcasts, cable programmes and typographical arrangements of published editions.[11] Unless a work falls into these tightly defined categories, they may not, at the outset, obtain copyright protection.[12]

The requirement of originality was identified as a key feature of copyright in *Ladbroke (Football) Ltd v William Hill (Football) Ltd.*[13] In that case, Lord Pearce offered guidance both in terms of what is captured by a 'literary work' as well as what 'original' means. He said:

> My Lords, the question whether the plaintiffs are entitled to copyright in their coupon depends on whether it is an original literary work. The words 'literary work' include a compilation. They are used to describe work which is expressed in print or writing irrespective of whether it has any excellence of quality or style of writing ... The word 'original' does not demand original or inventive thought, but only that the work should not be copied but should originate from the author.[14]

The core ingredient of originality, therefore, is that the work originates from the author and is not something that has been copied.[15]

Copyright legislation in the Caribbean details other salient features, such as the type of works that are protected, the duration of copyright,[16] what amounts to infringement of copyright,[17] applicable remedies[18] and any relevant defences to alleged breaches.[19]

### 4.4.1 On-field moves and copyright in broadcasts

Notwithstanding what seems to be an ever-expanding range of rights afforded to stakeholders under copyright, trademark and patent legislation, it does not appear that the law has reached to the point of protecting the actual moves of players in matches, though the broadcast of such moves, with the underlying additions of graphics and text, appear to be protected. This point

10 Copyright (Amendment) Act, 2015, No 13 of 2015.
11 'About Copyright and Related Rights' (Jamaica Intellectual Property Office, 2018) www.jipo.gov.jm/node/47.
12 See Jason Haynes, 'Subject Matter of Copyright Protection In The UK: A Road Map To Effectuating Statutory Reform' (2013) 39(2) Commonwealth Law Bulletin 319.
13 [1964] 1 WLR 273.
14 Ibid 291.
15 Note that in a number of UK cases, courts have held that if the work in question is the result of its author's own skill, labour, judgement and effort, then copyright subsists therein. See, for example, *University of London Press v University Tutorial Press* [1916] 2 Ch 601, 609–610, *per Peterson J; Independent Television Publications Ltd. v Time Out Ltd.* [1984] FSR 64.
16 In Jamaica, for example, copyright subsists in a work for up to 95 years after its creation. In most other jurisdictions, however, this period is 50 years.
17 A person may not do any of the following acts in relation to a work in which copyright subsists, unless the permission of the author/owner is obtained: reproduction; translation; adaption; arrangement, other transformation; rental/public lending; importation of copies of work; public display; public performance; broadcasting; or communication of work to the public. The infringer must have copied/showed/rebroadcast a substantial part of the work, judged both quantitatively and qualitatively.
18 Damages, injunctions and accounts of profits, plus additional damages because of flagrancy of an infringement, may be sought. Criminal sanctions, including fines and terms of imprisonment, may also be imposed in appropriate cases.
19 Persons who are alleged to have infringed copyright work may seek to rely on various defences, including the fair dealing defence, which exempts criticism, review or the reporting of current events from being regarded as infringements. See Jason Haynes, 'Critically Reconceptualising the United Kingdom's Fair Dealing Exception to Copyright Infringement in light of the Government's Most Recent Proposals for Reform and Lessons Learnt from Civil Law Countries' (2012) 12 European Intellectual Property Review 811.

was emphatically made by the European Court of Justice (ECJ) in *Football Association Premier League Ltd v QC Leisure*,[20] when it held that:

> sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive ... [particularly in relation to] football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright.

Although it is true that, by their very nature, sporting events involve some degree of unpredictability due to their competitive nature, a strong argument can nonetheless be made that some moves engaged in by certain players, for example, in football, are nothing short of original, as they represent the display of unique skill, labour and judgment. Moreover, a cogent argument can also be made that the general restriction on protecting actual on-field plays through copyright law is fraught with difficulties when one considers choreographed sports, such as gymnastics, where the movements performed on the day in question are not only the product of tremendous skill, judgment and physical exertion but are, in any event, replicable. Admittedly, however, the challenge with protecting these movements lies in the fact that copyright law, should it apply, would grant exclusive rights to the 'authors' of said moves, such that others will be prevented from replicating these moves without the permission of the 'authors', unless an appropriate defence applies, such as the fair dealing defence. Perhaps the law in this area could be tested sooner than later in light of the eponymously named 'Marisa Dick' move named after Trinidad and Tobago's Rio 2016 Olympic gymnast.[21]

Notwithstanding this, however, it is clear that even if on-field moves are not protected, the actual broadcast encapsulating these moves, undergirded by sound recording, texts, film and graphical enhancements, are protected by copyright law, which augurs well for the monetization of broadcasts of lucrative sporting events by various entities, including media powerhouses such as ESPN and Sky Sports, amongst others.

The World Intellectual Property Organization (WIPO) has offered its perspectives on the *QC Leisure* ruling and its implications for copyright protection in sport:

> Protecting sport through IP law is not straightforward. A sports performance is not recognized as a copyright work in the same way as a musical or dramatic performance. The portrayal of the sports performance through a picture or media coverage may, however, attract IP in different jurisdictions. Exclusivity in content licensing is achieved through contracts with athletes, the media, commercial partners, press and audiences. IP created by others is assigned in return for access.
>
> Active Rights Management (ARM) was involved with the IOC in amending its charter in 2000 to extend the IOC's assertion of ownership of representations of a sports performance to include digital representations. ARM also worked with the sports industry to open a debate within the European Union on whether something similar to a sports performance right should be recognized. The EU Court of Justice commented on this issue in the *Murphy case (joined cases C-403/08 and C-429/08Football Association Premier League v QC Leisure* and *Karen Murphy v Media Protection Services Ltd):* 'sports events such as football matches cannot be considered intellectual creations or works and so cannot be protected by copyright.' It was noted that sports events have a unique and original character that can transform them into subject matter worthy of protection. The EU determined that whether to grant such protection should be left to Member States in their domestic legal framework. Some countries have done so. Most have not.

20 Case C-403/08.

21 'This Teen Gymnast Made History After With A New Move You Have To See' (*Refinery29.com*, 3 February 2016) www.refinery29.com/2016/02/101795/marisa-dick-gymnastics-olympics.

The hesitance of EU Member States to offer domestic copyright protection for sports events or sports performances is not entirely surprising in view of the courts' own reticence to do same.

### 4.4.2 The evolution of social media and copyright protection

Yet another noteworthy matter that has arisen in recent years in the context of copyright law is whether the uploading, sharing or reproduction of clips of a sports broadcast might constitute a 'substantial' part of a broadcast, and therefore a breach of the copyright in the broadcast. In *England and Wales Cricket Board Ltd and Sky UK Ltd v Tixdaq Ltd and Fanatix Ltd*,[22] the court appeared to suggest that where such unauthorized use of the broadcast is qualitatively substantial, liability for breach of copyright could ensue, even though the use is of a quantitatively small amount of the copyright material. In this case, the England and Wales Cricket Board was the governing body of cricket in England and Wales, while Sky UK Ltd was a UK pay-television operator. Together, they owned the copyright in television broadcasts of cricket matches staged under the auspices of the board, and in films made during the course of production of the broadcasts, in particular by recording broadcast footage for the purposes of action replays. The defendants operated a website, social media accounts and various mobile applications through which users had uploaded and viewed a considerable number of clips, lasting up to eight seconds, of cricket match broadcasts. The claimants contended that each eight-second clip broadcast by the defendants constituted a substantial part of their copyrighted works, and that that infringement had been flagrant. The defendants relied on the defence of fair dealing for the purposes of reporting current events pursuant to section 30(2) of the Copyright, Designs and Patents Act 1988.

In finding for the claimants, the court noted that the expression 'reporting current events' was of wide and indefinite scope, and should be interpreted liberally, since the section 30(2) defence was clearly intended to protect the role of the media in informing the public about matters of current concern to the public.[23] In this regard, short excerpts of copyrighted sporting broadcasts could amount to genuine news reports, albeit this is to be confined to news of a sporting character.[24] The court further considered that while it was impossible to lay down any hard-and-fast definition of 'fair dealing' as it is a matter of fact, degree and impression, in principle, when considering whether a dealing is fair, it is prudent to have regard to the user's motive: the most important factor was whether the alleged fair dealing was in fact commercial competition with the proprietor's exploitation of the copyright work.[25]

On the facts, quantitatively, eight seconds did not amount to a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it was clear that most of the uploaded clips constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus, most of clips showed something of interest, and hence value. The majority also involved action replays of that kind. Each clip substantially exploited the claimants' investment in producing the relevant broadcast and/or film and constituted a substantial part of the relevant copyright works. The clips had been reproduced and communicated to the public by the defendants for the purposes of sharing the clips with other users and facilitating

22 [2016] 575 EWHC.
23 Ibid. The court considered and applied the case of *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2002] Ch 149.
24 *BBC v British Satellite Broadcasting Ltd* [1992] Ch. 141 [77]–[79], [82].
25 *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890, [2012] Bus LR 53 and *Time Warner Entertainments Co LP v Channel Four Television Corp plc* [1994] EMLR [82]–[85].

debate amongst them about the sporting events depicted. The clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value. In short, therefore, the defendants' objective had been purely commercial rather than genuinely informatory. In any event, even if the defendants' use of the claimants' clips had been for the purpose of reporting current events, it did not amount to fair dealing since the use complained of was commercially damaging to the claimants, conflicted with normal exploitation of the copyright works, and its nature and extent was unwarranted and disproportionate. That said, the court acknowledged that the defendants' infringements were not flagrant, although it noted that they had knowingly pushed legal boundaries.

Whether this ruling will be extended in future to restrict the activities of individual social media users who typically post on Facebook, Twitter and Snapchat key moments of a match or the main highlights after a match is completed is an interesting question to which there is no immediate answer. Indeed, the approach ultimately taken by courts will very much depend on how substantial the copyright material is and whether the exploitation of the copyrighted work is for a commercial or genuine informatory purpose.

We conclude this brief introduction to copyright law in sport by citing a typical copyright clause that may be found in a sports contract, with a sponsorship agreement being in view.

*Copyright*

The Sponsor and the Association agree to the following:

all Media Rights and intellectual property rights **including copyright** and any other rights shall be the sole and exclusive property of the Association for **the full period of copyright** and any extensions or renewals. The Association shall be entitled to retain all sums received at any time from the exploitation of any of these rights in any form of the Recordings;

the Sponsor confirms that it is **the sole owner of or controls all copyright**, trademarks and any other rights in the Sponsor's Logo and that the use of the Sponsor's Logo by the Association and the Television Company under this Agreement will not expose the Association or the Television Company to any criminal or civil proceedings during the Licence Period;

the Association confirms that it is **the sole owner of or controls all copyright**, trademarks and any other rights in the Promotional Logo and that the use of the Promotional Logo under this Agreement will not expose the Sponsor to any criminal or civil proceedings during the Licence Period;

all intellectual property rights **including copyright** and any other rights in the Sponsor's Logo, together with any goodwill, shall be the sole and exclusive property of the Sponsor and the Association shall not acquire any rights or interests in the Sponsor's Logo, including any developments or variations;

all intellectual property rights **including copyright** and any other rights in the Promotional Logo, together with any goodwill, shall be the sole and exclusive property of the Association and the Sponsor shall not acquire any rights or interests in the Promotional Logo, including any developments or variations.[26] [Emphasis added].

The above clause exemplifies the stance usually taken by the copyright owner to expressly affirm its exclusive ownership of IP rights, including copyright, to the exclusion of the other party. As seen above, it is also commonplace for such a stipulation to extend to trademark rights.

26 Deborah Fosbrook and Adrian Laing, *The Media and Business Contracts Handbook* (5th edn, Bloomsbury Professional, 2014) 503.

## 4.5 TRADEMARKS

According to the Trade Marks Act of Belize,[27] a trademark means:

> any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings and it may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.[28]

This definition is largely replicated throughout the Caribbean region[29] and closely follows the definition of a trademark under section 1(1) of the UK 1994 Trade Marks Act.

Bodden's perspective on the relative uniformity of the IP laws, including trademarks laws, in the region is instructive:

> Caribbean countries are working to ensure that their IP regimes encourage innovation and are internationally competitive. However, this is a challenge, as the legislation in some countries is very outdated. Although the legislative regimes differ between the various Caribbean jurisdictions, these regimes all originated from the same country – the United Kingdom – and thus bear some resemblance to one another. The Caribbean comprises approximately 25 islands, some of which are gradually becoming independent of the United Kingdom and the Netherlands. During this process of independence, the laws of some jurisdictions have undergone changes, while in others antiquated legislation remains in force.[30]

This is an accurate evaluation of how IP laws in the Caribbean have evolved at, understandably, different paces. Wilson's synopsis of the region's IP framework is similar. He holds the view that IP 'protection has taken place in the Caribbean on a piecemeal basis in a manner that is somewhat expectedly related to the timing, circumstances, and degree of independence of each particular nation state'.[31] This is a natural consequence of any geo-political set up that involves multiple sovereign nations seeking to operate in a common space. That said, the Caribbean Intellectual Property Office (CARIPO) is likely best placed promote harmonization, where possible, necessary, expedient and beneficial.

Some of the Caribbean countries either enacted, or flagged for enactment, new IP laws within the past decade, including the Cayman Islands,[32] the British Virgin Islands,[33] Grenada[34] and Trinidad and Tobago.[35] Historically, and perhaps surprisingly, the little island of Curacao, as of the year 2018, has had a 125-year lifespan in IP, with its first trademark application dating back to 20 January 20 1893.[36]

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27 Chapter 257.
28 Ibid section 2.
29 *A*nguilla Trade Marks Act Chapter T30, section 1(1); Antigua and Barbuda Trade Marks Act Chapter 435, section 5(1); Bahamas Trade Marks Act, Chapter 322, section 2; Barbados Trade Marks Act, Chapter 319, section 4(1); Bermuda Trade Marks Act 1974, section 1(1); Cayman Islands Patents and Trade Marks Law, 2011, section 2; Dominica Trade Marks Act Chapter 78.42, section 5(1); Guyana Trade Marks Act Chapter 90:01, section 2(1); Jamaica Trade Marks Act 1999, section 2(1); Montserrat Trade Marks Act Chapter 15.23, section 2(1); St Christopher and Nevis Marks, Collective Marks and Trade Names Act Chapter 18.22, section 4; St. Lucia Trade Marks Act 2001, section 2(1); St Vincent and the Grenadines Trade Marks Act 2003, section 2(1); Trinidad and Tobago Trade Marks Act Chapter 82.81, section 2(1); Turks and Caicos Trade Marks Ordinance, Ch. 17:04, section 2(1).
30 Gabriela Bodden and Aarón Montero, 'Filing Trademarks in the Caribbean: What to Expect' (2011) E-Proint 86.
31 Darryl Wilson, 'The Caribbean Intellectual Property Office (CARIPO): New, Useful and Necessary' (2010) 19(3) Michigan State Journal of International Law 551, 573.
32 Patents and Trade Marks Law 2011.
33 Trade Marks Act 2013.
34 Trademarks Act 2012 and the Copyright (Cayman Islands) Order 2015.
35 Trade Mark Act No 8 of 2015 (not yet proclaimed at the time of writing).
36 Gedeona Maduro, Martina Everts-Anthony and Ramses Petronia, 'Curacao Celebrates 125 years of Trademark History' (*WIPO Magazine*, June 2018) www.wipo.int/wipo_magazine/en/2018/03/article_0005.html.

The case law that will be examined throughout the chapter will serve as a reminder that one of the key ingredients for trademark protection is *distinctiveness*. A closing word on the interpretation of the predecessor to the 2013 Trade Marks Act of the British Virgin Islands is apposite, especially since this occurred in the context of a rare sports-related trademark case in the Caribbean.

### 4.5.1 *BVI Watersports Centres Ltd v Registrar of Corporate Affairs / Trademarks*[37]

*Facts*

The (British Virgin Islands) Watersports Centres Limited (the 'WCL') appealed against the decision of the Registrar of Corporate Affairs/Trademarks & Patents ('the Registrar') to register the name 'British Virgin Islands Watersports Centre' as a trademark in favour of the Royal British Virgin Islands Yacht Club ('the Yacht Club'). The Yacht Club, a charitable organization incorporated in the British Virgin Islands (BVI) in 1973, was either the main or the only yacht club in the BVI. The WCL was incorporated more than 30 years later in September 2004 by two former employees of the Yacht Club, Mr and Mrs Bramble. Essentially, the WCL was a competing business set up by these two former employees whose employment with the Yacht Club was terminated.

The Yacht Club had over time offered tuition and related services in sailing and other watersports and, when issuing invoices, had used the business name, 'BVI Watersports Centre', a fact known to the Brambles. The court noted the similarity between the WCL's name and the business name used on invoices by the Yacht Club. The Yacht Club in November 2004 applied to the Registrar for the registration of the name British Virgin Islands Watersports Centre ('the Disputed Mark') as a trademark pursuant to the Trade Marks Act,[38] an 1887 statute. The WCL opposed the application.

*Grounds of appeal*

The following grounds of appeal raised some interesting legal questions:

i) the decision of [the Registrar] that the name 'BVI Watersports Centre' should be registered as a trademark in favour of [the Yacht Club] was wrong in law and in fact. In particular: a. the purported trade mark was, and is, not capable of being a trademark and in particular did not consist of or contain any of the following particulars:
   - i a name of an individual or firm printed, impressed or woven in some particular or distinctive manner;
   - ii A written signature, or copy of a written signature, of the individual or firm applying for the registration thereof as a trade mark;
   - iii A distinctive device, mark, brand, heading, label, or ticket;
   - iv An invented word or invented words; or
   - v a word or words having no reference to the character or quality of the goods, and not being a geographical name.

37 *The (British Virgin Islands) Watersports Centres Ltd v Registrar of Corporate Affairs/Trademarks & Patents and Royal Virgin Islands Yacht Club* BVIHCV2006/0039.
38 Chapter 158.

> ii) the [Yacht Club] did not and cannot use the name 'BVI Watersports Centre' as a trademark; In the circumstances [the Registrar] was not entitled to and did not have jurisdiction to register the purported trade mark. Further, to the extent that the Registrar did have any discretion to register the purported trade mark, she wrongly exercised that discretion.

The court dismissed the preliminary objection by the Yacht Club that it lacked the jurisdiction to hear the appeal and turned its attention to the substantive legal question, which the court summarized in the following way:

> The main issue as I see it and which was argued on behalf of the [WCL] is whether the Registrar erred in granting the application as that decision implied that the Alleged Mark was a trademark capable of being registered under the Act. Or in other words is the Alleged mark a trademark?

## *Held*

The court allowed the appeal, having made the following instructive pronouncements:

> [22] First, is the Alleged Mark a trademark? The Act does not define a trademark. Section 5 states several characteristics at least one of which a trademark which is sought to be registered must have but it does not define a trade mark. The Act is derived from Part [IV] of the UK Patents, Designs, and Trade Marks Act 1883 as amended by the UK Patents, Designs and Trade Marks Act 1888. Neither Act defines a trademark, and the court must look to the common law as it existed when the Act was passed. See *General Electric Co. (of USA) v General Electric Co. Ltd* [(1972) 1 WLR 729], Lord Diplock at page 741:
>
> > ... since the Act of 1883 was itself an Act to amend and consolidate the law relating to trade marks ... final recourse must be had to the Act of 1875 ... The right of property in a trademark was recognized at common law before it was the subject of any enactment. The Act of 1875 did not itself create any right of property in trade marks. As its title itself indicated and its provisions confirm, it simply provided for the registration of trademarks, and spelled out the consequences of registration available to him for the protection of those proprietary rights. The Act of 1875 must, therefore, be construed in the light of the common law relating to trade marks in 1875. I use the expression "common law" to include the doctrines of equity applied in what at that time was the separate Court of Chancery.

The court added:

> [27] Doubtless on the evidence the Yacht Club is not in the business of either selling or manufacturing paper or paper products and the Alleged Mark is not used in reference to any goods sold or manufactured by it. It is used in relation to the provision of its services. The Alleged Mark is therefore not a trademark.

On the facts of the case, the court could easily answer in the negative the question as to the identity of the goods against which the disputed mark was being used. The case was also a reminder of how legislative drafting has evolved, since, in modern days, it appears unthinkable that a statute about trademarks would not even define what the term means. The authorities cited in *BVI Watersports* were quite dated, a fact that could be expected given the reality that the legislation under consideration was from 1887. Notwithstanding this, useful guidance on the function of a trademark was offered as the court cited the dictum of Bowen LJ in *Re Powell's Trademark*,[39] as it wrestled with the question as to what constituted a trademark at common law. Bowen LJ noted:

> the function of a trademark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods – *to give an indication to his eye of the trade source from which the goods come*, or the trade hands through which they pass on their way to the market.[40] [Emphasis added].

39 (1893) 2 C*h* 338.
40 *The (British Virgin Islands) Watersports Centres Ltd* (n 37) [23].

The question of a trademark's function would later receive significant attention from UK courts in two cases involving London football clubs that play in the English Premier League. In the first case, *Re Application No 2130740 by Tottenham Hotspur plc*, the court cited the second one, *Arsenal Football Club Plc v Reed*,[41] with approval, noting:

> The issue of the use of the name of a football club as a trademark was dealt with by Laddie J in Arsenal Football Club Plc *v* Reed [2001] RPC 922 at 942 where he stated:
>
> > I have come to the conclusion that Mr Roughton's alternative argument also fails. He says that any trade mark use of the Arsenal signs is swamped by their overwhelming acquired meaning as signs of allegiance to the football team. Therefore they are not and have never been distinctive. He says that this argument applied with particular force to the word 'ARSENAL'. I think this fails on the facts. I do not see any reason why the use of these signs in a trade mark sense should not be capable of being distinctive. When used, for example, on swing tickets and neck labels, they do what trademarks are supposed to do, *namely act as an indication of trade origin* and would be recognised as such. There is no evidence before me which demonstrates that when so used that they are not distinctive of goods made for or under the licence of AFC. The fact that the signs can be used in other, non-trade mark, ways does not automatically render them non-distinctive.[42] [Emphasis added].
>
> Ms Szell argued that the above case was not on a par with the instant case as Laddie J had evidence before him. However, there is nothing in the above passage that rests upon any evidence that was filed. If one substitutes the name of Arsenal's North London rivals, TOTTENHAM, for ARSENAL in the above passage the question of whether the trade mark in suit is devoid of distinctive character is answered. The answer is that it is not devoid of distinctive character.

In *Arsenal Football Club plc v Reed*, Matthew Reed, a loyal, long-time, supporter of Arsenal Football Club found himself in breach of the UK Trademarks Act in circumstances where he sold unlicensed scarves that bore Arsenal's registered trademarks alongside officially licensed versions of the same product. Interestingly, the court rejected the argument that the show of support, loyalty or affiliation could exonerate a defendant in breach of the Trademarks Act, and, even further, rejected the argument that the display of a disclaimer was sufficient to prevent liability from arising, though disclaimers may be relevant in the tort of passing off.

Another important development in this area is the court's finding in *R v Boulter*[43] that it is no defence for a person accused of infringing a registered trademark to claim that the reproduction of the mark was of such poor quality that no confusion as to the provenance of the product could have arisen in the minds of potential consumers.

The *Reed* and *Boulter* cases naturally raise the question of when a trademark infringement is likely to arise. Using Jamaica as a hypothetical case study, examples of breaches would include where:

(1) the defendant (D) uses an *identical trademark* on *identical goods/services.*[44] This does not require proof of likelihood of public confusion. Such a scenario would arise if, say, the new *Sandals* logo found on CWI's West Indies cricket team's kit,[45] which CWI has etched into its shirts, is used by D on shirts that he is selling, similar to what happened in *Arsenal v Reed*.

41 [2003] 3 WLR 450.
42 Ibid 9.
43 [2008] EWCA Crim 2375.
44 Jamaica Trade Marks Act, section 9(2).
45 Sandals Resorts became the new primary sponsors of West Indies cricket in the middle of 2018, taking over from telecommunications company Digicel.

(2) D uses an *identical trademark* on *similar goods/services* and this is likely to deceive or cause confusion.[46] Such an instance would occur if perhaps the said *Sandals* logo which CWI has etched into its shirts is used by D on hats which he is selling. In this case, it is an identical trademark, but this time on a similar product.

(3) D uses a *similar trademark* on *identical goods/services* and this is likely to deceive /cause confusion.[47] This may arise if D uses on shirts he is selling a similar logo (i.e. image X, perhaps the presence of a red instead of a burgundy background) to that of CWI's own logo, which the latter has etched into its *Sandals*-branded shirts.

(4) D uses a s*imilar or identical trademark on dissimilar goods/services* and the claimant's trademark has a reputation in Jamaica, and is being used by D unfairly or detrimentally.[48] This can occur, for instance, if D uses on key rings that he is selling, a similar logo (i.e. image Y: perhaps the presence of a red instead of burgundy background) to that of CWI's own logo, which it has etched into its *Sandals*-branded shirts.

Where the legislative provision in question requires the showing of 'confusion' before liability for trademark infringement could ensue, the case of *Realistic Games Ltd v Goal.com (Holdco) SA*[49] provides useful guidance:

(1) The likelihood of confusion must be appreciated globally, taking account of all relevant factors.

(2) The matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well-informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question.

(3) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.

(4) The visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements.

(5) Nevertheless, the overall impression conveyed to the public by a composite trademark may be dominated by one or more of its components.

(6) However, it is also possible that in a particular case an element corresponding to an earlier trademark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark.

(7) A lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa.

(8) There is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it.

(9) Mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

46 Ibid section 9(3)(a).
47 Ibid section 9(3)(b).
48 Ibid section 9(5)(a) and (b).
49 O/528/17 *UK Intellectual Property Office* [2018] ETMR 6.

(10) The reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense.

(11) If the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

As far as legal redress is concerned, regional trademark legislation identifies available remedies as including damages, injunctions, account of profit, erasure, removal, obliteration and delivery up of infringing material/articles.

The issue of distinctiveness is a feature that remains a fundamental ingredient in the determination of the nature and function of a trademark. As sports teams and individual athletes have grown in their understanding of the revenue-generation opportunities connected with the exploitation of IP rights, onlookers have seen a steady increase in the number of sports-related trademarks. Among the more popular ones are:

(1) Usain Bolt's 'to di world' slogan and the 'Lighting Bolt' pose;[50]

(2) Dwayne Bravo's 'djbravo47';[51]

(3) Cristiano Ronaldo's 'CR7';[52]

(4) Lionel Messi's surname 'MESSI'[53]

(5) Gareth Bale's 'Eleven of Hearts'[54] and

(6) Ian Thorpe's 'THORPEDO'.[55]

## 4.6 DOMAIN NAME IP DISPUTES

The above summary of trademark infringement closely resembles the legal analysis that is inherent in the myriad domain name disputes adjudicated upon by the WIPO Arbitration and Mediation Center, based in Geneva, Switzerland. Guided by the Uniform Domain Name Dispute Resolution Policy, the WIPO Arbitration and Mediation Center settles multiple disputes, including sports-related matters.

For a complainant (often an organization) to be successful, it must satisfy three conditions. It must show that:

(1) the disputed domain name is identical or confusingly similar to trademarks or service marks in which the complainant has rights,

50 'Sport and Branding' (*WIPO*, 2018) www.wipo.int/ip-sport/en/branding.html.

51 www.djbravo47.com.

52 'Cristiano Ronaldo enters Trademark Battle over Rights to CR7' (*Jackson White Law*, 2018) www.jackson-whitelaw.com/ip/cristiano-ronaldo-enters-trademark-battle-rights-cr7/.

53 'Messi scores trademark goal as General Court finds no likelihood of confusion between MESSI and MASSI' (*World Trade Mark Review*, 13 June 2018) www.worldtrademarkreview.com/daily/detail.aspx?g=c7c1bb0d-c39d-42ec-be42-03edd630d36e.

54 'Brand Bale! Spurs forward follows Beckham and Ronaldo after trademarking "Eleven of Hearts" goal celebration' (*Daily Mail*, 17 June 2013) www.dailymail.co.uk/sport/football/article-2343017/Gareth-Bale-trademarks-hearts-goal-celebration.html.

55 David Yates, 'Trade Marks – New THORPEDO Trade Mark' (*FindLaw Australia*, 2017) www.findlaw.com.au/articles/1864/trade-marks-8211-new-thorpedo-trade-mark.aspx. It is interesting to note that Trinidad and Tobago's multiple Olympic medallist, Richard Thompson, is known by the similar nickname 'Torpedo'. However, there has been no known effort to register that name as a trademark. In any event, the vast geographical distance between Thorpe's Australia and Thompson's Trinidad and Tobago and their respective target markets may very well be one factor that retards any potential IP clashes on the grounds of confusing similarity.

The following table illustrates sports-based claims which have been upheld at the WIPO Center:

*Table 4.1* Recent domain name disputes in sport

| *Successful complainant* | *Registered trademark* | *Disputed domain name* | *Date of decision* |
|---|---|---|---|
| Nike Innovate C.V. | NIKE | nikegiveaway.info | 4 July 2018 |
| Cricket South Africa | TG20L; T20 GLOBAL LEAGUE | t20gl.com | 16 March 2018 |
| Barcelona F.C. | BARÇA | barça.com | 25 September 2017 |
| Real Madrid F.C. | Real Madrid | realmadridcastilla.com | 11 August 2017 |
| Federation Francaise de Tennis | FRENCH OPEN | frenchopen2017live.net | 17 January 2017 |
| Lionel Andres Messi Cuccittini | LIONEL MESSI; LEO MESSI; LEO | liomessi.com | 6 January 2016 |
| Club Atletico de Madrid | ATLETICO DE MADRID | atleticodemadrid.com | 20 November 2015 |
| Chelsea Football Club | CHELSEA | chelseajersey.net | 17 September 2015 |

(2) the respondent has no rights or legitimate interests in the disputed domain name; and
(3) the respondent registered and is using the disputed domain name in bad faith.[56]

Typically, a successful complainant will have the disputed domain name transferred to it.

## 4.7 PATENTS

Gardiner's analysis of patents[57] places it, arguably, as the strongest form of intellectual property,[58] although he later admits that, in the context of sport, it has limited application and importance.[59] It is perhaps in the arena of sports equipment that patent law assumes some relevance given the very essence of this arm of the law, which is to protect inventions. He further cites the design of a golf club, the way of manufacturing golf balls and the design of a football boot as examples of creativity that can potentially qualify for patent protection.[60] Cricket helmets that protect batsmen from injury also benefit from patent protection.

Notably, in May 2013, the US Virgin Islands adopted the Uniform Trade Secrets Act, a statute originally enacted in the United States, to offer a legal framework for protecting patents and trade secrets.[61]

56 'Uniform Domain Name Dispute Resolution Policy' (*The Internet Corporation for Assigned Names and Numbers*, 24 October 1999) www.icann.org/resources/pages/policy-2012-02-25-en.
57 Note that, statutorily, a patent may only be successfully registered if the invention is novel, involves an inventive step and is industrially applicable.
58 Simon Gardiner et al, *Sports Law* (n 4) 414.
59 Ibid 415.
60 Ibid.
61 Lisa Michelle Komives, 'Understanding, Copyright, Trademarks and other Intellectual Property in the US Virgin Islands' (*Virgin Islands Law Blog*, 7 July 2014) https://lawblog.vilaw.com/2014/07/articles/litigation/understanding-trademark-and-intellectual-property/.

The focus of the rest of this chapter is on the protection of sports rights and will integrate judicial and legislative developments both regionally and internationally. The growth of the Caribbean region as a host for major sporting events has also aided in the development of the law and has increased general public awareness of IP rights in sport. The recent enactment of the 2017 Intellectual Property (Unjustified Threats) Act[62] in the United Kingdom was also a reminder of how dynamic this branch of the law is and that legislative initiatives are often contemplated in order to keep in step with either new innovations or new threats.

## 4.8 PROTECTING SPORTS RIGHTS HOLDERS FROM AMBUSH MARKETING[63]

### 4.8.1 Defining sports rights

> The first and most fundamental point is that English law does not recognize the existence of proprietary rights in a sports event per se.[64]

*Prima facie*, this principle appears unorthodox. Becker observes that in British Commonwealth countries like the United Kingdom, Australia, New Zealand, Canada and South Africa, plus in other nations like Germany, Switzerland, Sweden and Japan, an independent proprietary right in an event is not recognized.[65] The Australian authority of *Victoria Park Racing*[66] has been identified as the leading source from which this legal proposition is gleaned. Latham CJ, in that case, propounded that 'a "spectacle" cannot be "owned" in any sense of the word'.[67] The *Sport and General Press* decision (*'Our Dogs'* case)[68] was cited in *Victoria Park Racing* as establishing that a claimant would have to rely on contractual rights if he desired to exclude another from taking photographs at an event he organized. Notwithstanding this, it is also accepted that, in practical terms, sports rights do exist. Legal commentators hold the view that these rights, which are unquestionably valuable, are derived from a combination of principles arising from property, contract, tort and intellectual property law.[69] The corollary of owning valuable rights is the desire and need to safeguard them from anything that may diminish their worth. Ambush marketing is seen as one of the biggest threats to lucrative sports rights. Often, it takes legislative intervention to combat that threat.

### 4.8.2 The threat of ambush marketing

The plethora of definitions for 'ambush marketing' lends credence to Phillip Johnson's view that it is an amorphous concept.[70] There is, however, general agreement that the practice of ambush marketing describes the unauthorized association that entities or individuals seek to

62 This Act came into force on 1 October 2017 and has as one of its main goals achieving a balance between the enforcement of IP rights and the management of groundless threats of IP infringement.

63 This section of the chapter is an expanded version of a paper published by J. Tyrone Marcus, 'Ambush Marketing: An analysis of its threat to sports rights holders and the efficacy of past, present and proposed anti-infringement programmes' (2010) 18(1) Sport and the Law Journal 25 and (2011) 3/4, International Sports Law Journal 97

64 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (2nd edn, Bloomsbury Professional, 2014) [G 1.2].

65 David Becker, *The Essential Legal Guide to Events: A Practical Handbook for Event Professionals and Their Advisors* (Dynamic Publishing, 2005) Chapter 1, 7.

66 *Victoria Park Racing v Taylor* (1937) 58 CLR 479.

67 Ibid per Latham CJ, 497.

68 [1917] 2 KB 125 (CA).

69 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) [G 1.3]; David Becker (n 65) 7.

70 Phillip Johnson, 'Look Out! It's an Ambush!' (2008) 2(3) International Sports Law Review 24.

make with the reputation and goodwill of prestigious sporting events. It has often been subdivided into *association* ambush and *intrusion* ambush, the former occurring, for example, in 1984 when Kodak sponsored the ABC television broadcasts of the Los Angeles Olympics, although the worldwide sponsor was Fuji,[71] and the latter taking place at the 1996 Atlanta Olympics where Nike, a non-sponsor, bought billboards in and around the Games' venues,[72] although Reebok was the official footwear sponsor. Notably not everyone sees ambush marketing as negative, wrong or illegal. Also called 'parasitic marketing' or 'guerrilla marketing', some see the practice as creative, innovative and clever. Such feedback was given when Great Britain's Linford Christie appeared for a media interview in conspicuous Puma contact lenses at the 1996 Atlanta Olympics.

The Global Advertising Lawyers Alliance (GALA) offers a sound summary of these two main categories of ambush marketing:

> Ambush marketing is notoriously difficult to define but it is helpful to distinguish between two core types of ambush marketing. The first is where the content of the advertisement creates a direct or indirect association with the property or the event. A direct association may be created by, in the most blatant situations, using the property or the event's logo or name, whereas an indirect association may be created through more generic references to the property or the event, for example by depicting the sport and country in which an event is being hosted together with using celebrities competing at the event. The use of tickets for an event in promotions without permission can also be used to create this type of 'ambush by association'. The second core type of ambush marketing is 'ambush by intrusion'. This involves a brand seeking to get exposure during an event – either inside the stadia or within its vicinity, but often with the target of the brand being to be seen on broadcast coverage. In cases of ambush by intrusion, the 'content' of the advertisement is likely to be brand-led and will not refer to or allude to the event itself. Indeed, successful ambush marketing campaigns have been undertaken where no or very minimal branding of the ambusher has been on display but through use of colours, shapes, or the acts of the intruding brand representatives, the brand is nevertheless identified and gets wide exposure.[73]

Ambush marketing has the practical effect of compromising the potential for sports event organizers to generate revenue, especially through sponsors' contributions. Alex Kelham[74] succinctly observed that ambush marketing 'fundamentally undermines the key principle of sponsorship' which is exclusivity.[75] When exclusivity is compromised the magnetic appeal of sports sponsorship loses much of its effect and the ramifications can be telling. As one law firm puts it, if 'the event organizer cannot guarantee the exclusivity, he risks losing the sponsor or is in breach of the agreement'.[76]

For sponsors, then, ambush marketing damages the commercial relationship between themselves and the event organizer. With the stakes being very high, many financial and legal consequences stand to follow. Evidently, the line between what is lawful and what is not can easily get blurred in the context of competing interests. Whatever the legal status of ambush marketing may be, nations hopeful of hosting sporting events must be proactive.

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71 Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* (Sweet & Maxwell, 2008) 8, [1]–[18].

72 Ibid.

73 The Global Advertising Lawyers Alliance, *Ambush Marketing: A Global Legal Perspective* (Createspace Independent Publishing, 2014) 6.

74 Kelman was the London Organising Committee of the Olympic Games (LOCOG) Brand Protection Manager.

75 'Rights holder protection: how to combat the practice of ambush marketing' (C5 Online Sports Law & Business Conference, 29 April 2009).

76 'FIFA World Cup-Ambush Marketing' (*MME Legal Tax Compliance*, 6 June 2018) www.mme.ch/en/magazine/magazine-detail/url_magazine/fifa_world_cup_ambush_marketing/.

### 4.8.3 The bidding process and the call to implement protective legislation

It is generally accepted that the Olympic Games and the FIFA World Cup are the two most high-profile sporting spectacles. It is also now common practice for bidding nations to give the IOC and FIFA undertakings that brand protection will play a central role in hosting the Olympics and the World Cup respectively. Divergence only occurs in the methods used to achieve such protection. Recent trends suggest, though, that legislative intervention has become the regular prelude to event hosting.

In the build up to the 2007 ICC Cricket World Cup, held in the West Indies, the enactment of sunset legislation in the Caribbean gave effect to many of the objectives stated in the policy considerations for the implementation of the ICC Cricket World Cup West Indies 2007 Act, 2006 including the protection of commercial rights, the control of ambush marketing and the protection of CWC marks, indicia and images. Yet, as far as eligibility for event hosting is concerned, the question arises as to whether it is fair for a country with world-class facilities, a strong sporting history, financial support, an efficient transportation system, five-star hotels and a visionary post-event legacy plan to be rejected from hosting a major sporting event because it did not intend to enact brand protection legislation.

The danger that these influential world governing bodies face is that although their objectives are legitimate, they may very well be bordering on micro-managing the hosting of major events. It is in this context that competition law concerns are raised, since most sports governing bodies hold dominant market positions due to the fact that their governance structure gives them a virtual monopoly. In the European context, the competition provisions of the 2009 Treaty on the Functioning of the European Union (TFEU)[77] may very well apply if the decisions of sporting bodies distort trade between Member States or are deemed anti-competitive in light of dominant positions held in the sports market. EU law, though, does not frown upon the *existence* of a dominant position, but the *abuse* of it.

This alleged 'micro-management' of event hosting by powerful world bodies is a reflection of the changed priorities of modern sporting culture. Previously, the salient factor in bidding was the quality of facilities. While this remains a central feature, the paramount consideration is now the protection of commercial interests so that brand protection and strong intellectual property security are pertinent, and perhaps indispensable, elements of a bid package.

### 4.8.4 Case study: the ICC Cricket World Cup West Indies 2007 Act, 2006

Although the various versions of the ICC Cricket World Cup West Indies 2007 Act, 2006 ('the CWC Act') that were enacted in preparation for the Caribbean's hosting of the 2007 Cricket World Cup constituted transient 'sunset' legislation, their IP provisions remain a timeless template for future consideration. The CWC Act was passed to protect the intellectual property of the ICC, CWI and their various commercial partners. Drafted under the guidance of the CARICOM Legal Affairs Committee, the language of the legislation in the respective host countries was understandably consistent.

In terms of brand protection, one element of the approach of the St Lucian legislators, for example, was the prohibition of false advertising:

77 Formerly the 1957 Treaty establishing the European Economic Community (Treaty of Rome).

(18)-1. A person shall not publish or display, or cause or authorize the publication or display, of any advertisement that relates to or is connected with CWC 2007 which is false or misleading.[78]

Similarly, there were clauses to address the protection of the event marks. In Antigua and Barbuda, for instance, those clauses were even more detailed:

35. (1) No person shall use a CWC 2007 mark without the written authorization of the owner of that CWC 2007 mark.

(2) Registration by IDI of a CWC 2007 mark or any other mark shall vest in IDI from the date of registration until December 31, 2008 –

(a) the right to its exclusive use in connection with the goods or services for which they are registered; and

(b) the exclusive right to prevent any other person from using any such mark without the authority of IDI.

(3) Subsection (2) (b) extends to the use of an identical or confusingly similar mark in connection with goods or services where the use –

(a) has caused or is likely to cause confusion; or

(b) takes unfair advantage of, or is detrimental to, the distinctive character or the repute of a CWC 2007 mark.[79]

The IDI referred to in the legislation was the ICC Development (International) Limited, a company incorporated under the laws of the British Virgin Islands, and which was created by the ICC to control the commercial rights associated with its events. The Antiguan legislators did not only prohibit the unauthorized use of CWC marks, but explicitly spelt out the exclusivity accorded to owners of registered trademarks.

The Trinidad and Tobago (T&T) legislation, notably, used the specific language of 'ambush marketing'. Section 25 of T&T's CWC Act, entitled 'Prohibition of Ambush Marketing', was fairly comprehensive in its scope:

1 Except with the written authorization of CWC 2007 Inc., IDI or GCC a person shall not wilfully broadcast, display, make, publish or televise any advertisement, communication, statement, mark or image or cause or authorize any advertisement, communication, statement, mark or image to be broadcast, displayed, made, published, televised or carried on, cause or authorize any other activity which –

(a) *relates to or is connected* with CWC 2007;

(b) *implies or suggests a contractual or other connection or association of that person* with CWC 2007 or a person officially associated or involved in CWC 2007; and (c) is intended to –

(i) associate that person with CWC 2007 or *exploit the publicity or goodwill of CWC 2007*, in order for that person to gain a benefit of any kind;

(ii) diminish the status of an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007; or

(iii) imply that the person is an official sponsor, official supplier, official broadcaster or other licensee with regard to CWC 2007.

2 No person shall, in relation to CWC 2007, use or cause to be used, a mark, image, statement or brand *in a manner calculated to achieve publicity* for that mark, image, statement or brand with which that mark, image, statement or brand is associated and thereby deriving

78 Cricket World Cup Act 2006, section 18(1). See also section 31(1), ICC Cricket World Cup 2007 Act, 2006 of Antigua and Barbuda.

79 ICC Cricket World Cup 2007 Act, 2006 of Antigua and Barbuda, section 35.

any special promotional benefit from CWC 2007 without the prior authority of CWC 2007 Inc. or IDI.

3 For the purpose of subsection (2), the use of a mark, image or statement includes –

(a) any visual representation of the mark, image or statement upon or in relation to goods or in relation to the rendering of services;

(b) any audible representation of the mark, image or statement in relation to goods or the rendering of services; or (c) the use of the mark, image or statement in promotional activities, *which in any way directly or indirectly, is or is intended to be brought into association with, imply a connection with or allude to CWC 2007*.[80] [Emphasis added].

Notwithstanding the fact that this was the first major sporting event of this magnitude held in the region, the legislative drafters displayed a commendable appreciation for the threat posed by the practice of ambush marketing by those seeking to act as proverbial parasites, surreptitiously benefiting from the reputation and goodwill of the 2007 Cricket World Cup. The anti-infringement programme surrounding that event likely benefited from the growing trend at that time for host nations to enact brand protection legislation. The Caribbean drafters may well have gained knowledge from the experiences of the 2000 Sydney Olympics, the 2003 South Africa Cricket World Cup, the 2004 Athens Olympics and the 2006 Turin Winter Olympics, all occurring in the years immediately preceding 2007 ICC Cricket World Cup. Indeed, few events could prepare a host nation from a sports rights protection standpoint like the Olympic Games.

### 4.8.5 Olympic bids

An Olympic host city and its National Olympic Committee (NOC) are obliged to protect the Olympic symbol, the Olympic motto as well as the terms 'Olympic' and 'Olympiad'. It is pragmatic for this to be realized thorough legislation, unless the IOC grants permission to each of approximately 206 NOCs to register the terms as word marks, an admittedly cumbersome process. As alluded to earlier in this chapter, trademark law permits, *inter alia*, the registration of words as trademarks, especially if the principal requirement of distinctiveness is met.

NOCs have also sought to obtain Olympic IP protection by persuading their governments to become signatories to relevant international treaties like the 1981 Nairobi Treaty,[81] although that treaty applies only to the Olympic symbol and not the other Olympic properties.[82] There is general agreement that the treaty was not popular because, as Michalos notes, 'the requirement of the authorisation of the IOC, rather than of the respective National Olympic Committee, is probably the stumbling block of many nations'.[83] Johnson adds that a real problem is created with such an expectation since a country's domestic law may have already granted rights in the Olympic symbol to the NOC, as is the case in the United States[84] under its 1978 Amateur Sports Act.[85]

The upshot is that, at least with regard to the Olympics, the implementation of specific legislation is the preferred option for bidding nations. Alternatively, the existing legal structure must be potent.

80 ICC Cricket World Cup 2007 Act, 2006 of Trinidad and Tobago, section 25(1)–(3).
81 The Nairobi Treaty on the Protection of the Olympic Symbol (adopted at Nairobi on 26 September 1981).
82 Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* (n 71) [4–03].
83 Christina Michalos, 'Five Golden Rings: Development of The Protection of The Olympic Insignia' (2006) 3 International Sports Law Review 64–76.
84 Phillip Johnson, *Ambush Marketing: A Practical Guide to Protecting the Brand of a Sporting Event* (n 71) [4–06].
85 36 USC section 220501–29, amended by the 1998 Ted Stevens Olympic and Amateur Sports Act.

#### *4.8.5.1 From Rio 2016 to Paris 2024*

The Rio 2016 bid contained a compact brand protection programme. Both the state and city of Rio de Janeiro passed Olympic Acts.[86] '*Rio 2016*' was registered with the Brazilian Trademark Office while brand protection was based on the 1988 Federal Constitution, the 1996 Industrial Property Law, the 1998 Pelé Law and the 2003 Counterfeit Law.

Similar to the initially unsuccessful Tokyo 2016 bid, the Brazilian approach was to amend the existing legislative framework as necessary in order to accommodate any Games-specific requirements.[87] Article 124 of the *Industrial Property Law* is particularly relevant to the ambush marketing fight since it 'prohibits companies that are not official sponsors, providers or supporters of the Olympic Games from registering any item, brand or symbol which could easily be confused with official partners and symbols'. As a result of its legislative proactivity, Brazil was well-placed to prove that Olympic and other commercial brands would be secure.

The reasons for choosing one bidding territory over another are not usually given after the event is awarded. Yet, certain fundamental issues surface:

(1) Is that country's culture a 'protective' one when it comes to sports, brands and marketing?
(2) Does the bidding nation have a track record of strong IP protection?
(3) Does it have an effective law-enforcement policy and practice?

These questions deserve consideration and may reveal what future trends will develop for sport events hosting.

Within recent years, the sporting public has witnessed the emerging practice of sports governing bodies simultaneously awarding multiple major games to their respective hosts as happened with the 2018 and 2022 FIFA World Cups[88] and the 2024 and 2028 Summer Olympic Games.[89]

What was a failed 2016 bid for Tokyo became a successful one for the 2020 Olympics. In its brand protection guidelines, the Tokyo Organising Committee has sought to educate the public in the following manner:

> Emblems and names associated with the Olympic and Paralympic Games and other intellectual property are the exclusive property of the IOC and IPC, and the management of this intellectual property has been entrusted to the organising committee in Japan for the Tokyo 2020 Games ... The unauthorized use, abuse or misappropriation of marks associated with the Olympic and Paralympic Games and other intellectual property is known as ambush marketing. This not only infringes on the intellectual property rights of the IOC and IPC, but also results in a reduction of sponsorship funds and other forms of funding from sponsors and other organizations. This could therefore seriously compromise the operation of the Games and impede efforts to develop the athletes. Hence, the organising committee has the duty to protect the intellectual property, in order to observe Japanese law, including the Trademark Act, and its pledge to the IOC, while facilitating the smooth operation of the Olympic and Paralympic Games and develop athletes.[90]

It is instructive that the appeal of the Organizing Committee of the Olympic Games (OCOG) for compliance with Japanese law makes special mention of the already existing Trademarks

86 'Report Of The 2016 IOC Evaluation Commission' (IOC, 2016) 48.
87 'Rio 2016 Bid Document' (2016) Theme 4, 65.
88 The 2018 World Cup was awarded to Russia and the 2022 edn to Qatar.
89 The 2024 Olympics were awarded to Paris, France and the 2028 Games to Los Angeles, USA.
90 'Brand Protection Tokyo 2020 Games' (Version 3.3, August 2017) 2.

Act, and not to any new legislation. GALA's synopsis of the Japanese framework adds context to that country's anti-ambush strategy:

> There is no specific legislation in Japan directly relating to ambush marketing. The tactics used in ambush marketing, however, are generally already prohibited by the Trademark Act and the Unfair Competition Prevention Act in Japan. Moreover, in anticipation of the Tokyo Olympic and Paralympic 2020, the Japan Olympic Committee and others are expected to be increasingly active in protecting marks, catch phrases and other Olympics related intellectual property, which may lead to greater enforcement in the coming years.[91]

The successful Paris 2024 bid approached brand-protection by focusing on protecting advertising spaces: 'The OCOG and appropriate Government agencies will work arduously to protect marketing rights in public spaces surrounding the venues during the Games. Paris 2024 has secured agreements ensuring the OCOG's control of required advertising spaces.'[92] As the Paris 2024 Games draw nearer, it would be worthwhile to observe what additional legislative steps, if any, are taken by the French government.

The palpable conclusion is that the practice of enacting protective legislation for sports events is well-entrenched. The only distinction from one bid to another is whether the legislation already exists or new legislation must be introduced. Some territories have secured brand protection by amending existing laws. In South Africa, for example, both the Trade Practices Act 76 of 1976 and the Merchandise Marks Act 1941 were amended to prepare for CWC 2003, the 2009 Confederations Cup and the 2010 FIFA World Cup. In Switzerland, in anticipation of the 2008 European Football Championships, amendments were made to the Federal Act on Unlawful Competition provoking much controversy, amidst concerns that freedom of expression was being unlawfully thwarted. Australia amended its 1987 Olympic Insignia Protection Act (OIPA) to prepare for the 2000 Sydney Olympics, but still saw it fit to enact the Olympic Arrangements Act 2000 (OAA) and the Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Sydney Act). The OAA was one of those pieces of 'sunset legislation' that was passed for a limited time only, while the Sydney Act expanded the list of protected words first created under the OIPA 1987.

Irrespective of which route is taken, the onus remains on event organizers to strike the right balance between satisfying the needs of event partners while adhering to the broad spectrum of legal principles.

### 4.8.6 *Sui generis* legislation: necessity and legality

> There is a growing trend for governments, in response to pressure from event organizers wishing to protect their events and contractual agreements with their sponsors, to introduce specific anti-ambush laws. These go beyond the traditional protections offered by trademark law, unfair competition/passing off, copyright, competition laws and human right.[93]

The popularity of ambush marketing legislation, especially within the last decade, has brought it under close legal scrutiny. The backdrop for the enacting of ambush marketing legislation, in many instances, is the inadequacy of existing laws, including intellectual property and unfair competition laws. Opponents of ambush marketing legislation believe that some provisions

91 The Global Advertising Lawyers Alliance, *Ambush Marketing: A Global Legal Perspective* (n 73) 80–81.
92 'Paris 2024 Bid Book' [2.2.3].
93 'European Sponsorship Association position statement on ambush marketing' (European Sponsorship Association, wsD7D.tmp/draft/NEJ/07.09.04).

are oppressive, draconian, restrictive or unnecessary. In this context, Duthie[94] presents various alternatives to enacting legislation, including controlling the levels of sponsorship, media regulation and intellectual property protection.

The idea behind controlling the levels of sponsorship is to restrict the exposure given to non-event sponsors who may nevertheless be the sponsors of teams or individuals. In practical terms, this may mean that athletes will not be allowed to display branding from their sponsors during press conferences or prize-giving ceremonies, for instance.[95] This scenario is not uncommon as it occurred during a medal ceremony at the 1992 Barcelona Olympics when basketball legend Michael Jordan could be seen covering the logo of US team sponsor, Reebok, in order to protect his personal endorsement with Nike. Similarly, at Beijing 2008, star US basketball player, Dwight Howard, personally endorsed by Adidas, used a basketball to hide the Nike logo on his US kit. This type of restriction is admittedly more of a practical measure than a legally enforceable one since an event organizer will be hard-pressed to prove any illegality on the part of a commercial entity that has genuinely invested financially and otherwise in a team or athlete. Yet, it may still fall foul of by-law #3 of rule 40 of the Olympic Charter.[96]

As far as media regulation is concerned, event organizers can seek to control the broadcast sponsorship of an event so that confusion is reduced. Verow acknowledges that broadcast sponsorship is an effective means of ambushing an event and his proposed solution comports with Leone's view that instead of 'demanding ever more stringent legislation, sponsors themselves should be expected to counter ambush marketing by purchasing all the commercial opportunities afforded by a particular event'.[97] This 'saturation sponsorship'[98] strategy can also include the purchase of billboard and other advertising spaces in and around the event venue.

Intellectual property regulation is one of the most used and effective anti-ambush tools. Copyright, patent, design and trademark laws provide a strong legal basis for brand protection, while offering various remedies against infringement. It is for this reason that Leone believes that official sponsors are not defenceless under existing law and can avail themselves of intellectual property and unfair competition laws. Pauline Dore,[99] in reviewing the preparation of the London Organising Committee of the Olympic Games (LOCOG) for the 2012 Olympics, also mentions traditional legal methods like passing off, trademark and copyright law, while Lewis and Taylor add to that list of regulation by citing the Olympic Charter and the International Paralympic Committee Handbook, contractual controls, education and public relations.[100]

Hence, opposing viewpoints exist regarding the necessity of *sui generis* legislation.

The New Zealand criteria for enacting protective legislation is useful and includes the following considerations: Will the event:

(1) attract a large number of international participants or spectators;
(2) raise New Zealand's international profile;
(3) require a high level of professional management and co-ordination;
(4) attract a large number of New Zealanders as participants or spectators;
(5) offer substantial sporting, cultural, social, and economic benefit to New Zealand?[101]

94 Max Duthie, 'It's Not Just Cricket: Ambushing the Ambushers in South Africa' (2004) 11(1) Sport and the Law Journal 171.
95 Ibid.
96 Further discussion of rule 40 will follow later in this chapter.
97 Luisa Leone, 'Ambush Marketing: Criminal Offence or Free Enterprise?' (2008) International Sports Law Journal 77.
98 Duthie (n 94).
99 Pauline Dore, 'Let the Games Begin' (2006) 1 International Sports Law Review 40.
100 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) [H 2.8].
101 Phillip Johnson, 'Look Out! It's an Ambush!' (n 70) 24–29.

This model, though in need of further specifications for each of the benchmarks set, is commendable since it seeks to establish objective criteria upon which decisions are made with regard to protection from infringement.

### 4.8.7 Passing legal muster

> ... their legal validity could and should be challenged from an enforceability perspective in certain specific circumstances.[102]

Mouritz's assertion, made about a decade ago, that the Vancouver 2010 ambush marketing legislation deserved a legal challenge, confirms that scrutiny is not misplaced for anti-ambush laws. On closer examination, other principles of law are often compromised by ambush marketing legislative provisions.

#### *4.8.7.1 Competition law*

The merger of sport, business and law has become well-established during the last few decades. Not only is this synthesis a practical one; it now also has legal backing, as Court of Justice of the European Union (CJEU) and Court of Arbitration for Sport (CAS) jurisprudence have acknowledged the application of EU law to sport. The line of cases beginning with *Walrave*[103] and *Dona*[104] through to *Bosman*,[105] *Kolpak*[106] and *Simutenkov*[107] and continuing with the rulings of *Meca-Medina*,[108] *QC Leisure*,[109] *Webster*[110] and *Matuzalem*[111] tell a compelling story of how sport has been impacted by the rule of law, especially where it constitutes an economic activity under the Treaty on the Functioning of the European Union (TFEU).[112] In the Caribbean context, similar competition law provisions can be found at Articles 177, 178 and 179 of the Revised Treaty of Chaguaramas (RTC).

By virtue of the EU treaties and the 1998 Competition Act in the United Kingdom, principles of competition law have been conspicuous in the regulation of the commercial aspects of sport. More specifically, Articles 101 and 102 TFEU, respectively, address matters relating to distortion of competition and abuse of dominant market positions. The decisions of *Hendry*[113] and *MOTOE*[114] highlight the approach of the CJEU with respect to Article 102 questions. In the former case, Lloyd J evaluated the defendant body's rules as they sought to restrict the formation of rival snooker tournaments. He held that such a rule breached competition law and was also an unreasonable restraint of trade. The latter case also addressed the abuse of

102 Abraham Mouritz, 'Challenging the Legal Enforceability of The Vancouver 2010 Olympic Games' Anti-Ambush Marketing Provisions' (2008) 16(1) Sport and the Law Journal 10.
103 *Walrave & Koch v Association Union Cycliste International* [1974] ECR 1405.
104 *Re Dona & Mantero* [1976] ECR 1333.
105 *Union Royal Belge des Societe de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4292.
106 *Detscher Handbalbund v Kolpak* (Case C-438/00) [2003] ECR I-4135.
107 *Simutenkov v Spanish Football Federation* (Case C-265/03) [2005] ECR I-2579.
108 *Meca-Medina & Majcen v Commission* (Case 519/04) ECR 2006 1–6991.
109 *FA Premier League v QC Leisure* [2008] EWHC 1666 *Admin.*
110 *Andrew Webster & Wigan Athletic v Heart of Midlothian* CAS 2007/A/1300.
111 CAS 2008/A/1519 *FC Shakhtar Donetsk (Ukraine) v Mr Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) & FIFA;* CAS 2008/A/1520 *Mr Matuzalem Francelino da Silva (Brazil) & Real Zaragoza SAD (Spain) v FC Shakhtar Donetsk (Ukraine) & FIFA.*
112 Articles 101 (prohibition of anti-competitive business conduct) and 102 (prohibition of abuse of a dominant position) of the TFEU.
113 *Hendry v World Professional Billiards & Snooker Association* [2002] 1 ISLR SLR-1.
114 Case C-49/07, 1 July 2008.

a dominant position where the Greek State refused to grant Motoskyleetistiki Omospondia Elladus NPID (MOTOE) the necessary authorization under Greek law to organize motorcycle competitions in Greece.[115]

The question arises as to whether the IOC's and FIFA's monopoly positions are abused when they offer exclusivity to one set of sponsors over another. That issue resembles the matters raised in the *Danish Tennis Federation* (*DTF*)[116] litigation in which there was an apparent lack of objective criteria in the selection of exclusive tennis ball manufacturers. The court in *DTF* objected to the Federation's decision to appoint tennis ball manufacturers without the objectivity of a tendering process. Additionally, the length of exclusivity granted to Slazenger and Trethorn in that case meant that other manufacturers were excluded from the market for the full period of exclusivity, which was three years. It is hard to dispute that exclusive arrangements, especially if lengthy, will distort competition. Only if these restrictions are proportionate and are made in pursuit of legitimate objectives will they escape the punitive hand of competition authorities.

It is also not uncommon for sponsorship contracts to include rights of first refusal for existing sponsors who therefore get to monopolize their association with a particular brand, tournament or event. This, too, may very well contravene Article 101 of the TFEU[117] since, again, competition is restricted. Once more, issues of proportionality and the legitimacy of objectives become key determining factors in assessing the legality of a rights holder's actions.

Restrictions on competition are not misplaced because in the absence of them, income-earning potential through sponsorship can be undermined with detrimental effect. No sponsor will eagerly make future investments if there is no tangible benefit when current injections of revenue are offered. At the same time, the conduct of event organizers must also be kept on a leash of competitive parity. In this regard, Gardiner notes:

> competition regimes exist to regulate economic activity within countries and are usually predicated on the notions of 'fair play.' Most competition regimes aim to avoid anti-competitive behavior of cartels and prevent firms from abusing their dominance in any particular market.[118]

Hence, legal doctrines like the essential facilities doctrine exist to ensure that strong market powers do not unlawfully exclude others from market entry. It is nevertheless important to articulate that exclusivity in and of itself is not illicit if there is a lawful tendering process, as enunciated in *DTF*.

#### *4.8.7.2 Constitutional law*

> To date, the laws in the United States have been on the side of ambush marketers. As long as their statements are generally truthful, they have been protected as commercial speech under the First Amendment.[119]

One of the biggest legal hurdles to the enactment and enforcement of ambush marketing legislation is the potential conflict with constitutional and/or fundamental human rights. In this context, Kaufmann-Kohler, Rigozzi and Malinverni note that since 1970, the CJEU held that

115 'Comment: ECJ: MOTOE decision' (2009) 7(4) World Sports Law Report 4.
116 [1996] 4 CMLR 885.
117 Formerly Article 81 of the Treaty Establishing the European Community.
118 Gardiner et al, *Sports Law* (n 4) 351.
119 Stephen Durchslag, 'United States: Ambush Marketing: protecting sport from brand hijacks' (2007) 5(8) World Sports Law Report 1.

the protection of fundamental rights is a general principle of European Union law.[120] An analysis of specific clauses in ambush marketing legislation reveals that some provisions are likely to be declared legally unenforceable.

A useful starting point is the US status quo where, unlike 'other nations, such as the United Kingdom, New Zealand and South Africa, the US has not enacted legislation which prohibits ambush marketing'.[121] This reality clarifies Schmitz's assertion that, in the United States, a trademark holder will more often than not seek relief against an ambusher under the 1946 Lanham Act.[122] The implication, then, is that US law-makers are wary of enacting legislation that can be deemed to breach constitutional rights, including the right to freedom of expression, a fact that requires a special parliamentary majority in some Commonwealth nations. In the Caribbean, such legislation may be struck down if it is not demonstrably justifiable/reasonably required in a free and democratic society. To be valid as against the countervailing right to freedom of expression, they would need to:

(1) serve a legitimate objective, such as the protection of the rights of others;
(2) be rationally connected to that objective;
(3) be proportionate; and
(4) strike a fair balance between the competing rights and interests of the State vis-à-vis the individual.

In the Dominican case of *Cable and Wireless (Dominica) Ltd v Marpin Telecoms and Broadcasting Co Ltd*,[123] the Privy Council used the following lucid language to reinforce the principles detailed above:

> The right to freedom of speech is to my mind most sacrosanct. It is of the most fundamental importance in any democracy, particularly in any emerging democracy in that it nurtures and fertilizes the growth of democracy. Therefore, nothing should be done [if democracy is to flourish] to interfere with, to tamper with, except in exceptional circumstances, the right of free speech, the right to receive information and ideas freedom to communicate ideas and information and freedom from interference with one's correspondence.

Citing the Privy Council ruling in the *Marpin Telecoms* case, Kodilinye argues that limits are, however, placed on the right to freedom of expression in the Caribbean:

> Freedom of expression, including the right to receive and impart information and ideas, even if for commercial purposes, is also enshrined in the various Caribbean constitutions, though this freedom has not been the subject of litigation in the Caribbean where countervailing rights, such as the right to a private life, have been pleaded. This may perhaps be due to the fact that there is no history in the Caribbean of employing the provisions of the constitutions against private individuals and companies. However, if indeed such a practice were to become established, it is doubtful whether freedom of expression would be given as large a measure of protection as it receives in the United Kingdom and other European countries, given the small size of populations in the individual Caribbean countries.[124]

Evidently, the balancing of competing rights is a central feature of any effective legal system and, in the area of freedom of expression, the friction is evident. Many constitutions seek to

120 Antonio Rigozzi, Gabrielle Kaufmann-Kohler and Giorgio Malinverni, 'Doping and Fundamental Rights of Athletes: Comments in the Wake of the Adoption of the World Anti-Doping Code' (2003) 3 International Sports Law Review 39, 41.
121 Stephen Durchslag, 'United States: Ambush Marketing: protecting sport from brand hijacks' (n 119).
122 Jason Schmitz, 'Ambush Marketing: The Off-Field Competition at the Olympic Games' (2005) 2(2) Northwestern Journal of Technology and Intellectual Property 203.
123 [2000] UKPC 42.
124 Gilbert Kodilinye, *Commonwealth Caribbean Tort Law* (5th edn, Routledge, 2014) 467.

protect that freedom while, conversely, anti-ambush laws purport to curtail it.[125] This tension mirrors the dichotomy between the 'potentially conflicting rights'[126]contained in Articles 8 and 10 of European Convention on Human Rights (ECHR), respectively, dealing with the right to privacy and the freedom of expression. These competing interests were judicially considered by the South African Constitutional Court in *Laugh It Off Promotions*.[127] In this case, the court held:

> this case brings to the fore the novel, and rather vexed, matter of the proper interface between the guarantee of free expression enshrined in s.16 (1) of the Constitution and the protection of intellectual property rights attached to registered trademarks as envisaged by s.34 (1) (c) of the Trade Marks Act 194 of 1993 and consequently to related marketing brands.[128]

This right to free speech will continue to be a thorn in the side of law-makers if they fail to consider the panoply of vested rights among various stakeholders.

#### *4.8.7.3 The law of tort*

> Economic torts are also relevant to sport. There the wrongdoing consists of a deliberate act, not involving a breach of contract towards the victim, causing economic loss.[129]

Beloff's succinct analysis of the marriage of tort and sport reaches the heart of the issues of passing off, trespass and deprivation of property without compensation. Ambush marketing laws that seek to regulate advertising and marketing conduct in the locations bordering event venues usually ignore the proprietary rights of private landowners. Rights to property are also well enshrined fundamental and constitutional rights. The problem with the anti-ambush laws is that landowners who cede proprietary rights for the duration of the event are not compensated. These imbalances must be addressed at the drafting stage of *sui generis* laws.

#### *4.8.7.4 Advertising and media law*

In South Africa, the Advertising Standards Authority adopted a Code of Advertising Practice and Procedural Guide, with the main objective being consumer protection and the promotion of advertising fair play.[130] One of the central features of the code is the stipulation that express permission must be obtained by any advertiser seeking to refer to a living individual.[131] The code therefore contemplates the protection of privacy, a useful tool to prevent the unauthorized exploitation of an athlete's image.

#### *4.8.7.5 Rule 40 and rule 50, Olympic Charter*

Like FIFA, the IOC's vision of an effective commercial programme is an enigmatic mixture of foresight and paranoia. The 'clean venue' concept, which refers to the provision of the stadium or event location free from commercial advertising or branding, is well-established, but

125 Article 10 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights (ECHR)).
126 Peter Carey and Nick Armstrong, *Media Law* (Sweet & Maxwell, 2010).
127 Laugh It off Promotion CC (trading as Sabmark International) and another 2005 BIP 201 (CC).
128 Michael Murphy, 'South Africa: Ambush Marketing: Sanctions and State Legislation' (2007) 7(11) World Sports Law Report 1.
129 Michael Beloff, Tim Kerr, Marie Demetriou and Rupert Beloff, *Sports Law* (Hart Publishing, 2012) [2.50].
130 Michael Murphy, 'South Africa: Ambush Marketing: Sanctions and State Legislation' (n 128).
131 Ibid.

its legality remains in doubt. New Zealand, for instance, apparently lost the right to co-host the 2003 Rugby World Cup due to its failure to provide clean venues.[132] The legal footing for this expectation from world bodies appears shaky, at best, and remains susceptible to legal challenge.

The IOC, through rule 40 and rule 50.1 of the Olympic Charter, has sought to repel the threat of unlawful associations. In particular, by-law #3 to rule 40 states:

> Except as permitted by the IOC Executive Board, no competitor, team official or other team personnel who participates in the Olympic Games may allow his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.

Rule 50.1 states:

> Except as may be authorized by the IOC Executive Board on an exceptional basis, no form of advertising or other publicity shall be allowed in and above the stadia, venues and other competition areas which are considered as part of the Olympic sites. Commercial installations and advertising signs shall not be allowed in the stadia, venues or other sports grounds.

Admittedly, the 'clean city' vision, promoted by rule 50.1, is commendable and the search for 'commercial purity' in and around event venues is reasonably justifiable, but in practical terms, the purging of an entire city is disproportionate. Nevertheless, it is the concept of the 'clean athlete' that is most disturbing. 'Clean athlete', in this regard, is not to be confused with a drug-free athlete, which is a universally desired objective. Instead, it refers to the sportsman or sportswoman who is prohibited from displaying the branding of his or her individual sponsor during the period of the sporting event.

Athletes have complained that there is an inherent injustice under rule 40, when an entity has decided to invest in their growth and development and, through that support, they achieve global acclaim. Now that these athletes have qualified for the Olympics, for instance, they have to divorce himself for two weeks from the very body that helped to harness their innate ability. Seemingly, this is justified because brand Z, the athlete's sponsor, is not an Olympic sponsor.

The solution herein is in the negotiation and conclusion of clearly defined contracts and carefully drafted sporting rules that effectively consider the rights of the respective athletes, sponsors and event organizers. Indeed, it was this sort of compromise that led to a relaxation of the strictness of rule 40 in the period between London 2012 and Rio 2016.

#### *4.8.7.6 Lessons from the Winter Olympics*

It has not only been the more popular Summer Olympic Games that have received regulatory attention in recent years, but also, as GALA notes, the Winter Olympics, including the 2006 Winter Olympics in Turin, Italy:

> Following a trend set by major international sports associations such as IOC, FIFA, UEFA for events with significant audiences, the Italian House approved a specific bill in order to grant suitable protection to the sponsors' financial support during 2006 Winter Olympics in Turin. This event specific, temporary Regulation.
>
> (Law no. 167 of 17 August, 2005)

132 Mia Sudzum and Jason Rudkin-Binks, 'The Countdown begins – Legislative Comment' (2007) 18(8) Entertainment Law Review 253, 253.

> Reserved the use of the Olympic symbols and signs – on an exclusivity basis – to a limited number of legal entities or specifically licensed companies (the Official Sponsors), Strictly banned any publication, commercial distribution and sales of products or services with distinctive signs likely to suggest the existence of a license, authorization or other forms of association with the event.[133]

In like manner, after its successful bid, the Vancouver Organising Committee for the 2010 Winter Olympics (VANOC) proposed the *Olympic and Paralympic Marks Bill C-47* as the relevant statute to address the ambush marketing threat. Its justification lay in the fact that the total operating revenue was USD $1.63 million of which USD $760 million was expected to be contributed by VANOC sponsors.[134] Mouritz notes that this sum represented the biggest portion of VANOC's operating revenues.[135] Therefore, the case was built for strong measures to be enforced to protect the significant contribution made by VANOC's commercial partners. Nevertheless, Mouritz equally observed that the Bill contained what he called 'very stringent protective provisions', arguing that the Canadian legislator went overboard.[136] Like London 2012 and Sydney 2000, Vancouver 2010 sought to protect words like 'gold' and 'silver' as well as the word 'winter'. Consequently, the Vancouver laws were deemed to be 'overly restrictive'.[137]

A significant issue surfaced in this connection: 'The question at hand is therefore whether the restrictive provisions in the Bill on the use of Olympic trademarks and of generic Olympic terms are legally enforceable under English law in a non-commercial setting.'[138] The Canadian Bill did not allow for non-commercial use of Olympic trademarks nor of the generic Olympic terms.[139] Canada's Trade Marks Act, like the UK 1994 Trade Mark Act, creates an infringement only when protected marks are used in the course of trade. There is no infringement if use is not in the course of trade. For this reason, Mouritz argued that:

> non-commercial use of the Olympic Trademarks would fall outside of ECJ case law, and, in any event, the UK Trade Marks Act 1994 and the Canadian Trade Marks Act and should therefore be allowed in absence of the Bill. There is thus a conflict between the Bill and VANOC's policies on one hand and UK and Canadian intellectual property laws and ECJ case law on the other hand in relation to non-commercial use.[140]

Indeed, a conflict was apparent since CJEU, UK and Canadian jurisprudence catered for non-commercial trademark use, while the VANOC Bill did not. The explanation given was that the Canadian Government was adhering to the legal principle of *lex specialis derogat lex generalis* in order to justify departing from its own trademark legislation.[141] Under that principle, where there are two conflicting laws, the more specific law takes precedence over the more general law.

When considering non-commercial use of generic Olympic terms in domain names as well as the right to freedom of expression granted under the ECHR, Mouritz concludes that the Canadian legislative provisions would have been hard-pressed to be found as legally enforceable.[142]

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133 The Global Advertising Lawyers Alliance, *Ambush Marketing: A Global Legal Perspective* (n 73) 77.
134 Abraham Mouritz-Sport, 'Challenging The Legal Enforceability of The Vancouver 2010 Olympic Games' Anti-Ambush Marketing Provisions' (n 102) 10.
135 Ibid.
136 Ibid.
137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.
142 Ibid.

GALA summarized the Russian effort four years later for the 2014 Sochi Winter Olympics in this way:

> During the XXII Winter Olympic Games and Paralympic Games conducted in Winter 2014 in the town of Sochi there was in force the Federal Law № 310-FZ dated December 1, 2007 in Russia which provided for prohibition of unauthorised commercial association with the Games.[143]

Russia, therefore, introduced a specific law seven years before the Sochi Games.

Fast forward a further four years and it was the turn of Pyeongchang, South Korea, to host the 2018 edition of the Winter Olympics. The Special Act on Support for the 2018 PyeongChang Olympic and Paralympic Winter Games was passed in South Korea in preparation for those Games. Article 1 of the *Special Act* outlined its purpose in fairly broad terms:

> The purpose of this Act is to support the 23rd Olympic Winter Games and the 12th Paralympic Winter Games to be held in 2018 with the aim of promoting the physical exercise of the people and solidifying the Olympic legacy, thereby contributing to the national development.

Unlike legislation in other countries, specific anti-ambush marketing provisions were not specified in this legislation other than the generic commitment to support the hosting of the event.

### *4.8.7.7 The spectrum of FIFA's recent World Cup protection: 2010–2020*

FIFA and the South Africa 2010 organizers received much criticism over the arrest of two Dutch supporters who were pawns in Bavaria Beer's consecutive attempts to ambush the 2006 and 2010 editions of global football's showpiece event. The charges were eventually dropped, but questions of proportionality inevitably were raised by many onlookers. The vastness of football business today points to the likely continuity of these types of disputes.

About a year earlier, FIFA's contentious muscles were flexed in the North Gauteng High Court in Pretoria, South Africa. In *FIFA v Eastwood Tavern*,[144] the defendant restaurant embellished its signage with the inscription 'World Cup 2010' which would have been conspicuous in its appearance due to its proximity to Loftus Stadium in Pretoria, one of the 2010 World Cup venues. Further, the number '2010' and the words 'two thousand and ten South Africa' were featured close to the hoisted flags of reputable football-playing countries. The court decided in FIFA's favour, ordering Eastern Tavern to abstain from this form of unlawful competition.[145]

The decision was a predictable one given the passage of the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 and the Second 2010 FIFA World Cup South Africa Special Measures Act 12 of 2006 and Government Gazette notice of 14 December 2007. Annexure C 1 to the Gazette notice prohibited the use of expressions, including but not limited to, 'World Cup 2010', '2010 FIFA World Cup South Africa', 'SA 2010', '2010 FIFA World Cup' and 'Football World Cup'.[146] Additionally, the World Cup in South Africa was designated a 'protected event' under section 15(A) of the Merchandise Marks Act, offering the event statutory protection.[147]

The South African Constitutional Court in the *Laugh It Off* decision was forced to balance competing interests relating to protection of IP rights and freedom of expression. Any

143 The Global Advertising Lawyers Alliance, 'Ambush Marketing: A Global Legal Perspective' (n 73)125.
144 Quoted at Michael Murphy (n 128), at WSLR, September 2009.
145 Michael Murphy (n 128) WSLR, November 2009.
146 Ibid.
147 Ibid.

discussion of juridical developments in South Africa must consider its status as a constitutional State, in which the 1996 Constitution, including its Bill of Rights, has priority over other rules,[148] including those of sporting bodies. The Bill of Rights provides for the right of access to court, which is also an ECHR right, as well as rights to equality, property, freedom of expression and administrative justice.[149]

In *Coetzee v Comitis*,[150] the South African High Court took the bold step of setting aside, *in their entirety*, the rules of the National Soccer League (NSL). Reminiscent of *Bosman*,[151] the rationale for the court's decision was that the rules breached the fundamental rights of the footballers, who, under the NSL's constitution and regulations, were prohibited from transferring freely to another club on the termination of their existing contract with their employing football club. Again, the priority given to the fundamental rights of athletes was evident, a trend that is likely to continue as sportsmen show a greater willingness to explore and exercise their legal options.

At the other end of the 2010–2020 decade of World Cup football, Russia had another opportunity to host a major event, this time the 2018 tournament. The anti-infringement strategy was two-fold. On the one hand, reliance was placed on the *Russia 2018 Guidelines for the use of FIFA's Official Marks.*[152] The instrument, in part, outlined the need for IP protection:

> Without the significant support of FIFA's Rights Holders, FIFA would not be able to organise the Event. The Rights Holders will only invest in the Event if they are provided exclusivity for the use of the Official Marks. Without exclusivity, i.e. if the Brand of the Event were not protected and anyone would be able to use the Official Marks and thereby create an association with the Event for free, become a Rights Holder would be less attractive as the acquired rights would be significantly diluted. This would make appointing Rights Holders more difficult for FIFA and in turn could result in FIFA not being able to secure the necessary funding for the Event from such revenues. Therefore, the protection of the commercial rights is crucial for staging the Event, and FIFA asks that non-affiliated entities respect FIFA's intellectual property and conduct their activities without commercially associating with the Event.[153]

The second limb of the strategy was a legislative one, in light of the existing legal landscape:

> Currently there is no specific legislation outlawing ambush marketing in Russia except for activity during the 2017 FIFA Confederations Cup and 2018 FIFA World Cup. A specific law has been enacted in order to prevent unauthorised commercial association with the 2017 FIFA Confederations Cup or the 2018 FIFA World Cup which shall be held in Russia (Federal Law № 108-FZ dated June 07, 2013). The above mentioned Law is meant to protect official sponsors of the sports events from ambush marketing practices. For example, misleading behaviour, in particular creating a false impression that a commodity manufacturer or an advertiser is associated with the 2017 FIFA Confederations Cup or the 2018 FIFA World Cup, including as a sponsor, shall be deemed inaccurate advertising and/or unfair competition and shall entail the consequences provided for by the antimonopoly legislation of the Russian Federation, i.e. substantial fine amounts of which depend on the offender's turnover, or advertising legislation of the Russian Federation.

This two-pronged attack on ambush marketing is not necessarily a standard feature for the hosting of major games, but constitutes a fair and balanced policy. Each event, though, is likely to have its own narrative.

148 Michael Murphy, 'South Africa: Ambush Marketing: Sanctions and State Legislation' (n 128).
149 Ibid.
150 [2001] 1 All SA 538 (c).
151 *Union Royale Belge Des Societes de Football Association (ASBL) v Jean Marc Bosman* [1996] 1 CMLR 645 (ECJ).
152 *Russia* 2018 *Guidelines for the use of FIFA's Official Marks* (Version #2, April 2018).
153 Ibid 6.

#### *4.8.7.8 A case study of English law: the 2012 London Olympics*

The London Olympic Games and Paralympic Games Act 2006 (LOGPGA) was passed within months of London being awarded the 2012 Olympic and Paralympic Games on 6 July 2005. Key initiatives created by the LOGPGA included the London Olympic Association right and the Paralympic Association right as well as Advertising and Street Trading Regulations. LOGPGA also made amendments to The Olympic Symbol Etc. (Protection) Act 1995 (OSPA), an Act that created the Olympic Association right in the United Kingdom.[154]

LOCOG employed the combination of 'traditional legal protections'[155] and specific statutory rights. Under the traditional legal mechanisms, reliance was placed on copyright, trademark and contract law. With regard to the statutory rights, LOCOG was granted special rights under LOGPGA to prevent unauthorized associations, the sale of counterfeit merchandise and conduct that undermines revenue generation.[156]

The LOGPGA went on to identify 'listed expressions' that are reserved only for LOCOG sponsors, partners and licensees. This is an area that produces much disagreement since generic words like 'summer', 'gold' or 'silver' are given protection when used in conjunction with other expressions like the number '2012' or the word 'Games'. It is no surprise that advertisers in the lead up to those Games expressed their concerns that the Act restricted artistic licence.[157] Whether the defences offered under the Act, such as journalistic or artistic use, honest statement and incidental use, provided sufficient security for advertisers and non-sponsors was invariably an important consideration. Legislators who promulgate sport-related statutes have the unenviable task of stipulating parliamentary intention while offering sufficient exemptions that recognize other stakeholder rights.

Words like 'Olympic(s)', 'Olympian(s)' and 'Olympiad(s)', unsurprisingly, have received special protection, likely because they surmount the generic words test. The LOGPGA, in Schedule 3, made amendments to the OSPA and sought to expand the category of protected words to include words 'so similar to a protected word as to be likely to create in the public mind an association with the Olympic Games or Olympic movement'.[158] A term like 'golden games', for example, would have constituted an infringement of the Act. The fact that there was no need for the association to be either intentional or misleading increased the likelihood of an offence being committed. Such breadth of application, on its face, appeared disproportionate to what was necessary to protect the Olympic brand.

Legislation can never capture every possible infringement, so that resolving these difficulties in future events becomes a matter of reasonable limitations and proportionate restrictions. The Scottish Parliament, in 2008, introduced the Glasgow Commonwealth Games Act, with similar intent and content to the LOGPGA as that nation prepared to host the 2014 edition of the Commonwealth Games.

## 4.9 THE JUXTAPOSITION OF ACADEMIC AND JUDICIAL OPINIONS

Italy is an interesting example of a specific legislation adopted in relation to the Turin Winter Games which did not give rise to any court case. We have no means to determine whether this

154 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) [H 2.9].
155 Terry Miller, 'London 2012 – Meeting the Challenge of Brand Protection' (2008) 4 International *Sports Law* Review 44.
156 Ibid.
157 Ibid.
158 LOGPGA 2006 Schedule 3, section 3(1).

> is due to the extreme efficiency or the uselessness of that legislative package, or a little bit of both.[159]

Kobel's frank assessment confirms the general position that relatively few ambush marketing disputes have culminated in litigation. This could be either the result of effective anti-infringement programmes or the consequence of ambush marketers skilfully circumventing the law. Thoughts vary on the double-barrelled question of what behaviour actually constitutes ambush marketing and whether the practice is per se lawful or unlawful. Both limbs are not easily discernible. While Leone considers the practice 'perfectly legitimate',[160] Mandel calls it 'stealing' and 'thievery'.[161] Even when there is agreement on activities that can be classed as ambush marketing, its legality and often its morality remain factious issues.

### 4.9.1 Judicial opinion

In *ICC v Britannia*[162] the Delhi High Court held that a plea of ambush marketing was not available to the plaintiff, the International Cricket Council Development International Limited, a company formed by the International Cricket Council (ICCDIL), as it sought injunctive relief against Britannia Industries. The claimant claimed that the defendant's scheme, 'Britannia Khao World Cup Jao', amounted to unfair trading and that its use of the 2003 International Cricket Council Development International Limited, a company formed by the International Cricket Council (CWC), logo was unauthorized and constituted ambush marketing. Holding that the balance of convenience did not lie in the claimant's favour, the court observed that the claimant's failure to contest the existence of a lawful agency agreement on the defendant's behalf was fatal to its case. Further, the evidence in the rights contracts confirmed Britannia's entitlement to use some of the event marks, as it did, including the mascot.[163] This ruling led to the following opinion: 'It is humbly submitted that the Delhi High Court judgment refusing to accept ambush marketing as a ground for relief is a retrograde step.'[164] Bhattachargee's concern is meritorious. Even though the legality of Britannia's actions hinged on the rights granted in the relevant commercial agreements, it is submitted that the better approach would have been for the Delhi High Court to allow the plea of ambush marketing, even if the requirements to establish an infraction were not met. To reject the plea outright is to imply that the claim was frivolous, arbitrary or capricious. Were the case heard in South Africa, the competition venue, the ICCDIL's case would have had a stronger legal footing due to the amendments made to the 1976 Trade Practices Act and the 1941 Merchandise Marks Act.[165] The amended laws prohibited the implication of a contractual or other connection with a sponsored event, and the unauthorized use of a trademark relating to the event where that use achieves publicity or derives benefit from the event.[166]

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159 Pierre Kobel, 'International Report on Question B: Ambush Marketing Too Smart to Be Good? Should Certain Ambush Marketing Practices Be Declared Illegal and If Yes, Which Ones and Under What Conditions?' (Hirsch-Law, Geneva, 2007).

160 Luisa Leone, 'Ambush Marketing: Criminal Offence or Free Enterprise?' (n 97).

161 Gardiner et al, Sports Law 459 (citing Norman Mandel, Business Affairs Counsel, Coca-Cola, who presented at the Global Sports Law Conference, Cardiff, November 1999).

162 'ICC plea for stay on use of World Cup logo rejected' (4 December 2002) www.rediff.com/cricket/2002/dec/04reject.htm.

163 Sudipta Bhattacharjee, 'Ambush Marketing-The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law – A Global Perspective' (2003) 8 Journal of Intellectual Property Rights 375.

164 Ibid.

165 Amended by the Trade Practices Amendment Act 26 of 2001 and the Merchandise Marks Amendment Act 61 of 2002, respectively.

166 Ibid section 9(d) and section 15A, respectively.

Before a South African court, the ambush marketing plea would at least have been open to the ICCDIL, although it would have failed since Britannia had the requisite authorization to use the event marks on its promotional material. It is submitted that in rejecting the plea of ambush marketing, the Delhi High court failed to embrace the modern sports business culture and bowled an unplayable delivery at event organizers. The court, even if it ruled in Britannia's favour, missed an opportunity to make a categorical statement about the damage that ambush marketing can cause to the long-term health of sports funding and development.

In *Arvee*[167] and in *EGSS*,[168] the ICCDIL, as claimant in both decisions, obtained contrasting results. In the former case, the court rejected the pleas of passing off and ambush marketing, holding that there was no misuse of the ICC logo with the effect that consumers would not conclude that there was a connection between the defendant's goods and the 2003 CWC sponsors.[169] However, in *EGSS*, an injunction was granted against the use of the ICC logo, which use was deemed to have been caught by the Indian Copyright Act.[170]

It is hard to reconcile the Indian World Cup cases, especially since copyright law, if applicable in *EGSS*, should have been equally relevant in *Arvee* and *Britannia*. The dichotomy in the decisions may be explained by considering the causes of action presented to the court in each case. Had the ICCDIL not pursued passing off and ambush marketing in the first two cases, but instead relied on traditional intellectual property law, the outcome may very well have been different. This is because the courts, generally, appear more willing to entertain causes of action based on well-entrenched legal principles, rather than novel grounds for relief, even if they are legally sound. This renders impressive the approach in Jamaica of Clarke J in the *Bob Marley* case,[171] given his willingness to entertain the plea of a new tort; that of the unlawful appropriation of personality in the context of an image rights dispute.[172]

From a North American standpoint, the jurisprudence reveals the courts' willingness to protect sponsorship and licensing contracts[173] under section 43(a) of the Lanham Act, which covers false designations of origin and false descriptions or representations. Such was the case in *MasterCard v Sprint*[174] where both parties had official status, MasterCard as an official sponsor and Sprint, the official long-distance telecommunications provider. Difficulties occurred when Sprint did not respect the product exclusivity requirements of ISL Football AG which had granted MasterCard the exclusive right to use the trademark 'World Cup 94' on card-based payment and account access devices, which included phone cards.[175] Sprint's use of the World Cup trade mark on its telephone cards was deemed unlawful since it was outside of its designated product category.

Schmidz's acknowledgment of the United States Olympic Committee (USOC) line of cases, which cemented the function of the 1998 Ted Stevens Olympic and Amateur Sports Act (Ted Stevens Act),[176] is useful. In *Stop the Olympic Vision*,[177] *Union Sport*,[178] *International Federation of*

167 (2003) 26 PTC 245 (Del).
168 (2003) 26 PTC 228 (Del).
169 Sudipta Bhattacharjee, 'Ambush Marketing-The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law – A Global Perspective' (n 163).
170 Ibid.
171 *The Robert Marley Foundation v Dino Michelle Ltd*, *JM* 1994 SC 30.
172 A detailed analysis of the *Bob Marley* ruling will feature in the image rights section of this chapter.
173 Sudipta Bhattacharjee, 'Ambush Marketing-The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law – A Global Perspective' (n 163).
174 *MasterCard International Inc. v Sprint Communications Co* 1994 WL 97097 (SDNY 1994).
175 Jason Schmitz, 'Ambush Marketing: The Off-Field Competition at the Olympic Games' (n 122).
176 This Act amended the 1978 Amateur Sports Rights Act.
177 *Stop the Olympic Vision v United States Olympic Committee*, 489 F Supp 1112, 1120 (SDNY 1980).
178 *United States Olympic Committee. v Union Sport Apparel*, 220 USPQ 526 (ED Va 1983).

*Body Builders*[179] and *David Shoe*,[180] the courts held that the purpose of the *Ted Stevens Act* was to ensure the market value of licences.[181] This shows an admirable appreciation and awareness of the value of the commerce of sport. In the US courts, then, primacy is accorded to contractual obligations in commercial agreements and there is an unmistakable loyalty to the letter of the law. This was evident in *FIFA v Nike*.[182]

In that case, FIFA sought a restraining order to prevent Nike from using the designation 'USA 2003' in circumstances where Adidas was the official footwear sponsor for the 2003 Women's World Cup.[183] At the same time, Nike had a legitimate claim for use of the designation being the sponsor of the US Women's National Soccer Team. Interestingly, the court refused to grant the order, holding that the football association had not acquired secondary meaning in the descriptive designation 'USA 2003'.[184]

The ruling raises critical legal issues. The declaration of the designation as distinctive brings to bear the importance of trademark owners being proactive and sufficiently urgent not only in registering their marks, but also in complying with registration requirements. In the *World Cup 2006 OHIM*[185] series of decisions,[186] the cancellation division held that although the marks GERMANY 2006, WORLD CUP GERMANY, WORLD CUP 2006 and WM 2006 were suggestive of the tournament, it did not mean that they were devoid of distinctive character.[187]

By contrast, the registration of FUSSBALL WM 2006 was cancelled by the German Supreme Court, which found it to be descriptive with regard to some goods. The court observed that the addition of the word FIFA would likely have pushed the word mark over the distinctiveness threshold.[188] In the *FIFA v Nike* decision, the 'USA 2003' designation was only descriptive and FIFA would have had to acquire a secondary meaning in that designation. To acquire a secondary meaning, the public would have had to recognize the 'USA 2003' mark as identifying FIFA as the trade source of any products bearing the mark,[189] thus arousing issues similar to those considered in the *Arsenal v Reed*[190] decision. These are the obstacles faced when there is an attempt to register generic terms like '*World Cup*' or '*Football*'.

The decision in *National Hockey League v Pepsi*[191] was one of many involving the same litigants. The key issues to be ventilated in the case were summarized by Hardinge J as passing off and, in the alternative, trademark infringement or interference with contractual relations. The court relied on the House of Lords decision in *General Electric*,[192] as it found that although Pepsi's advertising campaign did constitute ambush marketing, there was nothing in law that could be done to protect either Coke or the National Hockey League in its attempts to protect Coke from its main competitor.[193] Hardinge J elucidated:

179 *United States Olympic Committee v International Federation of Body Builders*, 219 USPQ 353 (DDC 1982).
180 *United States Olympic Committee v David Shoe Co, Inc.*, 835 F 2d 880 (6th Cir 1987).
181 Jason Schmitz, 'Ambush Marketing: The Off-Field Competition at the Olympic Games' (n 122).
182 295 F Supp 2d 64, 68 USPQ 2d 1849 (DDC 2003).
183 Stephen Durchslag, 'United States: Ambush Marketing: Protecting Sport from Brand Hijacks' (n 119).
184 Ibid.
185 Office for Harmonisation in the Internal Market.
186 28 October 2005, Cases: No. 215635, No. 2153005, No. 2152817 and No. 2155521.
187 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) [2–22] fn 73.
188 Ibid [2–23].
189 Ibid [G 1.114] fn 3.
190 [2003] EWCA Civ. 696.
191 *Supreme Court of British Columbia*, Case No C 902104.
192 *General Electric Co Ltd v General Electric Co*[1972] 2 All ER 507.
193 Sudipta Bhattacharjee, 'Ambush Marketing – The Problem and the Projected Solutions *vis-a-vis* Intellectual Property Law – A Global Perspective' (n 163).

> It may be that due to Coke's failure to secure the right to advertise its product during the television broadcasts of NHIC and the securing of such rights by the defendant, the commercial value to Coke of the right to describe its product as the 'Official Soft Drink of the NHL' has less commercial value than would have been the case if Coke had also obtained the right to advertise on NHIC. But that cannot diminish the defendant's rights.[194]

The decision strengthens the earlier arguments of Duthie and Leone that 'saturation sponsorship' is not only practically prudent, but also legally wise.

Decisions from Commonwealth nations have traditionally provided persuasive precedent for fellow Commonwealth countries, including those in the Caribbean. A key decision was that of *New Zealand Olympic and Commonwealth Games Association v Telecom New Zealand*,[195] in which the claimant's claim against Telecom New Zealand was three-fold: infringement of the Fair Trading Act 1986, passing off and trademark forgery. The claimant sought interlocutory relief in the form of an interim injunction to prevent the defendant from publishing a contentious advertisement.

Justice Mc Gedan observed:

> Telecom's conduct is certainly of concern to the Olympic movement, but there is no proven inevitability of damage ... Telecom has been adventurous, perhaps unwisely so, but the Olympic Association, perhaps pushed by the competitor Bell South, may have been perhaps a little paranoid as to possible repercussions.[196]

The rationale of the judge in ruling for the alleged infringer, Telecom, was that the failure to prove inevitable damage was fatal to the Olympic Association's case. While he acknowledged concerns about Telecom's conduct, it was not sufficiently egregious to be considered unlawful. The ruling highlights the need for an event organizer or rights holder to prove the risk of actual damage, whether financial loss, damage to reputation or confusion in the public mind that leads to decreased revenue. A concern or paranoia about possible adverse ramifications is not enough.

Michalos laments the inconsistencies that have arisen out of the 'Olympic' cases like *Astral Olympic*, *Compulympics*, and *Family Club Belmont Olympic*[197] in which OHIM permitted the registration of the mark 'Astral Olympic' in the former case, but rejected similar registrations in the latter cases. Even some judges have found it difficult to find consistency as the dissenting judgments of Justices O'Connor and Blackmun in *SFAA v USOC*[198] indicate. They viewed the Amateur Sports Act as overbroad because that legislation vested the USOC with what they considered to be unguided discretion regarding the Olympic properties. This is not only indicative of the intricacies of IP law, but the need for greater international harmonization, especially in Olympic-related litigation.

### 4.9.2 The future of protection against ambush marketing

There is little disagreement that it is difficult to quantify whether rights owners, generally speaking, have been successful in the anti-ambush battle. Reminiscent of the anti-doping movement is the fact that, as counter-measures are initiated, new ways of infringement are created. This is

194 Ibid citing Hardinge J.
195 'Ambush Marketing Legislation Review' (IP Australia and the Department of Communications, Information Technology and the Arts, October 2007).
196 Ibid.
197 Christina Michalos, 'Five Golden Rings: Development of The Protection of The Olympic Insignia' (n 83).
198 483 US 522 (1987).

confirmed by the continuing advance in sophistication of ambushing measures. It is submitted that the material assessed in this section necessarily leads to the conclusion that the law as it relates to ambush marketing is still very unsettled due to inconsistencies in the application of the relevant law.

Pertinent legal questions raised in the Australian review[199] remain largely unanswered, in particular the issue of how does the regulation of ambush marketing operate when (1) existing law is either uncertain in its application or is very dependent on the facts of each case and (2) the law is in no way contravened. It is also important to consider whether nations that are new to event hosting are sufficiently prepared to fight against ambush marketers. The criticisms doled out to the Swiss government before Euro 2008 were typical for countries new to major event hosting. The accusation of compliance with governing bodies at the expense of others' rights is reminiscent of the backlash received by the then West Indies Cricket Board and Caribbean governments during Cricket World Cup 2007. The legislation itself was strict on its face but this, in some minds, was not by the calculated and well-planned efforts of the organizers. The new hosts may just have been happy to be there and could very well have adopted similar statutory provisions from abroad without fully appreciating the potential impact on a region such as this. Yet this is not entirely surprising given the novelty of this scale of sports event to the Caribbean region and perhaps an innate pressure to get it right the first time around. This relative legislative strictness, however, may have been the ideal fillip for a region that, back then, was still largely unfamiliar with the full commercial landscape regarding sponsorship, image rights and intellectual property law. In this regard, Schmitz was on point when he noted: 'the practice of ambush marketing encourages organizers to work harder to thwart intellectual property violations, and raises the awareness of intellectual property rights globally-a long-term benefit to all intellectual property owners'.[200] Perhaps greater forethought and advance planning are needed both by sponsors and event organizers. Too many anti-ambush campaigns have been reactive, leaving rights holders to play catch up. The European Sponsorship Association (ESA) believes that anti-ambush laws should provide marketers with certainty and should incorporate fair and proportionate civil sanctions.[201] In this way, the nebulous legal status of the ambusher and the ambushed will slowly receive much needed clarity.

## 4.10 PROTECTING IMAGE RIGHTS[202]

During an interview in 2006, Laddie J, an IP law specialist and the presiding judge in the landmark case *Eddie Irvine v Talksport*,[203] made the following comments which, interestingly, are still relevant in the context of the modern Caribbean sports industry: 'I think if you're going to change this by legislation you have to face up to it – you're going to have to create a new right, which is a modern version of passing off or unfair competition or some image right per se.'[204] An examination of the current legal protection available to sportspersons in this region, and famous persons in general, has revealed a *lacuna* in the law. At present, there is little comfort for

199 'Ambush Marketing Legislation Review' (n 195).
200 Jason Schmitz, 'Ambush Marketing: The Off-Field Competition at the Olympic Games' (n 122).
201 European Sponsorship Association, 'Position Statement' (14 October 2005).
202 This section of the chapter is an amended and expanded version of a recommendation annexed to a report first submitted in 2012 to the Ministry of Legal Affairs in Trinidad and Tobago by a Cabinet-appointed Committee to Enable the Protection and Commercialization of Sports-Related Intellectual Property in that country by J. Tyrone Marcus.
203 [2002] 2 All ER 414.
204 'Interview with Sir Hugh Laddie 21 March 2006' 14(1) Sport and the Law Journal 17.

the Caribbean athlete seeking to protect and to exploit commercially his or her image. It is here that attention must be drawn to this region's law-makers.

### 4.10.1 Sports image rights

With an American context within his immediate contemplation, Wolohan offered the following definition of image rights:

> The term 'Sports image rights' has become closely associated with the right of privacy and the right of publicity. Generally, a person's image right, relates to his or her name or likeness, such as photograph or other visual representation of the person. Recently, however, the courts have expanded the definition of likeness to include not just photos and drawing, but also voice and persona.[205]

This definition is a reminder of the way that image rights have been evolving. Wolohan first recognized the nexus with privacy rights,[206] and then proceeded to define image rights to include name, likeness, voice and persona.

This is consistent with the definition of 'image' in the standard contract used by the Professional Footballers' Association and the Football Association Premier League of England: 'the player's name, nickname, fame, image, signature, voice and film and photographic portrayal, virtual and/or electronic representation, reputation, replica and all other characteristics of the Player including his shirt number'.[207] This definition has been described as going much wider than the protection offered under UK common law.[208] Herein one finds both the difficulty and the reality. The legal framework in the Commonwealth Caribbean, as in the UK, lacks certainty and clarity in offering celebrities, in general, and athletes, in particular, the protection needed when it comes to the use of their image.

It is submitted, then, that the existing law as it relates to the recognition and protection of the value of a sportsperson's image is inadequate. An overview of the current legal principles follows with a view to highlighting where gaps exist and why the time is opportune for legislative intervention.

### 4.10.2 Passing off

Many legal definitions of passing off have been offered, a concise one being that it arises in circumstances where a party tries to pass off their goods or services as another's without their consent and, in so doing, taking advantage of the other party's brand, reputation or goodwill.[209] In the sporting context, the following suggestion has been made:

> to establish passing off arising out of the unauthorised use of a sport star's name, image, likeness etc, it will therefore be necessary to prove the following:
>
> i that the sports star has built up a reputation and goodwill around the commercial use of his name or image ...

205 Ian Blackshaw and Robert Siekmann, *Sports Image Rights in Europe* (Cambridge University Press, 2005) chapter XIX, 345–346.
206 Privacy rights have now been termed 'rights of publicity' in the United States.
207 Simon Smith, 'The Changing Face of Image Protection in Sport' (2004) International Sports Law Review 4.
208 Ibid.
209 'Image Rights – Do they Exist and Who Should Own Them?' (Sport and Technology Newsletter, 14 July 2008).

> ii that the alleged tortfeasor made a misrepresentation that leads the public to believe that the product or service is in some sense endorsed by, licensed by, or officially connected with the sportsperson ...
>
> iii that the sports star's goodwill in his or her image is in fact, or is likely to be, damaged by the misrepresentation.[210]

Using the above guidelines, one of the first requirements for the sportsperson is establishing that he or she had built up a reputation or goodwill based on the commercial use of his image or name. Many athletes have indeed built up a reputation, but it is usually through their sporting performances as against the commercial use of their name or image. It is possible that the sportsperson's quest for legal protection of an image right may fail at this first hurdle.

The second requirement is somewhat easier to establish, following the reasoning of the Court of Appeal in *Irvine v Talksport*.[211] In this case, Parker LJ stated:

> I find it difficult to conceive of a clearer way of conveying, by way of a quasi-photographic image, the message that a celebrity has endorsed a particular radio station than by depicting the celebrity listening intently to a radio bearing the station's logo.[212]

As far as damage to reputation is concerned, an inevitable overlap into defamation law emerges, reminiscent of *Tolley v Fry*,[213] where the unauthorized use of an amateur golfer in an advertisement was considered to have prostituted his reputation as an amateur golfer for advertising purposes.[214]

The law of passing off itself has to undergo its own evolution to get to a place where sportsmen could rely on it for legal protection. The above quoted elements of passing off are not always easy to establish, both in and outside of the sports industry. Yet, the *Eddie Irvine* decision went a far way in presenting passing off as a real, though not foolproof, option for image rights protection.

### *4.10.2.1* Irvine v Talksport: *two steps forward*

> Mr Irvine has a property right in his goodwill which he can protect from unlicensed appropriation consisting of a false claim or suggestion of endorsement of a third-party's goods or business.[215]

Laddie J's observation in *Irvine* was evidence that English law was beginning to recognize the need to offer famous persons protection for the use of their image. Whether intentionally or not, Laddie J moved the image right concept as a legal principle in the right direction when finding against Talksport Radio in a false endorsement claim brought by famous Formula 1 driver Eddie Irvine. Indeed, this decision, at that time, appears to be the closest that English law has come to acknowledging that the commercial viability of a celebrity's image was worth protecting.

Around the same time as the *Irvine* decision, former England cricketer Ian Botham brought a claim against Guinness arising from an advertisement in which his image was used. His lawyer claimed 'the advertisement suggests that Ian is endorsing the Guinness product when he's not doing any such thing and he has no contract with them. This is a clear breach of his

210 Dan Harrington, 'Image Rights – Part Two' (2002) Sports Law Administration and Practice 12.
211 [2002] 1 WLR 2355.
212 Stephen Boyd, 'The Legal Status of a Sportsman's Image Rights' (2003) IL 01481 SB 11.
213 [1930] 1 KB 467.
214 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64)1163.
215 Dan Harrington, 'Image Rights – Part Two' (n 210).

image rights.'[216] Still, in *Irvine*, the cause of action upon which the celebrity was forced to rely was a common law tort. Laddie J noted further: 'there is nothing which prevents an action for passing off succeeding in a false endorsement case'.[217] On one hand, then, the *Irvine* decision provided comfort for the sports celebrity. On the other hand, though, reliance on passing off was still needed. It is, in fact, well accepted that passing off is just one of many arms of the law upon which the famous person must rely for protection of his persona. The law, it is submitted, both in the United Kingdom and in the Commonwealth Caribbean, must move towards the recognition of a stand-alone image right. This will not come easily, however, as noted by Bate:

> English law recognizes no concept as a[n] image right and the term conveys no clear meaning. However, it is well-known that English law does give sportspeople and other celebrities the right to protect and control the exploitation of their name, likeness and other aspects of their personality and their private life through a *variety of means*, including contract, passing off, trademarks, copyright, the law of confidentiality or privacy, and various regulatory codes. These developments are being lent force by the Human Rights Act 1998.[218] [*Emphasis added*].

Herein rests one of the major pitfalls in the law relating to image rights. The sports celebrity must rely on a 'variety of means'. Using Bate's list above, these may include:

(1) contract;
(2) passing off;
(3) trademarks;
(4) copyright;
(5) the law of confidentiality or privacy; and
(6) various regulatory codes.

Other commentators[219] add defamation, malicious falsehood, unfair competition, trade descriptions legislation and data protection legislation to this list. The upshot is that, in England and in the Caribbean, the sportsperson must borrow bits and pieces of various branches of the law to protect his image rights.

While it is not the goal of this chapter to present a detailed analysis of each of the abovementioned arms of the law as it relates to image rights, it is submitted, nevertheless, that, although useful in some regards, they each have limitations in their scope and application and leave a gap in the law that can potentially be filled with the creation of a statutory image right.

Lewis and Taylor's UK perspective is noteworthy:

> the law does not properly reflect modern marketing practice, in that (*in contrast to many overseas jurisdictions*) it does not recognise an individual's proprietary interest in his image per se, but rather forces him to cobble together limited and piecemeal protection through the inventive use of various disparate legal doctrines.[220] [*Emphasis added*].

The above parenthetical comment about *overseas jurisdictions* is instructive and will be further assessed later in the chapter. Yet, the chance to examine whether the law will evolve to offer legal comfort to celebrity athletes and, increasingly, entertainers, seems to be surfacing at an

216 Mihir Bose, 'Botham in test match with Guinness over his image' (*The Telegraph*, 13 August 2002) www.telegraph.co.uk/news/uknews/1404262/Botham-in-test-match-with-Guinness-over-his-image.html.
217 Simon Smith, 'The Changing Face of Image Protection in Sport' (n 207).
218 Stephen Bate, 'Image Rights: Where next?' (2013) 13(2) Sport and the Law Journal 10.
219 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) 1162.
220 Ibid 1154.

opportune time. The litigation commenced by Barbadian-born superstar Rihanna is the latest image rights case whose value to the evolving legal scholarship warrants closer examination.

### *4.10.2.2* Robyn Rihanna Fenty v Arcadia Group Brands Ltd and Topshop[221]

This was an appeal to the England and Wales Court of Appeal by Arcadia Group Brands Limited and Topshop ('Topshop') from a 2013 High Court decision, where the court found the tort of passing off to have been committed by Topshop, which had sold t-shirts bearing Rihanna's image. On appeal, counsel for Topshop contended that the High Court judge fell into error in four ways:

> i That [it] wrongly proceeded on the basis that there was no difference in law between an endorsement case and a merchandising case;
>
> ii That although [it] correctly acknowledged that the sale of a garment bearing a recognizable image of a famous person does not, in and of itself, amount to passing off, [it] still fell into error in failing to proceed on the basis that the law of passing off treats the use on garments of such images as origin neutral;
>
> iii That [it] ought to have recognized and accepted that the absence of an image right was a matter of law and not a matter of fact; and
>
> iv That [it] fell into error in finding Topshop liable for misrepresentation in the way that he did because Rihanna had never properly alleged or developed a case that the particular image in issue was in any way distinctive as a result of any marketing or promotional activity which she had ever carried out.[222]

Kitchin LJ's disposition of these grounds of appeal raised various debatable issues on how English law continues to treat with the protection of a celebrity's image or other indicia of his or her personality from commercial use by others. The following parts of the judgment cast a spotlight on the law of image rights, or perhaps, more accurately, the absence of such a law:

> 29. I will deal with these various grounds of appeal in turn but must begin by setting out some basic principles. There is in English law no 'image right' or 'character right' which allows a celebrity to control the use of his or her name or image. Thus, in *Douglas & ors v Hello! Ltd & ors (No 3)* [2007] UKHL 21, [2008] 1 AC 1, two well-known film actors, Michael Douglas and Catherine Zeta-Jones, sought to prevent the publication and use of unauthorized photographs taken surreptitiously at their wedding. Lord Hoffmann (with whom Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood) agreed, said at [124]:
>
> There is in my opinion no question of creating an 'image right' or any other unorthodox form of intellectual property. The information in this case was capable of being protected, not because it concerned the Douglases' image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglases had sufficient control to enable them to impose an obligation of confidence.
>
> 30. Similarly, Lord Nicholls of Birkenhead explained at [253]:
>
> 'Publication of wedding photographs in 'Hello!' was not, of itself, improper exploitation of the reputation, name or likeness of the Douglases such as may be protected in some circumstances in the US: see Corpus Juris Secundum, vol 77, pp 591–592, para 51. Nor did '*Hello!*'s' publication of pictures of this event constitute 'character merchandising' or, still less, a case of 'false endorsement' as discussed by Laddie J in *Irvine v Talksport Ltd* [2001] 1 WLR 2355. Thus it is unnecessary to consider how far English law has developed, or should develop, in these fields.'

221 [2015] EWCA Civ 3.
222 Ibid [25]–[28].

> 31. Lord Walker of Gestingthorpe put it this way at [285]: 'Their claims come close to claims to protecting a celebrity's name and image such as has consistently been rejected in English law': see *Elvis Presley Trade Marks* [1999] RPC 567, 580–582, 597–598, and also Brooke LJ in the interlocutory appeal in this case [2001] QB 967, paras 74 and 75. The present limits of the law of passing off as a protection of a celebrity complaining of 'false endorsement' were thoroughly reviewed by Laddie J in *Irvine v Talksport Ltd* [2002] 1 WLR 2355.
>
> 32. Lord Walker continued at [293]: 'Although the position is different in other jurisdictions, under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or brand. Nor can anyone (whether celebrity or nonentity) complain simply of being photographed ...'
>
> 33. A celebrity seeking to control the use of his or her image must therefore rely upon some other cause of action such as breach of contract, breach of confidence, infringement of copyright or, as in this case, passing off.[223]

What becomes abundantly clear from this excerpt from the decision of the Court of Appeal is a consistent reticence to acknowledge the creation of an image right under English law. The words of Kitchin LJ could not have been clearer: 'There is in English law no "image right" or "character right" which allows a celebrity to control the use of his or her name or image.' He was not concluding that a celebrity had no remedy for the unauthorized use of his or her image. He was merely stating that such remedy did not lie in a claim for a breach of an image right. Ultimately, the Court of Appeal found that the activities complained of by Rihanna constituted passing off, which was unlawful under English law.

Kitchin LJ found support from Lord Hoffman in *Douglas v Hello!* where, as cited above, the language used was very similar. He noted that 'there is in my opinion no question of creating an "image right" or any other unorthodox form of intellectual property'. The inference that an image right is an unorthodox form of intellectual property is hard to miss. The words of Lord Walker of Gestingthorpe, also in *Douglas v Hello!*, continued the trend of luke-warmness regarding the acceptance of an image right, since he surmised that Michael Douglas and Catherine Zeta-Jones's 'claims come close to claims to a "character right" protecting a celebrity's name and image such as has consistently been rejected in English law'.

Lord Walker also noted the different philosophy and practice in other territories in this area. A comparison between the English position and that of other jurisdictions, then, becomes instructive for jurists, academics and practitioners in the Commonwealth Caribbean.

### 4.10.3 International trends: recognition of sports image rights

Harrington and White have expressed the view that image rights protection in the United Kingdom is weaker than in other key territories, such as the United States, Australia, France and Germany.[224] This is not surprising, however.

Viewing image rights from an international perspective, one can see a gradual and steady acknowledgment of the changed faced of sports business today. In the United States, for example, Boyd notes: 'the right of publicity ... came about largely because the prior case law of privacy was inadequate to deal with claims based on the commercial and proprietary damage

223 Ibid [29]–[33a].

224 Dan Harrington and Nick White, 'United Kingdom' in Ian Blackshaw and Robert Siekmann (eds), *Sports Image Rights in Europe* (Cambridge University Press, 2005) chapter XVIII, 315.

caused by unpermitted advertising use of human identity'.[225] Regarding the status of many States in the United States, McCarthy acknowledges the recognition of:

> the inherent right of every human being to control the commercial use of his or her identity. The right of publicity is a state-law created intellectual property right whose infringement is a commercial tort of unfair competition. It is a distinct legal category not just a 'kind of' trade mark, copyright, false advertising or right of privacy.[226]

The fact that this IP right in the United States is a State law right created by the legislator is noteworthy. It is submitted that a similar legislative initiative may very well be what is needed in the Commonwealth Caribbean.

Further evaluation of the relevant law in the United States and in Canada will be offered in the next section in the context of the *Bob Marley*[227] case.

In France, a general privacy right was recognized in 1970, having been incorporated into Article 9 of the French Civil Code.[228] In short, this was a right that prohibited the production and distribution of an individual's likeness without that individual's consent.[229] In fact, former France and Manchester United football standout, Eric Cantona, was awarded damages arising from the unlawful use of his image on a video cover.[230]

In Australia, reliance is placed on the 1974 Trade Practices Act as well as on passing off. In India, personality rights are not recognized, leaving claimants to rely on common law rights of personal privacy and, in some cases, even reliance on breach of contract or trade disclosure agreements.[231] It has been further submitted that in India, certain questions arise 'whether general IP laws are sufficient to protect the various layers of rights in the sport. The country has reached a stage where India needs a separate policy or legislation that deals with sports law.'[232] Once again, this recommendation is apt for the Caribbean region.

Ferrari notes that in 'Italy, as by and large in all continental Europe, the right on one's image, is by nature, a right of personality i.e. a right per se "against the world" or "erga omnes".'[233] Meanwhile, countries such as the Netherlands recognize a portrait right, but its protection and enforcement are based collectively on the Dutch Copyright Act, the Civil Code and the Benelux Convention on Intellectual Property.[234]

Corbett offers a useful summary of the European context relative to image rights protections:

> Image Rights are still somewhat under developed and under-utilized as a significant IP Right in Europe. In many jurisdictions, the so-called personality right allowing celebrities to control the use of their likeness is a more potent weapon. Professional athletes would appear to be the most likely target for the misappropriation of their name or likeness and this was the case last year in connection with video game publisher Konami's use of football legend Diego Maradona's image

225 Stephen Boyd, 'The Legal Status of a Sportsman's Image Rights' (n 212) 3 quoting McCarthy, 'The Rights of Publicity and Privacy'.
226 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice(2nd edition)* (n 64) 1158, at footnote 1, citing Mc Carthy, The Rights of Publicity and Privacy
227 *The Robert Marley Foundation v Dino Michelle Ltd, JM* 1994 SC 30.
228 Stephen Boyd, 'The Legal Status of a Sportsman's Image Rights' (n 212) 5.
229 Ibid.
230 Ibid 6.
231 Surbhi Mehta and Safir Anand, 'IP and Affiliated Issues in the Sports Arena' (*Managing IP*, 1 April 2006) www.managingip.com/Article/1321380/India-IP-and-affiliated-issues-in-the-sports-arena.html.
232 Ibid 27.
233 Luca Ferrari, 'Sports Image Rights under Italian Law' (2010) 1 Global Sports Law and Taxation Reports 27.
234 Steffen Hagen, 'Sports Image Rights in The Netherlands' (2011) 4(3) International Sports Law Journal 116.

> and name in their popular football video game Pro Evolution Soccer. Upon becoming aware that his personal image and name was being used, the former captain and manager of the Argentina national team confirmed that he would take legal action to prevent the unauthorised use of his personal IP Rights. Konami defended their use, pointing to a license agreement with FC Barcelona which they claimed encompassed rights to the name and likeness of former players of the club. The two parties came to an agreement to settle the dispute, but this tussle serves to highlight the disparity that often exists when it comes to a licensor/licensees understanding of rights owned, license periods and the use of image rights and personal trade marks versus the reality of ownership.[235]

The above snapshot of what obtains in other countries paints a vivid picture, one that suggests that there is greater openness to entertaining the possibility that image rights are worth the status of a *bona fide* legal or IP right. Corbett's overview was a reminder of some of the legal complexities involved, reminiscent of the issues argued in the *Bob Marley* case. Connelly's analysis of the potential for the proper development of image rights law in the Caribbean offers significant considerations. Just over a decade ago, he contended:

> it is submitted that the question which is yet to be definitively determined is whether the local courts, in dealing with a matter not governed by statute, are bound to apply the Common Law as applied in England, or whether it is open to the courts to rely on and adopt common law principles as developed and applied by other countries which share a Common Law tradition. It has been noted with great interest that the opportunity to address this issue, in an image rights case, was presented to the Supreme Court of Jamaica in the last decade in the case of *The Robert Marley Foundation v Dino Michelle Ltd*.[236] [*Emphasis added*].

Although Connelly's point of focus was the law in Trinidad and Tobago, the questions he raised can easily be transposed into a regional context. His search for answers led him to ask, justifiably, whether local and, by extension, regional courts could look within the family of territories sharing a common law tradition. Welcome guidance was at hand in one such country, namely, Jamaica, an island known especially for its athletic prowess, vibrant culture and globally acclaimed reggae music. It was in the latter arena that some degree of legal assistance became available.

### 4.10.4 *The Robert Marley Foundation v Dino Michelle Ltd*[237]

In a case involving the defendant's manufacture, printing and distribution of t-shirts bearing the image of late reggae icon, Bob Marley, the claimant claimed damages under three heads:

(1) passing off;
(2) appropriation of personality and, in the alternative,
(3) moneys had and received.

Clarke J's findings on the first two issues made it unnecessary for him to rule on the third limb of the claimant's claim for damages. Additionally, the claimant also sought an injunction restraining the defendant, whether by its servants or agents from manufacturing, from printing, distributing or in any way dealing in any t-shirts or other items bearing the name, likeness, signature, image, photograph, and biography of Bob Marley without its prior written consent.[238]

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235 Sean Corbett, 'Intellectual Property Rights update 2017–2018' (*lawinsport.com*, 2018) www.lawinsport.com.
236 Dayle Connelly, 'IMAGE is nothing; SPORT is everything; does the law in Trinidad and Tobago adequately protect the image/personality rights of sportsmen?' (LLM Dissertation, 2007/2008).
237 JM 1994 SC 30.
238 Ibid.

The standout feature of this case, from a legal perspective, was the court's scrutiny of the relative strength of a new tort: appropriation of personality. The submissions of both parties on this question were thought-provoking. The defendant's contention was that 'although recognized in Canada and some States of the United States of America, the concept of appropriation of personality as an independent tort is in this country jurisprudentially novel and esoteric'.[239] Counsel for the defendant further added that 'so far as the courts in Jamaica are concerned the categories of heads of tortious liability are closed and may only be opened or increased by Parliament'.[240] Clarke J summarized the claimant's submissions on this point in the following manner:

> Now, at the invitation of Mr Hylton, I take judicial notice of this that 'much modern commercial activity focuses upon the creation of a public perception of an association between a consumer product and a celebrity figure for the purpose of marketing the product.' This constitutes, according to one academic writer to whom the quoted words in this paragraph are attributable, 'a valuable by product of [the] fame [of most celebrities] allowing them to sell their persona for a user fee': Robert Howell in an article in the Intellectual Property Journal 1986 at page 150. This interest, Mr Hylton submitted, would be protected so far as the plaintiff is concerned by the recognition by the common law of Jamaica, in consonance with some other common law jurisdictions, of an independent tort known in Canada as 'appropriation of personality' and in the United States as 'breach of the right of publicity'. He further submitted that such a tort rests on the juridical basis that: 'When a person has a persona which is commercially marketable another person should not be allowed to take commercial advantage of that persona without permission."[241]

In short, it was the defendant's viewpoint that a new and independent tort could not be introduced into the laws of Jamaica, while the claimant held the opinion, with support from Canadian and American law, that a celebrity should have the legal right to protect the commercial value attached to his or her persona.

The judge himself placed reliance on Canadian and American jurisprudence in rendering the following salient pronouncements:

> Although no West Indian or English decisions recognize property in personality per se, *dicta* in cases such as Clark *v* Freeman and Dockrell *v* Dougall (supra) support the concept of a property interest as distinct from a privacy interest attached to personality. Just as the law recognizes property in the goodwill o[f] a business so must the law recognize that property rights attach to the goodwill generated by a celebrity's personality. On that basis those rights are violated where the indicia of a celebrity's personality are appropriated for commercial purposes. And the principles of unjust enrichment demand that a person must not unjustly benefit at the expense of another.
>
> The common law is not static. It has the capacity to develop 'as new cases, arising under new conditions of society ... [present] themselves for solution.' Indeed in Canada and in several States of the United States of America the common law (in the widest sense) has developed to take account of the commercial practice of utilizing without consent the name and likeness or image of celebrities ...
>
> From the foregoing analysis, I respectfully conclude that our law recognizes a civil wrong, known in Canada as 'appropriation of personality' and in several States of the United States as, 'breach of the right of publicity'. It is not so much that the cases have 'uncovered a piece of the common law and equity that had [hitherto] escaped notice... . as Cross J. once expressed himself in a passing off action – see *Vine Production Ltd. v McKenzie & Co. Ltd.* (1969) R.P.C. 1, 23 – but rather,

239 Ibid.
240 Ibid.
241 Ibid.

> the declaration of the tort results from the application of recognized principles of law ... to particular fact situations arising under 'new conditions of society'. The tort consists of the appropriation of a celebrity's personality (usually in terms of his or her name and likeness etc.) for the financial gain or commercial advantage of the appropriator, to the detriment of the celebrity or those claiming through him or her.'[242]

Clarke J's ruling displayed the requisite boldness that was needed to move the law in the Caribbean forward. Surely, he took solace from two sports-related Canadian cases, *Krouse v Chrysler Canada Ltd*[243] and *Athans v Canadian Adventure Camps Ltd*,[244] noting that 'both Canadian cases acknowledge that the true object of proprietary protection in the tort is the celebrity's personality as a commodity with a marketable business value, his name and likeness simply being indicia of that property interest'.

The clarity of the court's exposition in *Marley* is welcome, even if its practical effect has not been as far reaching as regional celebrity athletes would wish.

On a related note, the phenomenon of congratulatory messages after outstanding sport performances has become commonplace after major events. Yet, it is heartening to know that athletes' legal representatives have displayed increasing vigilance in their responses to such attempts from various organizations, including media houses, to associate themselves with the successful athlete. As alluded to earlier in the chapter, this is seen by many as a form of ambush marketing, while others may deem it a breach of an athlete's IP rights. Miller's observations after Jamaica's success at the 2008 Beijing Olympics are noteworthy:

> What comes to mind also are cleverly devised congratulatory advertising that does not claim or imply an endorsement but uses images and names of celebrities to attract the public's attention as we have seen in the press since our athletes' historic triumphs in the Beijing Olympics. In the final analysis, the remedies offered by passing off are open only to well-known persons as it requires significant goodwill in your name and reputation. Surely all persons, not just celebrities, should have enforceable rights over their images. Defamation laws give some protection but do not apply to purely commercial use that cannot be described as derogatory. Also, breach of confidence actions only protect images obtained in situations where confidentiality would be expected. Because of these shortcomings of the common law, wider reaching laws are needed to protect the image and publicity rights of Jamaican celebrities as well as that of the ordinary citizen.[245]

Miller's lament rang true then and still rings true today. Her call for wider-reaching laws, interestingly, was not aimed solely at celebrities, but also at the everyday citizen. Her proposed solution was appropriate legislative intervention that would give all persons rights over their image, thus removing the need to continually rely primarily on common law principles.[246] In 2012, Guernsey, the British Crown Dependency, took such an innovative step, which will be explored later in this chapter.

Samuels also sought to educate the Jamaican and, by extension, Caribbean sporting community with her observations after the success of the Moscow 2013 IAAF World Championships that time and effort have gone into the building up of an athlete's reputation, therefore bringing with it a commercial value to be respected and protected.[247]

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242 Ibid.
243 (1973) 40 DLR (3d) 15.
244 (1977) 80 DLR (3d) 583.
245 Roxanne Miller, 'Time for Image Rights Statute' (DunnCox Attorneys-at-Law, Kingston, Jamaica, 2008).
246 Ibid.
247 Yana Samuels, 'Copyright warning: Intellectual Property Advocates Concerned about Abuse of Athletes' Image Rights' (*Jamaica Gleaner*, 20 August 2013).

It is worth mentioning that the court in *Bob Marley* also took the time to address the important question as to what it referred to as the survivability of the right of publicity. On this point, it cited the excellent summary of the law from the American case of *The State of Tennessee, ex rel. The Elvis Presley International Memorial Foundation v Gentry Crowell:*[248]

> In the Elvis Presley case also, the Court of Appeals of Tennessee concluded that recognizing that the right of publicity is descendible would accord with principle in that:
>
> 1 The Court recognizes that an individual's right of testamentary distribution is an essential right. If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death.
> 2 One of the basic principles of Anglo American jurisprudence is that "one may not reap where another has sown nor gather where another has strewn."
> 3 Recognizing that the right of publicity is descendible is consistent with a celebrity's expectation that he is creating a valuable capital asset that will benefit his heirs and assigns after his death.
> 4 Concluding that the right of publicity is descendible recognizes the value of the contract rights of persons who have acquired the right to use a celebrity's name and likeness. The value of this interest stems from its duration and its exclusivity. If a celebrity's name and likeness were to enter the public domain at death, the value of any existing contract made while the celebrity was alive would be greatly diminished.
> 5 Recognizing that the right of publicity can be descendible will further the public's interest in being free from deception with regard to the sponsorship, approval or certification of goods and services. Falsely claiming that a living celebrity endorses a product of service violates the law. It should likewise be discouraged after a celebrity has died.
> 6 Recognizing that the right of publicity can be descendible is consistent with policy against unfair competition through the use of deceptively similar corporate names.

The court in *Elvis Presley* was lucid in its determination that the right of publicity survived the celebrity, therefore allowing his or her heirs or assigns to continue to reap the benefits of the commercial value attached to that celebrity while he or she was alive. Clarke J grasped the opportunity to adopt the *Presley* considerations in the *Marley* case, concluding his decision with a succinct statement of the law:

> In my judgment, the commercial use of Bob Marley's name and likeness or image by the defendant without the plaintiff's consent constitutes an invasion or impairment of the plaintiff's exclusive right as aforesaid resulting in damage to the plaintiff. Such conduct on the defendant's part constitutes the tort of appropriation of personality, separate and distinct from the tort of passing off.[249]

Clarke J, therefore, not only held that the defendant's conduct constituted the tort of appropriation of personality, but he was clear in distinguishing this tort from that of passing off. Connelly, however, questions the precedential weight of *Marley*, noting that the failure of the defendant to appeal the case has meant that Clarke J's approach has not been authoritatively approved.[250] Notwithstanding this, however, *Marley* was successfully relied on in another non-sporting 2010 Jamaican case of *Messam v Morris and Williams*,[251] where, in the context of potentially

248 (1987) 733 section W 2d 89.
249 *The Robert Marley Foundation v Dino Michelle Ltd*, JM 1994 SC 30.
250 Dayle Connelly, 'IMAGE is nothing; SPORT is everything; does the law in Trinidad and Tobago adequately protect the image/personality rights of sportsmen?' (n 236) [3.8].
251 JM 2010 SC 28.

embarrassing personal photographs having been taken, a claim in negligence failed, but the tort of wrongful appropriation of personality was found to have been committed.

These developments strengthen the foundation upon which a future image right can be built, but it appears that, in the short term, reliance on the law of tort will continue to be the first port of call for famous athletes. Hylton and Goldson, who, incidentally, were counsel for the Robert Marley Foundation in the *Marley* case, expressed their own optimism when writing for the *Cambridge Law Journal*:

> The recognition of the new tort of appropriation of personality represents an important development in the common law of Jamaica and indeed, of the Commonwealth generally. It emphasises not only the resilience of the common law itself, but also the strength and willingness of the Jamaican judiciary to lead in the development of the law in the Commonwealth Caribbean when new circumstances and 'new conditions of society' justify either the application of recognised principles of law to new fact situations or the recognition of new rights.[252]

Sharing conclusions similar to his fellow regional commentators,[253] Nathu sums up the position in Trinidad and Tobago, noting the necessary jurisprudential interdependence between Commonwealth territories:

> The courts in Trinidad and Tobago have not addressed the issue of publicity rights, and thus practitioners must continue to look towards developments in the law in other jurisdictions to protect the interests of persons whose fame has been exploited for commercial purposes. Congratulatory messages for high-achieving sporting personalities frequently appear in the daily newspapers with photographs of the subject celebrities, accompanied by the logos of 'well wishing' companies, creating unofficial endorsements. The United Kingdom has implemented Data Protection and Human Rights Acts, which give greater protection to privacy, however such legislation remains lacking in this country. As noted earlier, the laws of other Commonwealth jurisdictions, particularly those of the United Kingdom, remain the most persuasive precedent to our courts.[254]

Since the time of Nathu's commentary, Trinidad and Tobago did, in fact, enact the 2011 Data Protection Act,[255] but, at the time of writing, that Act was still only partially proclaimed, and so has limited potential in bridging the gap left by the absence of *sui generis* image rights legislation, a step taken by the legislature in Guernsey.

### 4.10.5 A recommended model: Guernsey

> Guernsey has recognized the fact that there is a significant gulf between existing laws and business practice in this area ... It has therefore taken ground breaking steps to introduce the world's first registered image rights law ...[256]

It was a very encouraging development to see the courage of the legislature in Guernsey, a British Crown Dependency in the English Channel, which introduced specific image rights legislation at the end of 2012. The introduction of the *Image Rights (Bailiwick of Guernsey) Ordinance*

252 St Michael Hylton and Peter Goldson, 'The New Tort of Appropriation of Personality: Protecting Bob Marley's Face' (1996) 55(1) Cambridge Law Journal 56, 64.
253 Terry Miller, 'London 2012 – meeting the challenge of brand protection' (n 155).
254 Jason Nathu, 'Publicity Rights and Celebrity Endorsements in Trinidad and Tobago' (JD Sellier & Co, Attorneys-at-Law, 2010).
255 Similarly, at the time of writing, the 2017 Data Protection Bill of Jamaica was receiving Parliamentary consideration.
256 Elaine Gray, 'Image rights laws to be introduced in Guernsey' (Carey Olsen, 1 April 2012) www.careyolsen.com/briefings/image-rights-laws-to-be-introduced-in-guernsey.

*2012* was the culmination of an extensive consultation process among industry leaders in the fields of law and commerce. The enactment of the law brought some semblance of legal clarity in Guernsey as it allows athletes, sports teams and others to consider the centralization of the ownership of their image rights as well as other IP rights.[257] In this regard, the appeal of the law when it was initially proposed was the lucidity in the legislative framework being offered for image rights.

One of the obvious limitations of the law is that only image rights registered in the Bailiwick of Guernsey receives protection. Nevertheless, as Guernsey, over time, ratifies and accedes to various international treaties, the potential reach of the law will expand. A foreseeable consequence of its implementation in Guernsey is the modelling of similar legislation in other territories making more practical the entry into and enforcement of reciprocal image rights agreements.[258]

It was envisioned that the law would 'take its place alongside a host of other essential intellectual property rights offered by the island, ranging from copyright, trademarks and patents to databases, performers' rights and design rights'.[259] The effect and intent, then, was not for the statutory image right to replace any existing IP rights, but to complement them. It is submitted that this was a commendable step, which acknowledged the commercial realities of modern-day sports marketing. It is further suggested that this was also a necessary step given the rapid commercialization of sport and the expectation of its continued expansion.

#### *4.10.5.1 Practical application of the Guernsey law*

At the heart of the practical implementation of the Guernsey legislation was the creation of an Image Rights Register and the post of a Registrar of Image Rights. The opportunity provided was one that would enable an applicant to register their personality and the images associated with that personality.[260] It meant that the image rights created bore the legal classification of a property.[261] This was a significant innovation that afforded a clear and discernible proprietary right in one's image.

Functionally, the Guernsey regime mirrored trade mark law. A useful comparison was drawn by experts there who observed: 'where trademarks seek to recognise and protect the distinctiveness of a brand, image rights will do so for the distinctiveness and personality of an individual.'[262] Commendably, the law began to close the gap between today's sports business reality and the actual legal protection offered.

#### *4.10.5.2 Summary*

It has been suggested that the exercise of recognizing property or quasi-property rights in a sportsperson's persona is best left to the legislature.[263] This proposal, made in the context

257 'New "Image Rights" Legislation in Guernsey and What it Could Mean for Sportspeople Worldwide' (www.lawinsport.com, 21 June 2012).
258 Jason Romer and Brandon Doffing, 'Comparative Survey on Sports Image Rights: Guernsey' (2010) 1 Global Sports Law and Taxation Reports 23.
259 Elaine Gray, 'Image rights laws to be introduced in Guernsey' (n 256).
260 Ibid.
261 Ibid.
262 Jason Romer and Brandon Doffing, 'Comparative Survey on Sports Image Rights: Guernsey' (n 258) 19.
263 Nick Krause, 'Image rights question hangs over Rugby World Cup' (*stuff.co.nz*, 2 September 2010) quoting Rob Batty, 'The Challenges of Prior Use to New Zealand Registered Trade Mark Law' (2014) 45 (2) Victoria University of Wellington Law Review 257–292.

of New Zealand business law, appears to be a growing trend, mirroring the views in Indian, American and English legal circles. The absence of *sui generis* image rights legislation is being weighed, analysed and criticized in a growing number of forums. This bodes well for the future of sports celebrities in their attempt to commercially exploit the value of their image. Advocates for a stand-alone image right in the Commonwealth Caribbean have the support of the Guernsey model as cogent evidence that the international IP community was not and is not afraid to take bold steps in offering proper legal protection to its celebrities.

## 4.11 PROTECTING SPORTS BROADCASTING RIGHTS[264]

In seeking to answer the question, 'What are broadcasting rights?', Beloff QC was compelled to ask even more questions:

> Where a sporting event is televised, are the organisers automatically entitled to the television revenues? Where a match between popular clubs is televised, attracting a large audience, are those clubs entitled to share in the proceeds? The issue at the root of these questions is the extent to which the law recognises a "right" akin to a property right in a sporting event ... Essentially, the test for intervention by the court seems to be whether a third party is 'free-riding' on the plaintiff's efforts.[265]

This matter of 'free-riding' essentially forms the common thread connecting the discussion in this chapter about how sports rights can be protected. Blackshaw's standpoint emphasizes the inherent value of rights deriving from the broadcast of sports events:

> Of the sports marketing mix, which includes sports sponsorship, merchandising, endorsement of products and services, and corporate hospitality, perhaps the most important and lucrative one is the sale and exploitation of sports broadcasting rights around the world, which contribute mega sums to many sports and sports event, including the Summer and Winter Olympic Games and the FIFA World Cup ... the commercialisation of sports broadcasting rights may be considered as the 'oxygen of sport'.[266]

Many will agree that media rights represent the largest generator of income for sports rights holders globally. Lucrative sports properties such as the previously mentioned Olympic Games, FIFA World Cup and the IAAF World Championships, for instance, command large rights fees, which are fiercely negotiated and hotly pursued.

The digital age, within recent decades, has made access to sports properties attainable for stakeholders all over the world, with the consequence that any bidding process has a true international flavour. Broadcast rights are awarded geographically, allowing rights owners like the ICC and World Rugby[267] to earn significant sums. Both of these entities hosted their quadrennial World Cups in 2015, attaining worthwhile exposure for their respective sports. The fact that the same two countries, namely Australia and New Zealand, contested the final of both events would have enhanced the value of the live broadcast in both countries, especially as joint hosts of the former event. Notably, Australia and New Zealand also contested the final of

264 This section of the chapter is an updated version of a paper first published by J. Tyrone Marcus, 'Sports Broadcasting Rights in the Caribbean' (2016) 1 Global Sports Law and Taxation Reports 31.
265 Michael Beloff, Tim Kerr, Marie Demetriou and Rupert Beloff, Sports Law (n 129) [6.28], [6.30], 170–171.
266 Ian Blackshaw, *Sports Marketing Agreements: Legal, Fiscal and Practical Aspects* (Springer Science & Business Media, 2011) chapter 13.
267 Formerly the International Rugby Board.

the World Netball Championships in 2015, making it a unique, if not unprecedented, case of the same two countries contesting three major world finals in one year. The local benefit from a broadcast revenue point of view would have been outstanding.

From a broadcast perspective, Sky TV in New Zealand and Fox Sports Australia led the charge, on various channels, for the Cricket World Cup 2015 in the host nations. In the Caribbean, ESPN had the responsibility of bringing the 'Gentleman's Game' to the region that played host to this very event back in 2007. For the Rio 2016 Olympic Games, ESPN Caribbean was subcontracted by CANOC Broadcasting Inc. (CBI)[268] to bring that event to the Caribbean, while Digicel Sportsmax won the Caribbean media rights for the Tokyo 2020 Olympics.

### 4.11.1 Defining broadcast rights

> When a broadcaster spends millions of pounds buying the rights to broadcast a sporting event, what exactly is it buying?[269]

This question was answered in part by Laddie J in *BBC v Talksport*,[270] where he defined a sports broadcasting right as 'the right to broadcast on radio and television, live coverage of matches from within the stadia where they are taking place'.[271] Of course, since the time of Laddie J's ruling, the array of broadcasting platforms has mushroomed into a fascinating inventory of media channels ranging from mobile phones to fibre-optic cable. It is also a well-known proposition that English law does not recognize proprietary rights in a sports event per se, which necessarily includes broadcasting rights. Yet, as has been stated throughout this chapter, the combination of intellectual property law, contract law, media law and property law, for instance, offers event organizers some legal protection when they host major events. When one adds to the equation the idea of exclusivity, the question of rights protection often becomes a matter of legal controversy and even professional acrimony. Such an impasse landed on Caribbean shores during the 2015 IAAF World Championships.

### 4.11.2 The battle for exclusivity in Jamaica: *Television Jamaica Ltd v CVM Ltd*[272]

Jamaica's reputation for producing world-class athletes across various sports is indisputable. Many consider sprint legend and multiple Olympic gold medallist, Usain Bolt, to be arguably the best sprinter to have ever graced the human race. Sportsmen and sportswomen from Jamaica, the Bahamas, Grenada and Trinidad and Tobago all heard their national anthems being played at the London 2012 Olympics, reflecting the growth of Caribbean track and field. Some of those very countries repeated the feat at Rio 2016. In this light, the IAAF World Championships held every two years is, and continues to be, one of the most eagerly anticipated international meets outside of the Olympics. It is the showcase event for global track and field.

It was, therefore, not entirely surprising that the 2015 edition of the IAAF's marquee event from 22–30 August 2015 in Beijing, China, led to a legal battle between Jamaica's two main

268 CBI held the broadcast rights for the Caribbean for the Rio 2016 Olympics.
269 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) chapter 13: 'Broadcasting and New Media', 1769.
270 [2001] FSR 6 per Laddie J.
271 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) 1770.
272 *JM* 2015 *CA*.

free-to-air television stations. Television Jamaica Ltd (TVJ), as claimant, applied for injunctive relief against CVM Television Ltd (CVM) to prevent the latter from showing material from the 2015 World Championships. In a case argued in the Supreme Court of Judicature of Jamaica between 25–28 August 2015, TVJ's application was to safeguard it against a breach of copyright by CVM.

Pursuant to its contract with the IAAF, TVJ's rights included a 'Licence to exploit the materials of each event via the Designated Rights in whole or in part, live or delayed.'[273] Batts J considered that as between the litigants it was 'not contested that the claimant at great expense obtained copyright in the material used by the defendant'.[274] Nevertheless, TVJ's rights were granted 'subject to all applicable laws and regulations',[275] which included the Copyright Act of Jamaica.

In a decision reminiscent of that in *British Broadcasting Corporation v British Satellite Broadcasting*,[276] where the event being broadcast was the 1990 FIFA World Cup, Batts J held the view that the fair dealing or fair use exception applied in the *TVJ* case, as it did in the 1991 *BBC* ruling. On appeal, Brooks JA refused TVJ's application for an injunction.

When the question of appropriate remedies was ventilated before the Commercial Division of the Supreme Court of Jamaica in 2017,[277] the court reminded the parties of the value of attractive sports properties. Brooks JA noted:

> [56] ... It is well known that Jamaicans are absolutely fanatical about track and field especially the track portion. From Dr Cynthia Thompson, Jamaica's first female at an Olympic Games in 1948, to Miss Elaine Thompson in 2016, Jamaicans have followed the fortunes and misfortunes of our athletes. Any broadcaster in Jamaica who secures the exclusive licence for global track and field events has secured something of great value. Such a broadcaster can use that exclusive licence to attract sponsors and advertisers. The great selling point is the exclusivity. The broadcaster is able to breakdown the broadcast into seconds, milliseconds and nanoseconds – all in an effort to maximize earnings. The broadcaster is likely to attract the highest viewership for particular events such as the men's 100m in which Mr Usain Bolt is competing.
>
> [57] What this means is that the broadcaster in Jamaica who does not have the exclusive licence or any licence at all has to come up with a strategy to garner viewers if it intends to compete with the exclusive licence holder. CVM came up with the idea of Return to the Nest as a counter-programme. Counter-programme, in the broadcast world, refers to a competing event put on by the non-rights holder, covering the event which the rights holder is broadcasting. It is an attempt to provide an alternative to the rights holder's broadcast. If one were to pose this question: what are the odds of a viewer, who has equal access to CVM and TVJ, tuning in to CVM when the 100m finals for men and women are on with Mr Usain Bolt, Mrs Shelly-Ann Fraser Pryce and Miss Elaine Thompson all in the final? This is what a sponsor or an advertiser would ask. The answer to that question goes a far way in determining where the sponsor and advertiser places his advertising dollar.[278]

The court's appreciation of the commercial context of sports broadcasting and, notably, that of athletics in Jamaica, augurs well for the future of Commonwealth Caribbean Sports Law especially if judicial intervention into this arena becomes more consistent.

273 Judgment of Batts J [10].
274 Ibid.
275 Ibid [11].
276 [1991] 3 All ER 833.
277 *Television Jamaica Ltd v CVM Television Ltd* [2017] JMSC Comm 1.
278 Ibid [56]–[57].

## 4.12 OTHER VALUABLE SPORTS PROPERTIES IN THE CARIBBEAN

Beyond the popularity of global football and Olympic sport, the emergence of 20/20 or T/20 cricket has made the Indian Premier League (IPL) and the Caribbean Premier League (CPL) much sought after events, while the ever-popular Barclays Premier League (BPL) showcasing top flight football in England continues to have a strong following in the Caribbean. As a matter of fact, only within recent years was there another changing of the guard regarding broadcast coverage of the BPL with FLOW Sports, under the ownership of Cable & Wireless Communications Ltd, acquiring exclusive rights to the BPL across 32 Caribbean countries starting in the 2016/2017 season. The significance of this development, from a Caribbean perspective, is that the previous rights owners were Sportsmax, which is now owned by Digicel, the fierce rival of Cable & Wireless in the telecommunications market. For those familiar with the Caribbean region, these two entities have had a more than colourful competitive history both on and off the field of play.

Therefore, in what appears to be an inevitable progression, the number of players in the Caribbean sports broadcasting market has grown, as they all compete for the right to broadcast what the IOC refers to, within the Olympic framework, as 'high viewer interest events'. The principle of 'must see' events on a broader scale is enshrined in the UK context under the well-known 'listed events' legislation.

In the Caribbean, there has been debate over the usefulness of 'must carry' rules as different nations either amend or enact their respective broadcasting authority legislation. These 'must carry' rules, however, are not specific to sport. It may take the passage of a Sports Broadcasting Act, similar to that passed by the Congress of the United States in 1961, to introduce these concepts to the realm of Caribbean sports broadcasting. Interestingly, under the aforementioned US legislation, professional sports leagues were exempted from the scrutiny of competition law (anti-trust law in the United States) as far as broadcast rights were concerned.

Over 50 years later, Moran holds the following view: 'the Sports Broadcasting Act should be revisited and updated to reflect innovations in broadcasting technology and the effect they have had on sports broadcasts'.[279] This opinion surfaces against the following backdrop: 'when Congress passed the statutes, it could not have contemplated the invention of cable television and the thousands of channels that could broadcast every game'.[280] Of course, it must be borne in mind that cable television is now but one of a plethora of broadcast platforms upon which fans can consume the very best sports content.

### 4.12.1 A final word: *QC Leisure* and its relevance for the Commonwealth Caribbean

The ruling in the much-debated *QC Leisure*[281] case created ripples across the sports media rights industry. The decision raised thought-provoking legal questions concerning the use of foreign decoder cards, intellectual property rights, especially copyright, and the licensing of sports broadcasting rights on a territorial basis. Lewis and Taylor's summary of the main issues is useful:

> The ability of sports rights holders effectively to prevent infringement of exclusive broadcast licences based on national territories was challenged, amongst other things on competition law

279 Thomas Moran, 'The Sports Broadcasting Act: Is an Update Needed?' (2013) Law School Student Scholarship 1.
280 Ibid.
281 *Murphy v Media Protection Services and FAPL v QC Leisure* [2012] All ER (EC) 629.

> grounds, in the *Murphy v Media Protection Services and FAPL v QC Leisure* litigation involving the issue of foreign decoder cards to watch in England Premier League matches broadcast abroad. On references heard together the Court of Justice held amongst other things that national legislation making it illegal to import, sell or use foreign decoder cards infringed the freedom to provide services protected in Art 56 TFEU without justification and that prohibition in an exclusive licence agreement on the licensee supplying decoder cards for use outside their territory restricted cross-border competition contrary to Art 101 TFEU. The preliminary rulings were then implemented by the domestic courts.[282]

While *QC Leisure* has helped to chart the future course of media rights in the European sports industry, its relevance to the Caribbean landscape is not yet visible, although the cross-border scenario in Europe can easily be replicated in the Caribbean. Certainly, the similarities in the multi-nation composition of both geographical regions suggest that the evolution of the legal analysis attached to broadcasting rights in the European Union may very well have precedential value for the Caribbean.

As this region continues to host more and more events like the 2017 Commonwealth Youth Games (CYG)[283] and the 2018 ICC Women's T/20 World Cup, and as it harbours ambitions for future events like the 2021 edition of the CYG,[284] one can expect the broadcast rights framework to expand accordingly. There is nothing to suggest that Caribbean stakeholders will not be ready to rise to the occasion, if and when these exciting future possibilities present themselves.

## CONCLUSION

Writing from an American perspective, Walter Champion summed up IP law as follows:

> Intellectual property law encompasses ideas and subjects such as patents, trademarks, copyrights, trade secrets, trade dress as well as other subjects that relate to topics such as publicity rights misappropriation, false advertising and unfair competition.[285]

His synopsis succinctly captures the breadth of IP law in general, including within the sports sector.

With the never-ending cycle of regional and global sports events becoming more and more accessible to sports fans, the likely, if not inescapable, consequence is a fascinating and dynamic evolution of sports-related IP law. Such a projection is not expected to bypass the shores of Commonwealth Caribbean countries making the future of IP in sport a bright one for the region.

282 Adam Lewis and Jonathan Taylor, *Sport: Law and Practice* (n 64) 952, [D 2.165].
283 This event was held in the Bahamas from 19–23 July 2017.
284 'Trinidad and Tobago Consider Bid for 2021 Commonwealth Youth Games' (*Inside The Games*, 23 June 2018) www.insidethegames.biz/articles/1066616/trinidad-and-tobago-consider-bid-for-2021-commonwealth-youth-games.
285 Walter Champion (Jr), *Sports Law in a Nutshell* (West Academic Publishing, 2017) 529.

# CHAPTER 5

# CIVIL LIABILITY IN SPORTS

## 5.1 INTRODUCTION

Every year, thousands of sportsmen and women are injured as a result of intentional, reckless or careless conduct on the part of players, coaches, match officials, professional bodies and, indeed, clubs. Notwithstanding the reality of broken hips, displaced knees, injured feet and lacerated skin, in the vast majority of cases, litigation does not ensue, as internal disciplinary procedures, insurance and settlements are deemed to offer a more attractive solution than public, lengthy and often adversarial court proceedings.

However, there remains a small, but growing, category of cases in which the courts offer a more attractive solution to the plight of injured sportspeople. These cases, though not straightforward, often involve conduct that is reckless or intentional or inconsistent with the duty of care in negligence, and typically result in several days of argument before the courts, a wide gamut of video and audio evidence, a plethora of witnesses testifying and, if successful, significant awards in damages.

The prospect of civil liability not only has the effect of reminding sportspeople of the need to exercise reasonable care even in the context of fast-moving games in relation to which split-second decisions must be made, but allows keen observers of sport, such as academics, the opportunity to problematize the conduct of sportsmen and women through the prism of the civil law. This problematization involves asking a number of key questions: should Brett Lee have been subject to civil liability after he floored Shivnarine Chanderpaul by bowling what was at the time regarded as a seriously dangerous bouncer in the context of the 2008 Test match between Australia and the West Indies? Should Chris Gayle have been sued in negligence where he broke a child's nose after he hit a six in the stands in the context of the 2012 edition of the Indian Premier League? Should the Jamaican football defender, Oniel Fisher, have been brought before the courts where he executed a dangerous two-footed tackle on Connor Hallisey in the 2016 edition of the Major League Soccer?

Although there is no clear answer to these questions as these matters never resulted in litigation, they nonetheless raise the important issue as to what role, if any, the law should play in regulating the conduct of sportspeople who cause injury to others. It is against this backdrop that this chapter has been conceptualized.

While this chapter does not attempt to provide exact answers to the many vexing questions that arise in this area, it nonetheless explores the liability of sportspeople in the torts of trespass to the person and negligence, respectively. The chapter usefully considers important jurisprudential developments on the liability of players, coaches, match officials, professional bodies and clubs, and explores the application of various defences in the sporting context. The chapter also considers in some detail the question of damages as an appropriate remedy in the vast majority of sporting cases where liability has been found to exist.

## 5.2 ASSAULT AND BATTERY

At common law, 'assault' is distinguishable from 'battery', although the line between the two is often blurred in practice, so that both are typically referred to simply as 'assault'. In the sporting context, this does not appear to matter very much because, in most cases, both assault and

battery are committed in rapid succession. If a battery occurs, the assault tends to be ignored since the quantum of damages for it will be rather small. An assault can be committed without a battery and battery can occur without an assault preceding it. For example, swinging at someone and missing is an assault but not a battery; striking someone from behind, without his or her knowledge, is a battery but not an assault.[1]

As a matter of law, an 'assault' may be defined as an act by which one person intentionally or recklessly causes another person to apprehend immediate unlawful personal violence or to sustain unlawful personal violence while a 'battery' may be defined as the intentional or reckless application of unlawful force by one person to another.

### 5.2.1 General principles

In sporting cases, in order to obtain an award of damages, an aggrieved player seeking to invoke the tort of assault/battery must establish that a defendant player intentionally or recklessly subjected him to a contact to which he did not consent. However, it must be noted that although intentional or reckless contact is a necessary ingredient, no 'hostile intent', in the sense of malice or ill-will, is required. In other words, there is no need for the aggrieved player to prove that the defendant player intended to cause him injury, whether physical or psychological. What he must prove, however, is that the defendant player intended the conduct, though not that he intended any harm by it.

The protection of the inviolability of the body through the tort of assault/battery is not at all a new paradigm, even in the context of sports, given that, as far back as the 1980s, the Court of Appeal in *Wilson v Pringle*[2] had already expressed the view that the protection of a person's bodily inviolability is a paramount concern of tort law. In this regard, the court explained that even the slightest contact with another person can amount to a battery, unless the contact in question is impliedly or expressly consented to, bearing in mind the exigencies of everyday life.

### 5.2.2 Sports-based case law

Although cases on assault/battery in the sporting context are relatively rare in practice, presumably because it is more difficult to establish intentional contact than negligent contact,[3] courts have repeatedly reiterated in the few cases decided upon to date that players do not consent to deliberate unilateral attacks on the field of play. For example, in *Gravil v Carroll, Redruth Rugby Football Club*,[4] the defendant player was found to have committed an unlawful battery, thereby rendering the Redruth Rugby Football Club vicariously liable in damages, in circumstances where the player in question, after the whistle had already been blown, threw a punch at the claimant resulting in the claimant sustaining a blow-out fracture of the right orbit, which required reconstructive orbital surgery. On the facts, the court considered that, notwithstanding the fact that the blow was thrown in the context of a highly competitive game following a scrum and an ensuing altercation, it was clear that the defendant had deliberately assaulted the claimant, an assault that the court described as 'a tortious (even criminal) assault'.

Similarly, in the Canadian case of *Leonard v Dunn*,[5] a player, within the context of a recreational hockey game, punched another player during the stoppage of play. The court, in finding

1 *L (H) v Canada (Attorney General)*, 2001 SKLaw Com 233 (CanLII).
2 [1987] QB 237.
3 Tim Kevan, 'Sports personal injury' (2005) 5(3) International Sports Law Review 61.
4 [2008] EWCA Civ 689, 2008 WL 2311367.
5 2006 CanLII 33419 (ON SC).

that the defendant committed an actionable battery, concluded that this behaviour fell outside the scope of implied consent, as it was an 'unprovoked battery unrelated to the advancement of the game'[6] or 'a deliberate unilateral attack'.[7] In this connection, Low J was particularly emphatic in finding that, having regard to the undisputed facts, this unprovoked battery could not be regarded as 'an element of the reasonable expectations of an adult recreational hockey player playing in a non-contact league'.[8]

A similar outcome was arrived at in another Canadian case – *Martin v Daigle*[9] – in which the court found that the defendant player had committed an actionable battery in circumstances where he struck the claimant, a fellow player, with his fist, thereby breaking one of the claimant's front teeth, and in the process also causing cuts, bruises and swelling to his lips and face. The court explained that assault and battery are actionable per se (that is, without proof of actual damage), though it cautioned that in cases where no actual damage is proved, only nominal damages are recoverable. On the facts, the court concluded that the defendant player had intended to cause bodily harm to the claimant and did cause such harm, which constituted an actionable battery, thereby entitling the claimant to recover substantial general damages for the physical injury sustained.

### 5.2.3 The defence of consent

While the defence of self-defence is available, as a matter of principle, to exonerate a player from liability for an actionable battery where he inflicts reasonable force in order to defend his person, by far the defence that it is most relied upon in the sporting context is that of consent. The defence of consent recognizes that it is not in every circumstance where a player is on the receiving end of some physical contact on the field of play that he will be able to successfully recover damages for battery. As intimated above, the defence of consent inures to exonerate a player who makes physical contact with another player, but in circumstances where the player's conduct falls within the rules of the game and does not represent a deliberate, intentional, or unprovoked attack. For example, in *Blake v Galloway*,[10] the defendant, a 15-year-old, was able to successfully rely on the defence of consent against a claim in battery brought by the claimant, also 15 years old, who alleged that the defendant had intentionally or recklessly thrown a piece of bark at him thereby resulting in significant injury to his right eye. The circumstances of the case were that during a lunchtime period, after practising with a jazz quintet, the claimant and defendant decided to take a break to engage in horseplay, whereby they threw twigs and pieces of bark chipping at each other, which untimely caused the claimant's injury. Dyson LJ held that as the youths were engaged in high-spirited and good-natured horseplay, there could be no actionable battery. More specifically, he found that the defendant had picked up the bark, and had thrown it back in the general direction of the claimant, not aiming at his head, and, although he did not shout any warning at the claimant who was not looking in his direction, the defence of consent was nonetheless still applicable. In reaffirming Lord Denning's view in *Lane v Holloway*,[11] Dyson LJ considered that in a sport that inevitably involves the risk of some physical contact, the participants are taken to have impliedly consented to those contacts that can reasonably be expected to occur in the course of the game, and assume the risk of injury from such contacts. Thus, for example, he noted, in the context of a fight with fists, ordinarily,

6 Ibid [19].
7 Ibid [23].
8 Ibid [19].
9 1969 CanLII 161 (NB CA).
10 [2004] EWCA Civ 814, [2004] 1 WLR 2844.
11 [1968] 1 Law Com 379, 386–387.

neither party has a cause of action for any injury suffered during the fight, though he cautioned that they do not assume 'the risk of a savage blow out of all proportion to the occasion'.[12] On the facts, given that the object was thrown in the general direction of the claimant, without negligence and without intent to cause injury, and, in light of the fact that it was thrown in accordance with the tacit understandings and conventions of the game, the claimant was taken to have consented to the harm caused.[13]

Similarly, in the Canadian case of *Scott v Patenaude*,[14] the claimant suffered significant facial injuries after his face came into contact with the defendant's shoe during the course of a rugby game. The circumstances of the case were that, in the context of a scrum, the claimant grabbed the defendant's leg, which necessitated the defendant attempting to free his leg by stepping forward with his free leg and rocking in somewhat of a back and forth motion before hollering at the claimant to let go of his leg. On the facts, the court considered that although it was unfortunate that the claimant had suffered serious injuries, the defendant was not liable for the alleged battery because his conduct was in the heat of the game, and was accordingly instinctive and unpremeditated. In finding that the defendant's conduct should not be 'judged by standards suited to polite social intercourse', the court noted that 'there is a degree of immunity conferred by the law upon participants in a lawful sport', evidenced by the general principle that it would be unreasonable to hold sports participants to the same standard expected of members of society in ordinary situations. While accepting that this immunity is not unlimited, and could accordingly be waived where a player purposely stomped on another player's face with his cleated foot, the defendant's conduct in this case was purely accidental and was a result of the unfortunate, albeit inevitable, consequence of the rough and tumble of the game of rugby. In short, while it was the defendant's foot that caused the injuries to the claimant's face, the evidence fell short of establishing that the act was intentional; rather, it was more likely than not that the injury occurred accidentally while the defendant was attempting to extricate his foot from the claimant's grasp, using a rocking/tugging type of action consistent with an individual attempting to free a foot from an obstruction.

When determining the scope of the defence of consent, there appears to be a blurring of the demarcation between civil and criminal liability, at least in the Canadian jurisprudence. In *Leighton v Best*,[15] for example, the court relied upon a criminal case, namely *R v Cey*,[16] to identify several factors that should guide civil courts in their determination of the scope of the defence of implied consent. First, courts must have regard to objective criteria, such as the nature of the act in question, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm. Second, Courts must also have regard to the conditions under which the game at issue is played, including the requisite setting, league, and the age of the participants, among other things; third, Courts must also bear in mind the fact that implied consent is limited both 'qualitatively and quantitatively',[17] so that it is imperative to determine, on a global assessment, whether the conduct complained of exceeds the scope of the prevailing implied consent, having regard to all of the circumstances of the case. Finally, courts must also bear in mind the fact that, in sporting events, the mere fact that a type of assault occurs with some frequency does not necessarily mean that it is not of such severe a nature that consent thereto is precluded.

12 Ibid [21].
13 Bruce Gardiner, 'Liability for sporting injuries' (2008) Journal of Personal Injury Law 16.
14 2009 SKLaw Com 181 (CanLII).
15 2009 CanLII 25972 (ON SC).
16 (1989) 48 CCC (3rd) 480 (Sask CA).
17 Ibid [9].

In *Leighton v Best*, the claimant's stick came up and struck the defendant in his face within the context of a men's hockey tournament. Thereafter, the two players jostled and the defendant eventually landed a punch which fractured the claimant's jaw. The claimant accordingly sued for damages on account of the alleged battery. On the facts, the court noted that two questionable acts were in issue – the claimant's striking of the defendant with his stick and the defendant responding by punching the claimant in his face. In relation to the former, the court found that the evidence did not establish that the claimant had intentionally hit the defendant with the stick, since this conduct was part of the inherent risk of participating in hockey, which the defendant had impliedly consented to. By contrast, the claimant was able to prove that, in punching him with his fist, the defendant's actions had exceeded the scope of the implied consent provided. Of special note, in this context, was the fact that the claimant did not remove his helmet during the tussle, which the court interpreted as indicating an unwillingness to expose his face to injury and thus negating implied consent to the possibility of facial injury, whereas the defendant removed the claimant's helmet in order to land a punch of such force as to demonstrate an intention to injure the claimant or at least recklessness as to the consequences of such a hard blow. In short, the defendant's conduct was unusual and beyond the scope of the ordinary standards applicable in men's hockey, and liability accordingly attached to such conduct because of the disproportionate nature of his retaliation in circumstances where no injury to the claimant's face or mouth was expected or consented to. Although the court did not think that the claimant's injury and attendant distress rose to a level that warranted an award of aggravated damages, it nonetheless awarded compensatory damages for the harm sustained.

## 5.3 NEGLIGENCE

Like assault and battery, the law of negligence aims to protect the bodily integrity of all persons to whom a duty of care is owed in the sporting context. Liability in negligence in the sporting context is not automatic, however. In order to prove negligence on a balance of probabilities, whether it be on the part of players, coaches, referees, professional bodies or clubs, it must first be established that a duty of care was owed; second, that that duty was breached; and, third, that damage was caused by that breach of duty. As will be demonstrated in the discussions below, a duty of care has traditionally been owed by players, referees and coaches, but in respect of professional bodies and clubs where, increasingly, novel issues surrounding their liability in negligence continue to arise, a duty of care is determined 'incrementally and by analogy'.[18] This means that, in respect of these novel categories of persons, a duty of care, according to *Caparo Industries v Dickman*,[19] will only be found to exist where the court is satisfied that that the harm caused was reasonably foreseeable; that there is a relationship of proximity between the parties; and that it is fair, just and reasonable to impose a duty of care, having regard to all the circumstances of the case in question.

### 5.3.1 The liability of players

The law of tort imposes a duty of care on players who choose to engage in sporting activities. This duty of care requires that players take reasonable care not to injure their neighbours, who may either be on the field (another player) or off the field (a spectator).

18 *Sutherland Shire Council v Heyman* [1985] 50 ALR 1 [481].
19 [1990] UKHL 2.

### *5.3.1.1 Players' liability in negligence to other players*

In *Elliot v Saunders and Liverpool FC*,[20] Drake J opined:

> I have no doubt that there is a lot of popular support for the view that the law should be kept away from sport. Amateur sport is primarily for the enjoyment of those taking part, professional sport, primarily for the entertainment of spectators. But in both cases there is some natural feeling of repugnance when what happens during a sporting event is made the subject of legal proceedings. I understand and sympathise with that view and I would certainly not encourage law suits arising from any sporting activities unless there are very good grounds to justify them. But it does not take much reflection to show that it would be wholly wrong to deny an injured party the right to claim compensation in the Courts if there is no other way in which he, or she, can obtain it ... Compulsory insurance might seem an attractive alternative, but the trouble there is that the insurance company who has to meet the injured party's claim, would be likely to want to sue the player who caused the injury in order to recover the compensation they had paid out, so the dispute would still end up in the law Courts.[21]

The essence of Drake J's well-articulated sentiments is that although it is, in most cases, undesirable for the law to intervene in sporting disputes, there are legitimate cases, for example where injury is sustained as a result of the negligence of another player, where public policy demands the law's intervention. The law intervenes because it recognizes that a player owes a duty of care to another player and, accordingly, where that player fails to exercise reasonable care and skill, having regard to the circumstances of the case, liability should ensue.[22]

One of the earliest applications of this principle can be seen in the 1985 case of *Condon v Basi*.[23] Here, during the course of a football match, the claimant, upon realizing that he was about to be challenged for the ball, pushed the ball away, but was subject to a late sliding challenge by an opposing player from a distance of about three to four yards. The court, in making an award of damages to the claimant who had sustained a broken right leg, found that the defendant had been negligent by lunging with his boot studs showing about a foot to 9 inches from the ground.

While it is incontrovertible that the defendant player in *Condon* owed a duty of care, and that duty was breached, for over 30 years, post-*Condon*, courts have struggled to reconcile the statement of principle in *Condon* that the appropriate standard of care is one of 'reckless disregard' and the traditional view that negligence is only concerned with careless conduct. In *Condon*, Sir John Donaldson MR, relying on the Australian case of *Rootes v Shelton*,[24] noted that the defendant 'was clearly guilty, as I find on the facts, of serious and dangerous foul play which showed a *reckless disregard of the plaintiff's safety* and which fell far below the standards which might reasonably be expected in anyone pursuing the game'.[25]

This notion of 'reckless disregard', though not traditionally associated with the law of negligence, appears to import a very high threshold for the finding of liability in negligence where injury is sustained by one player at the hands of another player. Unfortunately, however,

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20 (1994) (unreported) (Law Com D) NLJ 144.
21 Ibid 2.
22 Mark James, 'Liability for Professional Athletes' Injuries: a comparative analysis of where the risk lies' [2006] 1 Web Journal of Current Legal Issues 1.
23 [1985] 1 WLR 866.
24 (1968) ALR 33.
25 Cf. Peter Charlish, 'A reckless approach to negligence' (2004) Journal of Personal Injury Law 291. Charlish asks, 'Why the court would choose to accept a decision arising from a non-contact sport such as waterskiing, (particularly in the face of more convincing arguments from other jurisdictions), and apply it to an injury received in association football is a matter of some conjecture.'

this higher threshold is problematic from a jurisprudential perspective, in that it flies in the face of well-established principles of negligence, which simply require that the defendant's conduct fall below the standard of care and skill reasonably expected of that person, having regard to all the circumstances of the case. The notion of 'reckless disregard' has also created confusion for judges in subsequent cases, such as in *Elliot v Saunders and Liverpool FC*. In that case, during a football match, the claimant had leapt towards the ball with his right leg forward and his left leg behind, jumping towards the ball with both feet off the ground in what might be termed a 'scissors action', while the defendant, having seen this, responded by himself jumping towards the ball with both feet off the ground. The defendant, in so doing, collided with the claimant, causing him serious personal injuries, which brought the claimant's football-playing career to an abrupt end. The court, though sympathetic to the claimant's plight, ultimately rejected his claim, finding that,

> the [Claimant] has failed to prove, either that there was any *intent* by the Defendant to jump on or at him, rather than at the ball ... I find that [the Defendant] was not guilty of dangerous or *reckless* play and that the [Claimant] has failed to prove that the Defendant was in breach of the duty of care that he owed to the [Claimant] in all the circumstances of this case.[26] (Emphasis added).

Although the court's ultimate decision that the defendant was not liable in negligence appears to have been supported by the evidence, the problematic feature of this case lies in the court's importation of various conflicting terminologies on the question of the standard of care. On the one hand, the court appeared to suggest that proof of 'intent' on the part of the player was necessary, effectively importing a criminal law concept alien to the law of negligence, while on the other hand, also suggesting that the claimant had been unable to prove 'dangerous or reckless play', terminology that sets a very high threshold for establishing liability in negligence. Yet, still, the court cited with approval the statement in *Condon v Basi* that 'there is a general standard of care that you are under a duty to take all reasonable care taking account of the circumstances in which you are placed',[27] which is more akin to the traditional standard of care known to the law of negligence. This ambiguity between 'intent', 'reckless disregard' and 'reasonable care' is particularly problematic as it confuses litigants as to the appropriate standard of care, and creates tremendous latitude for argumentation, if not perplexity, among judges.

Thankfully, however, the vast majority of cases following *Condon* and *Elliott* seem to reaffirm the traditional view that ordinary principles of negligence apply in cases where sporting injury is sustained, so that a claimant does not have to prove that a defendant acted with 'reckless disregard' for his safety. For example, in *McCord v Swansea City Football Club, Mr J Cornforth*,[28] where the claimant suffered a career-ending injury to his right leg after he was hit by the second defendant whose right foot struck his right calf when pursuing a loose ball in the context of a football match, the court held that,

> there is a duty to take such care towards one's neighbour as is reasonable in all the circumstances could fit the relationships of player and spectator and player and player in every sport ... I do not believe that it assists for me to label the actions as reckless, rash, or whatever other term one may choose.[29]

Although the court ultimately found that the manoeuvre attempted by the second defendant when he slid towards the claimant with his leg extended and his studs presented was a

26 *Elliott v Saunders* QBD [1994] 13.
27 Ibid 4.
28 *The Times,* 11 February 1997.
29 Ibid 9.

'dangerous one' and a 'misjudgment which carried a real risk of serious injury',[30] it nonetheless put to rest the view emanating from *Wooldrige v Sumner*[31] and *Condon* that the claimant has to prove 'reckless disregard' in order to establish a defendant's liability in negligence:

> The submission is that the observations of Lord Donaldson were *obiter*, as strictly they were, and that there is no reason in logic why a different standard should apply as between player and player from that which obtains between player and spectator. Though neighbourhood is not to be seen as a series of concentric circles, the duty to a fellow player in the game of football must accommodate a closer inter-dependence and one quite different to that which obtains between a player and a spectator.
>
> In my opinion, Lord Justice Diplock's analysis is more illustrative of the reaction of the reasonable man than definitional, for all that aphorism should not be confused with exegesis. In my opinion, no one definition beyond the undoubted proposition that *there is a duty to take such care towards one's neighbour as is reasonable in all the circumstances could fit the relationships of player and spectator and player and player in every sport.*[32] (Emphasis added).

Similarly, in *Pitcher v Huddersfield Town Football Club Ltd*,[33] where the claimant's right knee was injured as a result of a collision between himself and the defendant who, while going after the ball, had lunged at the claimant with his left leg and thereby struck the claimant's right leg, the court held that,

> [the] test is *whether the Claimant established on the balance of probabilities that in all the circumstances the Defendant's conduct fell below the reasonable standards of care and skill to be expected of professional footballers* (...) the Claimant does not have to prove recklessness or intention; he has to prove negligence.[34] (Emphasis added).

On the facts, the court found that the defendant's conduct amounted to a mere error of judgment, which could not give rise to liability. The evidence was that the defendant had been going for the ball when he launched his tackle, and, although using his left foot to pursue the challenge was a mistake, the challenge occurred in the heat of the moment and was thus a mistimed tackle that was not actionable in negligence.

Perhaps the most authoritative confirmation that ordinary principles of negligence apply in the sporting context, rather than the inflated notion of 'reckless disregard', can be found in the Court of Appeal decision of *Caldwell v Maguire*,[35] in which the court rejected a claim by a professional jockey that the defendant, a fellow jockey, was liable in negligence for injuries sustained by the claimant in circumstances where the defendant had executed manoeuvres in the context of a fast-moving race which were contrary to the rules of the Jockey Club, but which nonetheless amounted to a mere lapse of skill or judgment. On the question of the applicable standard of care, the court explained that,

> the duty was to exercise such degree of care as was appropriate in all the circumstances ... The [lower Court] judge did not say that a Claimant has to establish recklessness. That approach was specifically rejected by this Court in Smoldon. As in Smoldon, there will be no liability for errors of judgment, oversights or lapses of which any participant might be guilty in the context of a fast-moving contest. Something more serious is required. I do not think it is helpful to say

30 Ibid.
31 *Wooldrige v Sumner* [1963] 2 Law Com 43.
32 Ibid 4.
33 [2001] All ER (D) 223.
34 Ibid 18.
35 [2001] EWCA Civ 1054.

> any more than this in setting the standard of care to be expected in cases of this kind ... In such circumstances it is not possible to characterize momentary carelessness as negligence.[36]

In short, although the court was not prepared to definitively pronounce on what the appropriate threshold for liability in negligence is in respect of players who cause injuries to other players on the field of play, it was certain in its articulation that ordinary principles of negligence apply, rather than the standard of 'reckless disregard'. Although this confirmation is somewhat comforting to some scholars, there still remains some unease among other scholars whose view is that the court needed to be more precise in its articulation of the standard of care and that, in any event, the subsequent case of *Blake v Galloway*[37] does little to help eliminate the state of flux that characterizes this important area of law. In *Blake*, there appeared to have been some confusion over the appropriate standard of care in circumstances where a 15-year-old, in the context of horseplay, had suffered serious damage to one of his eyes as a result of a piece of bark chipping thrown by the defendant hitting him. In finding that the defendant was not liable in negligence since the offending blow was caused by a piece of bark which was thrown in accordance with the tacit understandings or conventions of the game, the court commented:

> I would prefer the approach of Kitto J [in *Rootes v Shelton* [1967] HCA 39]; *you are under a duty to take all reasonable care taking account of the circumstances in which you are placed*, which, in a game of football, are quite different from those which affect you when you are going for a walk in the countryside.[38] (Emphasis added).

However, it then proceeded to muddy the jurisprudential waters by stating:

> I would, therefore, apply the guidance given by Diplock LJ in *Wooldridge v Sumner* [1963] 2 QB 43, although in a slightly expanded form, and hold that in a case such as the present there is a breach of the duty of care owed by participant A to participant B only where A's conduct amounts to *recklessness* or a very high degree of carelessness.[39]
>
> ...
>
> broadly speaking, the victims of such accidents will usually not be able to recover damages unless they can show that the injury has been caused by a failure to take care which amounts to *recklessness* or a very high degree of carelessness, or that it was caused deliberately (i.e. with *intent* to cause harm).[40]
>
> ...
>
> [the bark] was thrown in the general direction of the Claimant, with no *intention* of causing harm.[41]

A careful reading of these passages indicates some degree of discomfort on the part of their lordships on the question of the appropriate standard of care, which is both a disappointing and confusing outcome in light of the earlier Court of Appeal judgment in *Caldwell*, which appeared to set the record straight. The essence of the uncertainty lies in the fact that the standard of care appears, at least in *Blake*, to have shifted goal posts between ordinary negligence, recklessness and intention.

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36 Ibid [20], [28].
37 [2004] EWCA Civ 814.
38 Ibid 5.
39 Ibid [16].
40 Ibid [25].
41 Ibid [14].

Notwithstanding this muddle, however, it is now widely accepted that the Court of Appeal's approach in *Caldwell* is determinative of the standard of care in negligence. This effectively means that the standard of care is whether the defendant exercised reasonable care and skill, having regard to all the circumstances of the case. That said, it is likely that reckless conduct does have a place in this area of law, at least evidentially. In other words, it is arguably much easier for a claimant to establish liability in negligence, at least evidentially, if the defendant's conduct is dangerous and reckless than if it is simply an error of judgement or lapse of skill, even where such error or lapse goes contrary to the rules of the game. This is not to say, however, that the standard of care is recklessness but, rather, reckless conduct could provide more cogent evidence of a breach of duty than conduct of a lesser degree of intensity.

### *5.3.1.2 The 'playing culture'*

Despite the confusion highlighted above, at least one very important point has been agreed upon by courts deciding upon sports-related injuries over the last 30 years: the rules of the game and the 'playing culture' are of some relevance in the determination of liability.[42] This view was expressed first in *Condon v Basi*, where the court explained that, 'non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances'.[43] Similarly, in *Elliot*, the court again reiterated that, 'Whether or not a player has committed an offence under the laws of association football, is by no means conclusive on the issue of liability in a civil claim for damages. It is simply one of the circumstances to be taken into consideration.'[44] Against this backdrop, the court in *Pitcher* found that the tackle in issue was of a kind that, although against the rules of the game, occurred 'up and down the country every Saturday of the football season in Division One matches',[45] thereby exempting the defendant from liability. Similarly, in *Caldwell*, the court considered that the Jockey Club's rules and its findings that the defendant had acted contrary to these rules were relevant matters to be taken into account, but the finding that the defendant was guilty of careless riding was not determinative of negligence. In that case, the court noted that 'there is a difference between response by the regulatory authority and response by the courts in the shape of a finding of legal liability'.[46] Finally, in *Blake*, the court considered it determinative that the offending blow was caused by a piece of bark which was 'thrown in accordance with the tacit understandings or conventions of the game in which the claimant participated'.[47] It then explained that

> if the Defendant in the present case had departed from the tacit understandings or conventions of the play and, for example, had thrown a stone at the Claimant, or deliberately aimed the piece of bark at the Claimant's head, then there might have been a breach of the duty of care.[48]

In short, then, it is submitted that even where the rules of the game are not complied with by a defendant who, by his action, causes injury to another player, this, by itself, is not

42 Steve Greenfield, K Karstens, Guy Osborn and J.P Rossouw, 'Reconceptualising the standard of care in sport: The case of youth rugby in England and South Africa' (2015) 18 (6) Potchefstroom Electronic Law Journal 2184.
43 *Condon* (n 23) 868.
44 *Elliott v Saunders* (n 26) 6.
45 *Pitcher v Huddersfield* (n 33) 24.
46 *Caldwell* (n 35) [28].
47 *Blake* (n 37) 14.
48 Ibid.

determinative of liability, as the court will consider all the circumstances of the case, including the 'playing culture' (that is, conventions or customs of the sport) and whether the conduct could properly be said to amount to a mere error of judgement.

### *5.3.1.3 Errors of judgment*

Courts, over the last 30 years, have repeatedly indicated that it would take more than mere errors of judgment, oversights or lapses of skill for there to be liability in negligence on the part of a defendant whose conduct causes harm to another player.[49] By way of example, in *Caldwell*, the court considered as instructive the fact that the incident occurred in the last part of a close race, and although the defendant had failed to check to see that the line they were taking was safe, this failure could not be characterized as anything more than an error of judgment, an oversight or a lapse of which any participant might be guilty in the context of a race of this kind, but which fell short of the threshold for liability in negligence. Similarly, in *Pitcher*, the court was not prepared to find that the tackle in issue was anything more than an error of judgment, holding that there could not be said to be actionable negligence even where the defendant failed 'to pull up, change direction or change his mind and bring his foot down in 0.2 of a second'.[50] It then went on to explain that this 'was an error of judgment in the context of a fast-moving game where [the defendant] had to react to events in a matter of split seconds'[51] and that 'whatever their training and their skills, First Division footballers are far from infallible'.[52] In a similar vein, the court in *Blake v Galloway* held that, 'an error of judgment or lapse of skill [was] not sufficient to amount to a failure to take reasonable care in the circumstances of horseplay such as that in which these youths were engaged'.[53]

Notwithstanding the seemingly blanket statements in the foregoing cases, however, the court in *Elliott v Saunders* appears to have left the door ajar, entertaining the possibility of liability for at least some errors of judgment, when it noted that, 'an error of judgment, may be enough to give rise to liability on the part of a Defendant, *but whether or not it does so, depends on the facts and circumstances of each individual case*'[54] (emphasis added). Although there has been no reported case in the Commonwealth Caribbean where a player has successfully sued another player for negligently inflicted injury, it would appear that the same principles described above would apply in the regional context. The law's lax approach to liability for errors of judgement and lapses of skill might explain why, particularly in the TT Pro League and the Jamaica Red Stripe Premier League, there has been a dearth of litigation, notwithstanding the fact that injuries have been inflicted on players. For example, although Joe Public's defender, Carlyle Mitchell, had to be hospitalized on account of having suffered serious injuries to his face after a collision with Ma Pau SC forward, Trevin Caesar, there was not even as much as the talk of litigation. In fact, Mitchell's then public general manager, Sam Phillip, appeared to be more concerned with the player's well-being than the prospect of litigation, merely commenting to the press that 'the doctors are waiting until the swelling goes down to further assess the injuries ... until then, we will know if he has to undergo surgery'.[55] Similarly, in the context of the CONCACAF Gold Cup match between Jamaica and the United States, it appears to have been tacitly accepted

49 Bruce Gardiner, 'Liability for sporting injuries' (2008) Journal of Personal Injury Law 16.
50 *Pitcher* (n 33) 23.
51 Ibid 24.
52 Ibid.
53 *Blake* (n 37) [17].
54 *Elliott v Saunders* (n 26) 4.
55 'Injured Joe Public defender could need surgery' (*TT Pro League*, 22 November 2010) www.ttproleague.com/index.php/tt-pro-league-news/domestic-news/467-injured-joe-public-defender-could-need-surgery.

that it was a mere error of judgment or lapse of skill, rather than actionable negligence, when Jamaica's captain and goalkeeper, Andre Blake, suffered a serious hand injury when he palmed away a screaming drive from Altidore, immediately followed by a follow-up effort from Darlington Nagbe, which he attempted to smother with his body.[56]

#### *5.3.1.4 A variable standard of care?*

The final issue for determination is whether the same standard of care is applicable to players who play in a lower level division game and those who play in a higher level division game. The confusion, in this regard, lies in the fact that in *Condon v Basi*, the court held that 'there will of course be a higher degree of care required of a player in a First Division football match than of a player in a local league football match',[57] whereas in *Elliot*, the court found that

> the fact that the players are top professionals with very great skills is no doubt one of the circumstances to be considered, but in my judgment, the fact that the game is in the Premier League rather than at a lower level, does not necessarily mean that the standard of care required is different.[58]

Apart from the fact that the sentiments expressed hitherto in *Condon* were *obiter*,[59] it is submitted that Drake J's view in *Elliott* is both more sound and defensible than Sir Donaldson MR's, and, indeed, appears to comport with conventional thinking on the question of the applicable standard of care in negligence. Indeed, it would seem that the standard of care in both higher level, for example, CONCACAF, and lower levels of the game, for example, the Jamaica Red Stripe Premier League, is the same, albeit that the nature and level of the match in question, and, accordingly, the standards of skill to be expected from the players, form part of the factual context within which such standard fell to be applied.[60] That duty, as articulated in *Caldwell*, being to exercise in the course of the contest all care that is objectively reasonable in the prevailing circumstances for the avoidance of infliction of injury to fellow contestants.

### 5.3.2 Players' liability in negligence to spectators

Players owe a duty of care in negligence to spectators who attend matches and who might accordingly be impacted by their conduct. The existence of this duty goes all the way back to the early 1960s in the contentious case of *Wooldridge v Sumner*,[61] which involved a photographer who, having attended the National Horse Show, was seriously injured after a horse, whilst galloping to the finish line, knocked him down. Contrary to directions given to the photographer by the steward of the course just before the galloping of the horses, the photographer merely took himself to a bench seat between two tubs, which were in any event in the horses' path. The court heard that the photographer was both unfamiliar with horse racing and apparently wholly uninterested in horses, and had suffered the injuries after he attempted to unsuccessfully pull another person off the bench out of the line of the horse, which in the process resulted in

56 '#GoldCup2017: US lead 1–0 as Jamaica lose goalkeeper Andre Blake' (*Jamaica Observer*, 26 July 2017) www.jamaicaobserver.com/latestnews/GoldCup2017:_US_lead_1-0_as_Jamaica_lose_goalkeeper_Andre_Blake?profile=1511.
57 *Condon* (n 23) 868.
58 *Elliott v Saunders* (n 26) 4.
59 A.H. Hudson, 'Care in sport' (1986) Law Quarterly Review 11.
60 Tim Kevan, 'Sports personal injury' 5(3) (2005) International Sports Law Review 61.
61 [1962] 3 WLR 616.

him stepping or falling back into the path of the horse that passed three or four feet behind the bench at which he was standing.

In a claim for damages for personal injuries, the court found that although the defendant jockey had owed a duty of care to the spectator photographer, that duty was not breached as the photographer failed to provide cogent evidence that the jockey acted with 'reckless disregard' for the safety of spectators. In any event, the court was prepared to countenance the defence of *volenti non fit injuria*, finding that if the photographer had sat still on the bench, there would have been no accident, and that therefore the jockey could not foresee that a spectator would be allowed into the arena who did not know how to behave when in close proximity to a horse. In other words, in taking up his position in a place where spectators were not allowed, the photographer necessarily came into close proximity to horses proceeding at a gallop, which in effect meant that he must be taken to have accepted the risk of something going wrong in the course of the event. This is because, in law, persons who stand so close to the scene of such events are deemed to have taken the risk of something going wrong in the ordinary course of the sport, and which is a risk incidental to it. In short, a reasonable competitor is entitled to assume that spectators in the arena would be paying attention to what is happening, would be knowledgeable about the sport, in this case horses, and would take such steps for their own safety as any reasonably attentive and knowledgeable spectator might be expected to take. In this context, although it was arguable that the jockey committed an error of judgment by riding 'too fast', it was precisely because the photographer was not interested in the event and was not watchful or mindful of what was taking place that he sustained injuries.

Notwithstanding the fact that the court appeared to have correctly decided this case on the facts, it is the *obiter dicta* of their lordships on the question of the standard of care that has since given rise to considerable headaches to students, academics and practitioners of Sports Law. Part of the challenge with the decision in this case lies in the fact that the court appears to have introduced a wholly nuanced, if not antithetical, standard of care to be expected of sports participants in respect of spectators, which is arguably out of sync with the general tenor of ordinary principles of negligence. More specifically, on the one end of the spectrum, the court explained that:

> If the conduct is deliberately intended to injure someone whose presence is known, or is *reckless* and in disregard of all safety of others so that it is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused.[62]

On the other end of the spectrum, the court seems to have merely confirmed the application of ordinary principles of negligence with respect to the standard of care, finding that:

> provided the competition or game is being performed within the rules and the requirement of the sport and by a person of adequate skill and competence the spectator does not expect his safety to be regarded by the participant (...) What is reasonable care in a particular circumstance is a jury question (...) it may be answered by inquiring whether the ordinary reasonable man would say that in all the circumstances the Defendant's conduct was blameworthy.[63]

The second proposition appears to confirm conventional thinking that a player owes a duty of care to take reasonable care to prevent injury to spectators, having regard to his skill and competence, and the general circumstances of the case, which is the typical formulation of the standard of care to be found in text books on negligence. However, in ultimately finding that 'I do

62 Ibid 624.
63 Ibid 624, 632.

not think it can be said that he was riding recklessly and in disregard of all safety or even on this evidence without skill',[64] the court seems to have adopted a particularly high threshold that is not consistent with ordinary principles of negligence. Apart from the confusion that the adoption of this standard has caused among judges in subsequent cases such as *Condon*, *Caldwell* and *Blake*, it is clear that if the standard of care is one of 'reckless disregard', it is very unlikely that in practice there will be liability on the part of players in a typical case involving injury to a spectator, since this threshold is evidently a higher one than the ordinary standard of care in negligence.

One way of reading this judgment, however, is to accept that mere errors of judgement would not constitute a breach of duty; something more is required. That 'something more', however, does not mean that 'reckless disregard' must be proven. Rather, it may very well mean that, evidentially, where there is evidence of reckless conduct, there is a higher likelihood that the court will regard this as being a breach of a player's duty of care to spectators than if it were simply conduct that falls within the conventions of the game. In other words, as pointed out by the court itself in *Wooldridge*, while it would be merely a misfortune, but not negligent, for a skilled batsman to hit a six and the ball hits someone over the boundary or for a tennis ball to hit a spectator or a racket to be accidentally thrown in the course of play into the spectators at Wimbledon, it is quite something else for a player, in temper or annoyance, to throw a ball at a spectator's face at a cricket match or a racket at spectators at a tennis match.

## 5.4 THE LIABILITY OF COACHES/INSTRUCTORS

Given the 'supervisory, instructional and safety functions' that coaches and instructors play in respect of players under their jurisdiction, it is perhaps axiomatic that it is just, fair and reasonable for the courts to impose a duty of care on these persons.[65] This duty of care requires the exercise of reasonable skill and care by a coach or instructor so as to ensure that those under their charge are not exposed to unreasonable or unacceptable risks.

The standard of care expected of coaches or instructors is the exercise of reasonable care and skill as a reasonably average competent and responsible coach operating at a particular level would exercise, having regard to all the circumstances of the case in question.[66] In short, a coach or instructor must bring to the exercise of his functions no less expertise, skill and care than other ordinarily competent members of his profession would bring, though he need not bring more, since the standard is that of the reasonably competent coach or instructor in all of the circumstances of the case.

Today, with the increasing formalization of sporting relationships, coaches' and instructors' obligations to players have become standardized features of contracts. These duties typically include the provision of adequate mentoring, training, instruction, supervision and even medical care to enable the player to reach his fullest potential. In this context, it would appear that if a coach or instructor, when going about attaining these objectives, acts in accordance with the conventions accepted as proper by a responsible body of other coaches skilled in that particular art, he would not be liable in negligence for any ensuing harm or injury. That said, although the discretionary professional judgment of coaches and instructors is well acknowledged and respected when defining the standard of skill and care, this is not a licence for these professional men and women to take obvious risks that can be otherwise guarded against.

64 Ibid.
65 Neil Partington, 'Legal liability of coaches: a UK perspective' (2014) 14 Int Sports Law 232.
66 Neil Partington, 'Professional liability of amateurs: the context of sports coaching' (2015) Journal of Personal Injury Law 233.

Several cases illustrate this point. In *Foscolos v Footscray Youth Club*,[67] the Victoria Supreme Court in Australia considered an unfortunate situation in which the claimant, a young boxer, suffered a devastating spinal injury in the course of a wrestling bout. The circumstances of the case were that the opposing wrestler inflicted a 'suplex' throw at the claimant in the presence of the wrestling coach, though the coach did not immediately intervene to stop this dangerous play. Although a recognized wrestling manoeuvre used at the highest levels of the sport, a 'suplex' throw is regarded as extremely dangerous in the hands of those who are unskilled or inexperienced. Performed properly, it enables one wrestler to effect a winning throw on his opponent thus winning the match in a single stroke. The danger inherent in its execution, however, arises from the fact that unless both parties are skilled, the wrestler being thrown can strike the mat head first with his body either perpendicular or almost perpendicular, thereby causing serious injuries. On the facts, the court upheld a claim for damages against the coach, finding that the coach, in allowing the 'suplex' throw, had fallen below the standard of care reasonably expected of wrestling coaches, having regard to all the circumstances of the case. In other words, the coach was liable in negligence for failing to stop the bout immediately upon the opposing wrestler attempting a 'suplex' throw, since he was aware that such a throw was inherently dangerous. This amounted to a failure of the coach to supervise the wrestling contest adequately.

It appears from subsequent case law that if a coach or instructor is aware that a player has limited competence or skill in a particular sporting event or manoeuvre and nonetheless allows the player to engage in strenuous activity beyond his level of competence, that coach or instructor might be liable in negligence if any harm or injury were to subsequently ensue. By way of illustration, in *Graham Trevor Anderson v Michel Lyotier, Wendy Lyotier (t/a Snowbizz), Jerome Portejoie*,[68] the ski instructor was sued in negligence in circumstances where he allowed the claimant, who had limited competence in skiing, to descend from an off-piste area, which ultimately resulted in the claimant running into a tree, thus sustaining injuries that rendered him a complete tetraplegic. The court reviewed the evidence of what transpired in the days immediately preceding the unfortunate incident and considered that the instructor had failed to address the capacity of the claimant to undertake the off-piste slope, in light of the fact that this slope was steeper than any off-piste terrain that the claimant had skied that week with the instructor; the snow conditions were such that they required more skill to negotiate than the on-piste conditions; as well as the fact that there were trees (not just shrubs or saplings) on the slope.

The court considered that the test is whether, looked at prospectively and objectively, the terrain in the condition that it was in was a reasonably safe piece of terrain for all members of the group, including the claimant, to negotiate. On the facts, the court found that it was reasonably foreseeable that any one of the three individuals who were under the instructor's supervision (including the claimant) would have fallen or lost control of their skis when negotiating this terrain and, even further, there was a reasonably foreseeable risk of impacting with a tree in consequence, given the presence of the trees on the terrain. According to the court, the instructor's duty was to choose activities for the group that were within the competence of the least able member of the group, and that in simply assuming, without being sure, that the claimant and the other members of the group had the requisite experience and capacity to negotiate the terrain, the instructor had acted in breach of his duty of care. Merely describing the group's ability as 'fairly homogenous' was not enough; it was unacceptable for the instructor to have taken 'his eye off the ball on this particular occasion' by failing to stop and think about the true capacity of members of the group, especially the claimant, who had displayed a lack of

67 [2002] VSC 148.
68 [2008] EWHC 2790 (Law Com).

adequate skills in the days preceding the incident. Interestingly, the court rejected the argument that whatever choice the instructor, as an experienced ski instructor, made was right because his judgment was always well-informed and within the band of reasonable decisions that could be made. Instead, the court considered that although instructors may take decisions which fall within a reasonable range of approaches, they must consider conscientiously the capabilities of all members of the group before requiring that these persons perform potentially dangerous activities.

However, while the court ultimately found the instructor liable, it felt that the instructor was not totally responsible on the facts, since the claimant had an obligation to speak out in opposition if he was asked to do something beyond what was reasonable for him to attempt. The court accordingly concluded that while the instructor was two-thirds responsible, the claimant, because he was contributorily negligent, was one-third responsible, which was reflected in the quantum of damages ultimately awarded. The court, however, took the opportunity to issue some words of caution that might impact on how future cases in this field are decided:

> this case does not mean that anyone who suffers injury, even a serious injury, following a skiing accident, whether on or off-piste, necessarily wins damages ...
>
> Equally, it does not mean that everyone who suffers an injury when under the supervision of an instructor wins damages. Everyone recognizes that skiing is an inherently risky pastime and accidents causing injuries, sometimes very serious, will occur, more often than not without negligence being established on the part of anyone involved.[69]
>
> ... nothing in the result of this case should be seen as dissuading anyone embarking on a skiing holiday from taking out suitable insurance cover, including, if it can be obtained, cover that provides substantial funds if permanent serious injury, including paralysis, should occur.[70]

On another note, an interesting question has arisen in recent years as to whether coaches or instructors should be held liable in negligence where players under their jurisdiction complain of aches and pains symptomatic of serious underlying injuries, but said coaches or instructors refuse to take appropriate steps (such as a referral to a medical practitioner) to minimize the issues complained of, thereby resulting in further, more serious, harm being sustained by these players. This issue was recently considered in *Richard Davenport v David Farrow*.[71] Here, an athletics coach was sued for damages in negligence by an athlete who was previously under his charge who had to undergo surgery twice to repair fractures to his back with bone grafting and fixation in respect of a condition called bilateral spondylolysis. The claimant's case was that the stress fractures were sustained in October/November 2004, causing him significant pain, which affected his ability to train, and which he drew to the attention of his coach, but which the coach ignored, dismissing his complaints as symptomatic of lack of motivation on his part. He submitted that, in breach of his duties to the claimant, the coach failed to take the complaints seriously, assuring him that there was nothing wrong with him. The claimant further submitted that the coach ought to have advised him to have the condition investigated once it became clear that it was a persistent problem, and that had an investigation then taken place, the stress fractures would have been treated conservatively with rest, and that, on the balance of probabilities, they would have united satisfactorily without surgical intervention. On the contrary, the coach denied liability, arguing that the evidence did not support the onset of acute back pain in the autumn of 2004, and that, on the balance of probabilities, the stress fractures occurred at

69 Ibid [148].
70 Ibid [150].
71 [2010] EWHC 550 (Law Com).

a much earlier date. If, indeed, the fractures had developed at an earlier stage, then there could be no causal relationship between the alleged failure on the part of the coach to respond to the claimant's complaints of back pain during the relevant period, and the injury, loss and damage for which the claimant contended.

On the facts, the court found that it was more likely that the stress fractures occurred at an earlier stage than in October/November 2004, thereby exonerating the coach from liability in negligence. More specifically, the court, having examined the coach's training log, the claimant's medical report and other circumstances of the case, found that the coach's instructions to the claimant were within the range of acceptable coaching (level 4) for an athlete of his ability and aspirations. On the basis of the evidence presented, it could not be demonstrated that there was a change in the level and intensity of training in September 2004 such as to provide an explanation for the development of the stress fractures.

Although the court ultimately decided in the coach's favour, it seems likely that, in future, a coach may nonetheless be exposed to liability in negligence if he fails to take a player's complaints seriously and accordingly fails to refer that player for treatment where the severity of the complaint demands a referral. Moreover, it would also seem that a coach who undertakes a training regime that is outside of the range of acceptable coaching, having regard to the player's ability and aspirations, may expose himself to liability where injury or harm is thereby suffered by the player. Although the implications of this judgment are still not yet fully known, it might very well be that traditionally robust (or even hostile) coaches may have to somewhat 'soften' their approach to coaching, especially where players legitimately complain of pain or illness that may eventually morph into something more serious.

The final question for determination in this discussion of the liability of coaches and instructors in negligence is the appropriate standard of care to be expected of coaches/instructors who train or supervise players with disabilities. This question was considered in the case of *Morrell v Owen*.[72] Here, all the participants in the events in question were paraplegic sportsmen and women who had achieved a high level of competence in their chosen sport. The claimant, who had been disabled since the age of 15, took part in archery. The accident in question occurred during a training session at which two separate activities during that weekend, namely discus and archery, were held simultaneously in the same hall, which was divided by a fishnet curtain. Discuses were being thrown against the net. There was no possibility of a discus from one part of the hall entering the other part by travelling over the top of the net, but a stray discus could enter the other part by travelling past the sides of the net. Further, discuses thrown against the net caused it to billow towards the archers' section. Anyone entering or leaving the archery section in the hall, for example to visit the lavatories, had to negotiate their own passage past the discus section. The injury to the claimant was caused by a stray discus striking the net causing it to billow towards the archers' section of the hall. It struck the claimant on her temple, causing, *inter alia*, permanent brain damage.

The claimant, in an action for damages in negligence, claimed not to have been aware at the time of the event that there was a discus-throwing event in the hall that weekend. She further claimed not to have been informed of the nature or dangers of the event at the other side of the net. On the facts, the court accepted that the archers, including the claimant, had received no safety instructions that weekend and that the coaches had not taken any special safety precautions to ensure the safety of the claimant. The court ultimately held that the kind of misthrow that occurred was entirely foreseeable and so too was the accident in question, which effectively meant that the coaches at the event were in breach of their duty of care in

72 (1993) *Times,* 14 December 1993.

failing to take adequate measures to protect against any ensuing harm to the participants. Interestingly, if not contentiously, the court opined that coaches at an event that involved players with disabilities owe a greater duty of care to the participants than would be owed by the coaches had the participants been able bodied. According to the court, the particular responsibility of the coaches where the participants are disabled include instructing the disabled participants in appropriate safety procedures and practice, providing for the safe passage of participants moving into and out of the practice area, and the provision of an ambulant ad hoc person to watch over the movements of the disabled player. On the facts, damages were awarded for the failure of the coaches to comply with these requirements.

It is submitted that although it may appear, on the face of it, that requiring a higher level of care and skill in a game that involves players with disability is unfair to coaches who, in the absence of continuing professional development, may not be *au fait* with how to treat with the special needs of these players, this is an important jurisprudential development, which arguably reflects the growing public policy interest of the law in ensuring the highest levels of protection for persons with disabilities, which is very much welcome.

## 5.5 THE LIABILITY OF REFEREES/UMPIRES

The role of referees is to enforce the rules of a particular sport, and players are accordingly to some extent dependent, for their safety, on the due enforcement of these rules by referees. Where a referee undertakes to perform this role, it is clearly fair, just and reasonable that the players under his jurisdiction are entitled to rely upon him to exercise reasonable care in so doing. Indeed, rarely, if ever, does the law absolve from any obligation of care a person whose acts or omissions are manifestly capable of causing physical harm to others in a structured relationship into which they have entered. Against this backdrop, it is clear that a referee owes a duty of care to players, as there is sufficient proximity between him and the players in question.

The standard of care required of a referee is that which is reasonable in all the circumstances of the case, having regard to the level of skill and care that is to be reasonably expected of a referee refereeing the particular match in question, irrespective of the grade of the referee. Accordingly, a referee who fails to exercise such care and skill as is reasonably expected in the circumstances of a particular case will be held to have breached the standard of care, and thus liable in negligence. That said, before imposing liability, courts are minded to take full account of the factual context in which a referee exercises his functions, and he cannot be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. In short, the test is the standard of the ordinary skilled referee exercising and professing to have that special skill. A referee need not possess the highest expert skill, since it is well-established that it is sufficient if he exercises the ordinary skill of an ordinary competent referee exercising that particular art. This effectively means that an amateur or volunteer referee who takes the field after a professional referee fails to turn up cannot reasonably be expected to show the skill of one who holds himself out as a professional referee, though he is expected to exercise such care and skill as is reasonably expected of an ordinarily competent referee at his level, having regard to all the circumstances of the case.

Although the application of these principles is not without opposition, it has increasingly become clear in recent years that there is now a well-established duty of care owed by referees to players, which appears to be more easily breached in the context of robust sports where the proper enforcement of the rules of the game is paramount, such as rugby, than in perhaps other

less intense sports. For example, in *Smoldon v Whitworth & Nolan*,[73] the defendant, a rugby referee, was held liable in negligence in circumstances where he failed to enforce the crouch – touch – pause – engage (CTPE) sequence, which resulted in the claimant suffering serious injuries. More specifically, the court heard and accepted evidence that, notwithstanding the fact that the scrums were repeatedly coming together in a rushed way and with excessive force, and despite the fact that the number of impact collapses was abnormally high (at least 20 such collapses), the referee had failed to insist on the CTPE sequence and had, in fact, ignored complaints that there was head butting and punching in the scrum. In failing to tightly control the scrum and, indeed, in failing to take appropriate disciplinary measures in accordance with recent changes to the laws of the game, the referee was held to have fallen below the standard of a reasonably competent referee in refereeing the scrummages in this game. In short, given the prior events of the game, which demonstrated poor formation and frequent collapsed scrums, it was held that the serious spinal injury sustained by the claimant was a foreseeable consequence of the failure of the referee to exercise reasonable care and skill. On the facts, it was clear that the referee should have adopted all the necessary measures to impose his authority on the two packs and should have insisted on observance of correct scrummaging procedures.

Although the referee in question raised the defence of consent, the court was quick to reject this argument, finding that although the player had consented to the ordinary incidents of the game of rugby football of the kind in which he was taking part, the rules were framed for the protection of him and other players in the same position, and so the claimant could not possibly be said to have consented to a breach of duty on the part of the referee whose duty it was to apply the rules and ensure, so far as possible, that they were observed. Similarly, the court rejected policy arguments raised by the referee that if liability was imposed on referees, referees would become 'too vulnerable to suits by injured players'. In finding that this fear was not well-founded, the court explained that finding a referee liable, as in this case, was not intended to open the door to a plethora of claims by players against referees since, in the vast majority of cases, referees would have exercised such care and skill as was reasonably to be expected of them, even in the context of hotly contested games. Interestingly, however, the court cautioned that players should not be too confident in automatically establishing liability in negligence on the part of referees where injuries are sustained, and intimated that players may need to, instead, consider insurance against negligently inflicted injuries.[74]

A similar decision was arrived at in yet another rugby case, namely *Vowles v Evans*.[75] Here, during the context of a rugby game officiated by an amateur referee, the claimant was rendered a permanent incomplete tetraplegic as a result of a collapsed scrum. The background to the case was that one of Llanharan's head props dislocated his shoulder and had to accordingly leave the field, which meant that Llanharan had no trained front row forward on the bench to replace him and, in fact, also had no one in the second or back row of their pack who had trained as a front row forward or who had recent or significant experience of playing in the front row. Notwithstanding this, however, Llanharan did not opt for non-contestable scrummages. Instead, the leader of their pack, Christopher Jones, who was playing as a flanker, indicated that he would 'give it a go' as front row forward, although he had little experience playing in this position. The referee agreed to this course without interrogating Jones about his previous experience. During the game, a scrum collapsed, which resulted in the claimant sustaining serious injuries, which was the genesis of this claim for damages.

73 [1997] PIQR P133.

74 See Philip Tracey, 'Sports injury – should the referee be blamed?' (2000) Journal of Personal Injury Litigation 10. Tracey notes that 'the case of Smoldon has not set any dangerous precedent as was first thought.'

75 [2003] EWCA Civ 318; [2003] 1 WLR 1607 (CA (Civ Div)).

The court, in reviewing *Smoldon*, confirmed that referees, like the defendant in this case, owed a duty of care to players under their supervision, and that the relationship between a referee and those playing in the game that it is his duty to control means that any injury suffered is not too remote. On the facts, the court found that, as a referee, the defendant had assumed the responsibility of safeguarding the safety of the players, a duty that he had failed to properly discharge in all the circumstances of the case. While accepting that a referee in a fast-moving game cannot reasonably be expected to avoid errors of judgment, oversights or lapses, this was not the situation in the instant case. Rather, the referee in this case had effectively abdicated his responsibility by leaving it to Llanharan to decide whether to play non-contested scrums. Moreover, he did not make enquiries of Jones as to whether he was suitably trained and experienced, which he turned out not to be. Because front row players are particularly vulnerable to injury, and potentially serious injury if one of their number lacks the requisite technique and is not suitably trained and experienced, the referee was under an obligation to exercise adequate skill and care to ensure that Jones was suitably competent to perform the role in question. Of importance, in addition, was the fact that the decision by the referee not to have non-contested scrums was not taken in the heat of the moment during fast-moving play, so that it could not be said that it was merely an error of judgement, oversight or lapse on his part.[76] He had simply failed to satisfy himself that Jones, or any other player for that matter, was suitably trained to play in the front row.

Like *Smoldon*, the court in *Vowles* was once again confronted with the question as to whether policy considerations required a finding that the referee did not breach the applicable standard of care.[77] In rejecting the argument that 'if referees are to be potentially liable in negligence for injuries to players, the supply of those prepared to referee without reward will be in danger of drying up', the court explained that it did not believe that this would happen, since it would in practice be 'very rare' in the vast majority of cases for referees to be deemed to have breached their duty of care. In justifying its position, the court noted that liability was only established in this case because the injury resulted from a failure to implement the laws of the game, which were designed to minimize the risk of just the kind of accident that subsequently occurred. In any event, the court considered that the availability of insurance, both to players against the risk of injury and to referees against the risk of third party liability, could impact on the policy question of whether it is fair, just and reasonable to impose a duty of care on referees in future cases, and felt that 'we would not expect the much more remote risk of facing a claim in negligence to discourage those who take their pleasure in the game by acting as referees'.[78]

From the foregoing discussion, it is clear that the courts are torn between the need to ensure the safety of players against failures in the enforcement of the rules of the game by referees, on the one hand, and the likely negative impact that the imposition of liability would have on the willingness of referees to supervise games, on the other hand. This issue was again recently thrown in the spotlight in the decision of *Bartlett v English Cricket Board Association of Cricket Officials*,[79] which involved a claim for damages brought against the decision of umpires, in the context of a cricket match, to proceed with play on a saturated field. The court heard that

76 Jonathan Bellamy, 'Who would be a referee? The developing legal liability of sports referees' (2004) International Sports Law Review 10. Bellamy contends that, notwithstanding the ruling, 'in no sense does a referee insure players against the consequences of physical injury in a game in which the risk of such injury is inherent.'

77 Tim Kevan, 'Sports personal injury' (2005) 5(3) International Sports Law Review 61. Kevan argues that 'whilst this case does not necessarily open the floodgates for litigation against referees, it will no doubt lead to other actions over the course of the next few years.'

78 *Vowles v Evans* (n 75) [49].

79 2015 WL 5037730.

it had rained for two consecutive days leading up to the Saturday match, and it rained again on the Saturday, albeit not heavily. In accordance with rule 2.2 of the Playing Conditions, the umpires insisted that the ground be inspected. Following the inspection, the umpires noted that the grass in the outfield was long and, therefore, not drying as quickly as they would have liked. They formed the view that the ground was 'a little soft' but not 'squelchy', and accordingly observed that the conditions in the outfield were not such that it was dangerous or unreasonable for play to take place. Although the umpires initially delayed the start of the match to give the ground time to dry, they eventually decided to begin play further up the square – a drier area than other parts of the field. However, on the fifth ball of the game, the batsman 'edged' the ball through the gap between the slip and gulley towards the third man boundary, which necessitated the claimant quickly running after the ball, and then executing a 'sliding stop', which was ultimately found to be the cause of the serious injuries (medial meniscus tear) that he sustained. The claimant sought damages, alleging that the umpires had been in breach of their duty of care by requiring that they play on the saturated outfield.

While the court acknowledged that umpires officiating over an organized sporting event owe a duty of care to the participants in that event, it considered that the umpires in the instant case could not be properly held liable on the facts of this case. More specifically, the court felt that the umpires had executed their duties by evaluating the conditions of the square, the infield and the outfield, so as to determine the suitability of the ground for play. Because they had carried out this 'thorough and careful inspection of the ground' before reaching a view of the suitability of the ground for play, they could not be considered to have been negligent where the player himself made a deliberate and conscious choice to field the ball by using the well-known fielding technique of the sliding stop which was, in any event, poorly executed. In short, the court's view was that it was the player's faulty execution of the slide that was the material cause of his injuries, and not the condition of the ground in the outfield.[80] Given that the decision to play on a different square was reached after a careful and considered evaluation of all the relevant factors, the court could not find the umpires liable in negligence on the facts, though it emphatically recognized that 'it is common sense that if the umpires considered the prevailing conditions were such that there was an obvious and foreseeable risk to the safety of the players, it would be unreasonable and dangerous to allow play to proceed'.[81] Interestingly, the court indicated that the fact that grass on a cricket ground is wet and slippery does not mean that the ground conditions are to be regarded as dangerous or unreasonable since a cricket match can be played safely even when the conditions are not ideal. The question, then, is whether, in all the circumstances, the prevailing conditions make the ground unsuitable for play such that it is dangerous or unreasonable to proceed, which was not established on the facts of this case. Notwithstanding this, however, the court appears to have left the door ajar for ensuing liability on the part of umpires in negligence, albeit that such a claimant bears the burden of proving, on a balance of probabilities, that the decision of the umpires to proceed with the game fell outside the range of reasonable decisions that a reasonable umpire would make in the circumstances. That said, the fact that another person, let alone another umpire, might have reached a different decision on the evidence available does not automatically establish liability on the part of the defendant. In the final analysis, the claimant in *Bartlett* was unable to show that the decision of the umpires was clearly wrong and that no reasonable and responsible umpire could, on the evidence available, have made a decision to allow play.

80 Neil Partington, '"It's just not cricket" Or is it?' (2016) 32(1) Journal of Professional Negligence 77. Partington is of the view that the decision in *Bartlett* 'provides a stark reminder to amateur volunteers in sport of the importance of assuming tasks only at levels commensurate with their qualifications and experience and, being mindful of potential limitations'.

81 *Bartlett* (n 79) [192].

## 5.6 THE LIABILITY OF PROFESSIONAL BODIES

Professional bodies, such as national governing bodies, have been held to owe a duty of care to those people who are immediately connected to a sporting event, namely players, match officials and even spectators. This is a duty to adopt adequate rules and monitor the enforcement of these rules, as well as adopt such layout and organization of sporting facilities and events so as not to cause foreseeable injury. The existence of this duty is based on two interconnected principles: assumption of responsibility and reliance. More specifically, where a professional sporting body places itself in a relationship to a player in which the player's physical safety becomes dependent upon the body's acts or omission, the body's conduct can suffice to give rise to a duty of care on the part of the body to exercise reasonable care for the player's safety. In these circumstances, the body's conduct can accurately be described as the assumption of responsibility for the player's safety, so that the body is obliged to exercise reasonable care and skill in looking after the player's safety, having regard to all the circumstances of the case.

These principles were authoritatively espoused in the ground-breaking decision of *Watson v British Boxing Board of Control Ltd*.[82] Here, Michael Watson, a super-middleweight boxer, fought Chris Eubank for the World Boxing Organisation's super-middleweight title in London. During the course of the final round, the referee had to stop the fight because Watson, after being hit in the head by Eubank, appeared to be unable to defend himself, and had in fact lapsed into unconsciousness on his stool. It took seven minutes before Watson was examined by one of the doctors who was in attendance at the fight, and nearly half an hour between the end of the fight and the time that he arrived at the hospital, at which he was given an injection of mannitol, a diuretic that can have the effect of reducing swelling of the brain. By this time, however, he had sustained serious brain damage, which left him paralyzed down the left side and with other physical and mental disability.

Watson brought an action in negligence against the British Boxing Board of Control, since the fight had taken place in accordance with their rules. These rules included provisions for medical inspection of boxers, resuscitation equipment and procedures and for the attendance of two doctors at a fight. In fact, the board had even required a third doctor to be present and also that an ambulance should always be on standby.

The court began its methodical assessment by indicating in no uncertain terms that the board had owed a duty of care to Watson, since it was the board that had set out, by its rules, directions and guidance to make comprehensive provision for the services to be provided to safeguard the health of the boxer, and, in fact, all involved in boxing contests were obliged to accept and comply with the board's requirements. It explained that the principles that gave rise to a duty of care in this case were those of assumption of responsibility and reliance. More specifically, it accepted that the board had assumed responsibility for the control of an activity the essence of which was that personal injuries should be sustained by those participating. It had also assumed responsibility for determining the details of the medical care and facilities that would be provided by way of immediate treatment of those who received personal injuries while taking part in the activity and, even further, those taking part in the activity, and Watson, in particular, relied upon the board to ensure that all reasonable steps were taken to provide immediate and effective medical attention and treatment to those injured in the course of the activity. In other words, the board had placed itself in a relationship with Watson in which Watson's physical safety was very much dependent upon the board's acts or omissions, so that the board's conduct sufficed to give rise to a duty of care to exercise reasonable care for Watson's safety.

82 [2001] 2 WLR 1256, [2001] QB 1134.

While the court considered that there is a difference in principle between making rules and giving advice, and that simply giving advice to all involved in professional boxing as to appropriate medical precautions does not, on the face of it, establish sufficient proximity between the professional body and the individual player to give rise to a duty of care, this was not the situation in the instant case. Rather, the board went beyond merely giving advice; it had made provision in its rules for specific medical precautions to be employed and, in fact, made compliance with these rules mandatory. Indeed, by reason of its control over boxing, the board was in a position to determine, and did in fact determine, the measures that were taken in boxing to protect and promote the health and safety of boxers. Accordingly, where a boxer, such as Watson, reasonably relied upon the board to take reasonable care in making provision for their safety, he could successfully claim damages where the circumstances were such that there was a failure on the board's part to comply with its duty of care.[83]

The existence of a duty of care on the part of national governing bodies was once again, more recently, confirmed in the case of *Wattleworth v Goodwood Road Racing Co Ltd*.[84] Here, the wife of the deceased sued the Royal Automobile Club Motor Sports Association Limited ('the MSA'), the national governing body for motor sports in the United Kingdom, after her husband was killed in circumstances where he collided with a tyre-fronted earth bank on the inside of the track while driving his car on the Goodwood motor racing circuit. The claimant alleged that the MSA had breached its duty of care to users of the Goodwood circuit, including her deceased husband, by negligently designing or selecting the tyre structure fronting the bank at the relevant part of the Lavant bend on the circuit.

Given the relative novelty of the situation, the court had to determine whether or not a duty of care was owed by the MSA. The court ultimately found that the MSA did in fact owe a duty of care to the deceased with regard to its recommendations provided to the Goodwood Road Racing Company as to the lorry tyre faced earth bank at the Lavant bend. Like *Watson*, the court in this case accepted that the MSA had assumed responsibility going well beyond the mere authorization of events for which an MSA track licence and event permit was required. In fact, the MSA had plainly given advice to Goodwood both as to the circuit and as to the protective devices to be deployed around the track when it contemplated and expected that such advice would be acted upon by Goodwood not only with regard to the MSA events, but also with regard to other motor car uses of the circuit. The MSA had been deeply involved in recommending the safety procedures to be adopted with regard to the track and protective barriers, and its agents had in fact inspected the track frequently and occasionally attended Goodwood committee meetings to discuss safety issues. The court rejected the assertion that if a duty of care was owed, the MSA would find itself being liable to an indeterminate class, noting

83 Kris Lines, 'Thinking outside the box (-ing ring): the implications for sports governing bodies following Watson' (2007) International Sports Law Review 67. Lines cites Mark James who asks the questions 'Should all rugby games have doctors, stretchers and neck braces available in case of a damaged spine from a collapsed scrum? Should all football matches have splints available in case of broken legs? Should hockey games have eye or dental treatment available in case of the ball or stick causing facial injury? These would certainly seem to be natural extensions of the Watson decision.' He then goes on to argue that 'although the medical protocols for all sports will need to be re-evaluated in light of their judgment in Watson, it is submitted that such a duty will have more of an impact on more specialist sports because of the nature of the injuries encountered. For example, the brain injury that Michael Watson suffered immediately differentiates his case from the standard football or hockey injury which can be treated by a touchline doctor or paramedic (either in attendance or responding to an emergency call) without any detailed medical protocols. Given that the injury in Watson was both catastrophic and required highly specialized treatment, the judgment could more easily be applied to sports where similarly complex injuries are foreseeable, for example: scuba diving, rugby and gymnastics. In these instances, the standard medical team may not be trained or equipped to deal with known injuries such as decompression illnesses, or spinal fractures. Therefore, as in Watson, any failure of that sport's NGB to provide specialist treatment might also be seen as negligent.'

84 [2004] EWHC 140.

instead that liability was limited to those using the circuit of Goodwood who were, in any event, within the contemplation of the MSA. Thus, although the MSA did not assume responsibility for the provision of driver testing, marshalling, ambulances and so on for non-MSA events, it nonetheless was obliged to take reasonable and appropriate steps to avert any risk of injury to drivers. On the facts, however, the MSA was found to have discharged its duty of care, in that it exercised reasonable skill and care in all the circumstances of the case. More specifically, the choice and approval of the tyre wall installed as part of the Lavant bend was reasonably made after proper consideration, and the approved barrier did not inappropriately depart from the relevant guidelines. In addition, the tyre wall so approved was not unsafe in that it did not expose drivers to unnecessary or unjustifiable risks. On the contrary, the court found that it was a reasonable choice, designed to meet the various foreseeable types of collision that might occur at that section and appropriate for the foreseen wide range of cars, drivers and uses.

While the decision to hold that the MSA, the national governing body for motor racing in the United Kingdom, owed a duty of care in negligence to drivers is both rational and defensible, particularly in light of what has already been discussed in relation to the case of *Watson*, an interesting question arises as to whether or not the same ruling may be applied to questions about the liability of international federations. Unfortunately, it appears that this area remains in a state of flux following *Watson*, *Wattleworth* and the Australian case of *Agar v Hyde*.[85]

In *Wattleworth*, the wife of the deceased had also brought an action in negligence against the Federation Internationale de l'Automobile ('the FIA'), the international federation for racing, of which the MSA, as well as 117 other national bodies, was a member. The court, however, found that although the relevant FIA agent inspected the circuit and had made recommendations on all parts of the circuit (including the earth bank at Lavant) in the expectation that those recommendations would be implemented, no duty of care arose on the part of the FIA in this case. On a balance, the court found that no duty of care was owed by FIA to users of the circuit, such as Wattleworth, given the relatively limited nature of what the FIA's agent undertook, which, unlike the MSA, did not amount to an assumption of responsibility with regard to the track and barriers towards users of the circuit at non-international events. In other words, the relationship of the MSA to Goodwood was far closer than that of the FIA. The lack of proximity coupled with the lack of assumption of responsibility, in this context, meant that the FIA, as compared to the MSA, could not be deemed to be under a duty of care to users of the circuit, such as Wattleworth. In fact, the court went as far as to suggest that it would be unreasonable to subject the FIA to a duty of care in negligence, given the fact that it had essentially primarily entrusted circuit safety matters to national sporting authorities, and had to, in any event, concern itself with many scores of countries, other than the United Kingdom. Interestingly, however, the court appeared to leave the door ajar, entertaining the possibility that in an appropriate future case, a duty of care on the part of an international federation might ensue, finding that 'the FIA did not owe a duty of care to Wattleworth; but, *even if it did*, it was not in breach of that duty of care'.[86]

The court's apparent refusal to expand the duty of care owed by international federations is reminiscent of the earlier approach countenanced in the Australian case of *Agar v Hyde*. In that case, the respondents, two men who, whilst playing the sport in local rugby competitions in Australia, suffered serious injuries, brought an action in negligence against the International Rugby Football Board (the 'IRFB'), the then international federation, as opposed to national governing body, for rugby. Although part of the IRFB's mandate was to frame and interpret the

85 [2000] HCA 41.
86 *Wattleworth* (n 84) [179.3].

rules of the sport, the court refused to find that a duty of care was owed by it, in similar vein to the court in *Wattleworth*. More specifically, the court found that, given the lack of reliance by the injured players on the work of the IRFB, and, indeed, the lack of the IRFB's 'answerability to and relationship with their home Unions',[87] it could not be said that a duty of care was owed to the players. In other words, 'the distance in time, place, and contemplation between the [players] playing in the games in which they were injured and the IRFB'[88] was such as to prevent a duty from arising. Pointing to the lack of organization of, or control over, the matches in which the injured players were injured as well as the fact that the IRFB did not decide whether the laws of the game that it promulgated would be adopted in the matches in question and, indeed, the fact that there might potentially be an indeterminate number of claims by an indeterminate number of people throughout the world if a duty of care were imposed, the court felt satisfied that the IRFB could not be liable. In short, 'there were too many intervening levels of decision-making between the promulgation by the IRFB of laws of the game and the conduct of the individual matches in which the respondents were injured'.[89] The court concluded its judgment by asking some difficult, though important, questions,

> Should the international body controlling cricket have been held liable for not prescribing the wearing of helmets by batsmen before the West Indian cricket selectors unleashed upon the cricketing world their aggressive fast attack of the 1970s? Should cricket be played with a soft, rather than a hard ball? Should hockey sticks be made of semi-rigid materials only?[90]

While these are, indeed, questions that challenge our understanding of the precise role of the law of tort in regulating sporting behaviour and in demarcating relationships, especially where serious injuries are sustained in the sporting context, it is submitted that they should not, on their own, prevent a duty of care from arising on the part of an international federation. More specifically, our contention is that sports bodies, such as the International Cricket Council and FIFA, which frequently organize, host and exercise considerable control over mega sporting events, such as World Cup cricket or World Cup football, should not per se be exempted from liability in negligence if it is that they have assumed responsibility for the safety of sportsmen and women, and have breached their duty of care and skill in relation to these persons who, in reliance on this duty, suffer harm. Indeed, while it is understandable that, in most cases, the question of proximity will be somewhat of a hurdle to cross, it is not completely unforeseeable that an international body may, as a result of some act or omission on its part, be in breach of its duty of care, if one indeed exists. This view appears to comport with *obiter* statements in *Watson*, namely:

> where A advises B as to action to be taken which will directly and foreseeably affect the safety or well-being of C, a situation of sufficient proximity exists to found a duty of care on the part of A towards C. Whether in fact such a duty arises will depend upon the facts of the individual case and, in particular, upon whether such a duty of care would cut across any statutory scheme pursuant to which the advice was given.[91]

Having regard to these sentiments, and even accepting that the question of whether, in fact, a duty arises will very much depend upon the facts of the individual case, it appears that if a player, because of his reliance on the responsibility assumed by an international federation, suffers injury, he may very well be deemed to be part of a class that is within the contemplation

87 *Agar v Hyde* (n 85) [127].
88 Ibid.
89 Ibid [81].
90 Ibid [127].
91 Watson (n 82) [72].

of the international federation. This is particularly the case if the international federation is involved in an activity that gives it not merely a measure of control, but complete control over and responsibility for a situation that could result in injury to the player if reasonable care is not exercised by the federation.[92] Indeed, as stated in *Watson*, 'it would be quite wrong to determine the result of the individual facts of this case by formulating a principle of general policy that sporting regulatory bodies should owe no duty of care in respect of the formulation of their rules and regulations'.[93] Like their lordships in *Watson*, we are of the view that contrary to the sentiments expressed in *Wattleworth* and *Agar*, respectively, an international federation may very well owe a duty of care in circumstances where it assumes responsibility for the safety of a player, and the player, being proximate to the federation, suffers injury as a result of relying on this assumption of responsibility. The implications of this proposition are stark,[94] but may mean, at the very least, that international federations must become more 'prospective in their thinking and to seek competent advice as to how a recognized danger could best be combated'.[95]

A related question that raises even thornier issues than those described above is whether international federations, like FIFA in the wake of the 2014 World Cup, should be held to owe a duty of care not only to players, but also to its workers, some of whom may suffer injury or death as a result of apparent breaches of safety standards. While the answer to this question is still unclear, and will be discussed in a related context below, one should not forget that in preparation for the 2014 FIFA World Cup, seven individuals lost their lives as a result of various accidents, including a crane collapsing at the stadium while hoisting a 500-tonne piece of roofing or from falling off the roof of a partially constructed stadium.[96]

## 5.7 THE LIABILITY OF CLUBS/LEAGUES

In *White v Blackmore*[97] Lord Denning MR infamously noted that clubs/leagues are under a duty to take adequate and reasonable measures to ensure the safety of players and, indeed, spectators. In practice, he explained, this entails taking such reasonable measures as to ensure that the field of play and the immediate environs are as free from danger as reasonable care and skill could make them. This includes, but is not limited to, ensuring that the outfield is in a safe enough state before play can be commenced and erecting proper barriers. Although this duty of care exists as an independent cause of action in negligence, it has become quite clear from recent jurisprudential developments that the duty in negligence overlaps with the duty of care that arises under the common law with respect to occupiers' liability and the codification of these common law principles under the Occupiers Liability Act.[98]

92 Cf. Bruce Gardiner, 'Liability for sporting injuries' (2008) Journal of Personal Injury Law 16. Gardiner notes that 'governing bodies may escape liability where their involvement is peripheral, and some other entity has effectively taken the lead in specifying the necessary precautions'.

93 Watson (n 82) [91].

94 Tim Kevan, 'Sports injury cases: footballers, referees and schools' (2001) Journal of Personal Injury Law 138. Kevan suggests that 'it will certainly be advisable for professional bodies to undertake risk assessments and provide appropriate levels of medical facilities and further to keep the participants informed as to the results if they decide not to provide particular medical cover in order that they may make their own arrangements as necessary.'

95 Watson (n 82) [121].

96 'Brazil World Cup: seventh worker dies on stadium construction' (*Associated Press*, 30 March 2014) www.theguardian.com/football/2014/mar/30/brazil-world-cup-worker-dies.

97 [1972] 3 All ER 158.

98 Barbados Occupiers Liability Act, 1965; Jamaica Occupiers Liability Act, 1969.

One of the few Caribbean cases that illustrates the application of this duty of care in negligence is that of *Strickland v Barbados Rally Club*.[99] In this case, the mother of the deceased brought an action against the Barbados Rally Club in circumstances where her son, a spectator at a rally event held in Barbados and organized by the club, was killed after being hit by a car driven off the track by a driver participating in the event. The grieving mother alleged that the accident by which her son met his death was caused solely by the negligence of the driver and/or the club, arguing that the club had failed to take adequate measures to fence off the racing track, and had failed to post adequate signs to warn spectators of impending danger.

While the court did not find the driver in question to be liable in negligence, it nonetheless was prepared to find the rally club liable for a number of reasons. First, the club had not taken all reasonable measures to protect spectators at the event, including the deceased, by failing to reasonably foresee that, given the nature of the relevant corner, a competitor approaching at high speed was likely to pick up a skid and lose control of his car. More specifically, the court found that the club ought also to have appreciated that in such an event the car could leave the course and crash into spectators who were not at a safe distance away from the course, and that even if the spectators were positioned at a safe distance, they were likely to surge forward to get a better, or the best, view of the rally in the absence of a barrier of some kind to keep them at that safe distance. In this case, no barriers of any kind were erected with a view to spectators' safety. This was deemed by the court to have been 'a grave omission on the part of the Club'. Additionally, the court considered that there was no public address system where the accident occurred, which could have otherwise alerted spectators as to the dangers. Further, merely having five officials to supervise the day's events was an inadequate response by the club to ensuring that spectators remained at a safe distance away from the track. Finally, the court noted that although the words of the notice that was erected were sufficiently clear to exclude liability, not enough was done by the club to bring the notice to the attention of spectators, including the deceased.

Although this decision is an important one from a Caribbean standpoint in that it reminds clubs that they cannot simply adopt a minimalist approach to safety, which is characterized merely by exclusionary signs, it should not be taken as establishing a per se rule that a club is liable for the injuries sustained by spectators in the context of a sporting event. Indeed, courts, since the 1930s, have maintained that clubs are not liable for 'accidents which no reasonable diligence could foresee',[100] and, in any event, spectators take on themselves the risks inherent in the sport in question. This view was endorsed by Scrutton LJ in *Hall v Brooklands Racing Club*[101] when he explained that:

> [There is a] risk of being hit by a cricket ball at Lord's or the Oval, where any ordinary spectator in my view expects and takes the risk of a ball being hit with considerable force amongst the spectators, and does not expect any structure which will prevent any ball from reaching the spectators. An even more common case is one which may be seen all over the country, every Saturday afternoon spectators admitted for payment to a field to witness a football or hockey match, and standing along a line near the touchline. No one expects the persons receiving payment to erect such structures or nets that no spectator can be hit by a ball kicked or is violently struck from the field towards the spectators. The field is safe to stand on, and the spectators take the risk of the game.[102]

Similar sentiments have repeatedly been expressed in the context of occupiers' liability.

99 BB 2012 HC 17.
100 *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205.
101 (1932) All ER 208 [213].
102 Ibid 214.

### 5.7.1 Occupiers' liability

Under the rules of occupiers' liability, whether at common law or statute, an 'occupier'[103] of premises, namely a club/league that has sufficient control over said premises, is under an obligation to exercise a 'common duty of care' to all 'visitors' (players/spectators) to its premises. This common duty of care is essentially a duty to take such care as in all the circumstances of the case is reasonable to see that the players/spectators will be reasonably safe in using the premises for the purposes for which they are invited or permitted by the club/league to be there.[104] The relevant circumstances include, but are not limited to, the degree of care and of want of care that would ordinarily be looked for in such a visitor.[105] Although warning the visitor of any foreseeable dangers is part of the club's/league's duty, this warning, by itself, is not to be treated, without more, as absolving it from liability, unless in all the circumstances of the case it was enough to enable the visitor to be reasonably safe.[106] Similar provisions on the exclusion of liability can be found in regional statutes on unfair contracts terms.[107]

A useful illustration of the application of the common duty of care in the sporting context is the case of *Hall v Holker Estate Co Ltd.*[108] Here, the claimant, who was injured when the goalposts collapsed while playing football with his son at a caravan park owned by the defendant, succeeded in his claim for damages for breach of the *Occupiers Liability Act.* The court explained that if the daily system of inspection had been carried out by the defendant, it would have been evident that no pegs were in place, contrary to the manufacturer's directions, to anchor the goalposts. By contrast, however, in the Jamaican case of *Beverly Stewart v Yadar Kindergarten Preparatory School*,[109] the defendant was held not to have been liable for breach of the *Occupiers Liability Act* in circumstances where the claimant, a grandmother of a student who attended the school, was injured whilst participating in the parents' race at the school's sports day. Having regard to the fact that the field was inspected before the games begun and there were, in any event, several incident-free races during the course of the day, the court found that the claimant had failed to establish that there was a hole on the running track that she fell into and which caused her injury.

Similarly, in the UK case of *Sutton v Syston Rugby Football Club Ltd*,[110] the court refused to find the rugby club liable for breach of the *Occupiers Liability Act* when, during the course of a training session, the claimant suffered serious injuries after he fell onto his right knee, which was gashed by a plastic object, found by the judge to have been a broken off part of a cricket boundary marker, which had been left behind by members of a cricket club who had used the area a few days earlier. Although the court accepted that a duty of care was owed by the club to take such care as was reasonable in all the circumstances of the case to see that the claimant (and their other visitors) were reasonably safe in using the club's premises, this duty was not breached as the club's coaches had in fact inspected the pitch before the start of play. On the facts, it was

103 Section 2(2) Jamaica Occupiers Liability Act provides that, 'for the purpose of the rules so enacted, the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees'. At common law, an occupier is someone who has sufficient control of the premises to enable them to discharge the common duty of care owed to visitors. It also includes, in the case of third parties, operators or organisers.
104 Ibid section 3(2).
105 Ibid section 3(4).
106 Ibid section 3(5).
107 For example, see section 5 of the Trinidad and Tobago Unfair Contract Terms Chapter 82:37; section 33 of the Barbados Unfair Contract Terms Act Chapter 82:37.
108 [2008] EWCA Civ 1422.
109 2014 JMSC Civ 202.
110 [2011] EWCA Civ 1182.

held that even a reasonable 'walk over the pitch' inspection would have been unlikely to have revealed the stub, indicating that the club had done all that was reasonable in the circumstances to ensure the players' safety. Interestingly, however, the court cautioned that to satisfy the duty of care in future cases, the club needs to ensure that its agents inspect, at a reasonable walking pace, the pitch as a whole rather than a specific part of the pitch before the start of a game or training session. That said, the court was keen to espouse the policy view that it 'must not be too astute to impose duties of care which would make rugby playing as a whole more subject to interference from the courts than it should be'.[111]

The seemingly 'hands off' judicial approach, based on policy considerations, to addressing the question of liability on the part of clubs where injuries are sustained by players, and, more particularly, spectators, is very evident in the case law emanating from Canada, Australia and the United States. In this corpus of case law, it is clear that the court will not be minded to find a club liable for breach of their duty in the domain of occupiers' liability if a player or spectator willingly places himself in a position where harm might result, whilst knowing that some degree of harm might result.[112] In other words, there will be no liability where a player or spectator has assumed both the physical and legal risks involved in the sporting activity in question, referred to in *Dixon v City of Edmonton*[113] as those 'inherent risks incidental to and inseparable from a sport'. Against this backdrop, clubs in Canada and the United States have not been found liable for an alleged breach of their duty under occupiers' liability statutes in the following circumstances:

- Where, during a pre-game practice, a baseball player batted a ball in the direction of the bleachers that hit and injured a spectator;[114]
- Where a baseball player flipped the ball into the stands after catching the last out of the inning, thereby hitting and injuring a spectator;[115]
- Where a spectator, who was seated in an unprotected part of the stadium, was struck in the face by a broken bat during the context of a baseball game;[116] or
- Where a spectator, situated behind the goal[117] or in the front row of the stadium,[118] was struck in the face by a puck during a pre-game hockey warm-up session.

From these cases, it has become increasingly clear that the court has taken the position that clubs are not insurers against dangers that are incidental to various sports, and that, accordingly, a club need only take reasonable steps to ensure the safety of spectators.[119] This view was affirmed in the case of *Payne v Maple Leaf Gardens Ltd*,[120] in which the court stated:

111 Ibid [18].
112 *Crocker v Sundance Northwest Resorts Ltd* [1988] 1 SCR 1186.
113 [1924] SCR 640.
114 *Lorino v New Orleans Baseball & Amusement Co* 133 So 408 (La App 1931). The court held that, 'visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.'
115 *Loughran v The Phillies PICS Case No* 05–1929 (Pa. Super. November 23, 2005). The court, in finding that the conduct constituted an inherent risk in the game, considered that, 'even a casual baseball spectator would concede it was not uncommon for a player to toss a memento from the game to nearby fans'.
116 *Rees v Cleveland Indians Baseball Co* 8th Dist. No 84183, 2004-Ohio. 6112. The court considered as instructive the fact that she had frequented baseball games in the past, and had, in any event, never mentioned to stadium personnel her fear of sitting in an unprotected area.
117 *Hurst v East Coast Hockey League Inc* (SC S Ct, November 13, 2006). The court considered that the risk of being hit by a flying puck in the context of a hockey game was a 'common, expected, and frequent risk of hockey'.
118 *Elliott v Amphitheatre Ltd* [1934] 3 WWR 225 (Man).
119 Leigh Augustine, 'Who is Responsible When Spectators are Injured while attending Professional Sporting Events?' (2008) Univ of Den. Sports and Entertainment L. J. 12.
120 [1949] 1 DLR 369.

> there is no absolute warranty on the part of an occupier who invites others to use the premises to see a game or other spectacle that the premises are safe. An occupier is not under a duty to guard against every possible danger. Rather, he or she is under a duty to see that reasonable skill and care have been used to ensure safety and guard against dangers that may reasonably be anticipated in the circumstances.[121]

Similarly, in the Australian case of *Falvo v Australian Oztag Sports Association*,[122] the court pointed out that:

> It is impractical to require sports grounds to have surfaces that are perfectly level and smooth. Common sense tells one that the cost of perfection would be exorbitant and, if perfection were insisted upon, countless people in this country would be deprived of the opportunity to participate in sporting activities.[123]

Among other things, one of the practical effects of these rulings is that if a spectator chooses to occupy an unscreened seat because he prefers the unimpeded view that it offers, or if he is unable to procure a screened seat, but nonetheless chooses to remain and view the game, there will be no breach of the club's duty of care where he suffers injury.[124] Similarly, where a club has deemed it fit to provide protective screening, such a club is unlikely to be in breach of its duty if some injury is nonetheless sustained by a spectator, even if the screening does not totally eliminate the risk of spectator injury.[125] These decisions appear to be based on policy considerations, namely if a club is liable for risks that result from spectators' voluntary assumption of the risks inherent in sport, clubs will end up having two options: (1) to place all spectator areas behind a protective screen thereby reducing the quality of everyone's view, and since players are often able to reach into the spectator area to catch foul balls (in baseball), changing the very nature of the game itself; or (2) to continue the status quo and increase the price of tickets to cover the cost of compensating injured persons with the attendant result that persons of meagre means might be 'priced out' of enjoying the great pastime. Neither of these options, according to the court in *Neinstein v Los Angeles Dodgers*,[126] is acceptable.

A related question arises as to whether clubs may extend, restrict, modify or exclude their duty to players or spectators by agreement or otherwise. In principle, the simple answer to this question is in the affirmative.[127] However, it must be borne in mind that a mere warning is not to be treated, without more, as absolving a club from liability unless, in all the circumstances, it was reasonable. Indeed, although, as stated in *Alchimowicz v Schram*,[128] a club has no duty to warn of a danger that is so obvious and apparent that anyone would be aware of it, the words of the notice must be sufficiently clear to exclude liability, and it must be shown that all reasonable steps are taken to draw the condition contained in the notice to the attention of the player or spectator. This issue arose for consideration in the Barbadian case of *Strickland*, where the court found that, although there were warning signs, these signs were not brought to the attention of the deceased spectator in question, bearing in mind the fact that the rally was held along a course some two miles long; there was no defined entrance point because there was no admission fee; and the very nature of the course, which meant that spectators, like the

121 Here, a spectator sitting next to the boards was injured by a stick thrown by a hockey player after a fight broke out between him and another player during a game. Because the spectator's injuries were caused by the player's negligence or improper conduct, it was the player, but not the occupier, who was liable.
122 [2006] NSWCA 17.
123 Ibid [20].
124 *Hagerman v Niagara Falls (City)* (1980) 29 OR (2d) 609 per Justice Labrosse.
125 *Rosa v County of Nassau* 153 AD 2d 618, 544 NYS 2d 652 – NY.
126 (1986) 185 Cal App 3d 176, 229 Cal Rptr 612.
127 Section 3(1) Jamaica Occupiers' Liability Act.
128 [1999] OJ No 115 (CA).

deceased, could have entered at any point. This is in contrast to the case of *Coronel v Chicago White Sox Ltd*,[129] in which the claimant failed to recover damages from the club where she was struck in the face with a foul ball as she looked down into her lap for some popcorn. On the facts, the court found it sufficient that the claimant had been warned on three occasions of the dangers inherent in watching a major league game, including through the flashing of a warning on the screen, a warning over the public address system, and the caveat printed on the back of the ticket stub.

### 5.7.2 Safety and security

The final question that arises for consideration is the extent to which clubs are under a duty to ensure that there is adequate security and relative freedom from hazardous activities on their premises, such as alcohol, a favourite pastime in the Caribbean. This question is not merely of philosophical import, but has serious implications in practice, evidenced by the now well-known 'Hillsborough disaster' in which 93 football fans were trampled and killed and 766 others were reportedly injured during the FA Cup semi-final between Nottingham Forest and Liverpool. According to subsequent independent reports, the disaster was primarily caused by too many Liverpool fans having been allowed into the stadium through a narrow gap leading to the stand. Not only did this disaster result in litigation, first by police officers who suffered psychiatric injury as a result of the events in *White v Chief Constable of South Yorkshire*[130] and then by relatives and friends in *Alcock v Chief Constable of South Yorkshire*,[131] but it has set an important precedent in terms of the need for all parties concerned, primarily clubs, to ensure that adequate safety/security measures are in place to protect spectators and, indeed, players against harm. If it is that the sporting environment created by clubs is treated as a workplace, then it is not simply a discretionary option for clubs to ensure safety and security, but a legal duty mandated by the various regional Occupational Health and Safety Acts, which provide that 'a workplace shall not be so overcrowded as to cause risk of injury to the health of the persons employed therein'.[132]

The overly negative externalities associated with hooliganism in sports has resulted in sports governing bodies becoming a lot more pragmatic in recent years in the sense of putting appropriate measures in place to deter this type of behaviour. For example, UEFA's Disciplinary Regulations, in Articles 8 and 16, provide that national associations and clubs are strictly liable for the misbehaviour of their supporters. A failure on the part of a national football association to control the misbehaviour of its supporters can result in serious sanctions being imposed, including suspension, forfeiture of points and even fines. In *Football Association of Albania (FAA) v Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS)*,[133] for example, the Albanian national football team was fined 100,000 euros by UEFA in circumstances where, during a UEFA qualifying match against the Serbia national football team, FAA's supporters flew a drone that carried a banner depicting the map of an area that is sometimes referred to as 'Greater Albania', which showed several Albanian nationalistic symbols. The drone eventually descended closer to the ground, until it was observed to come within reaching distance of a Serbian player who reached the banner and began pulling the drone

129 Ill Dec 917, 595. NE 2d 45 (1992).
130 [1998] 3 WLR 1509.
131 [1992] AC 310.
132 Section 54 (1) Barbados Safety and Health at Work Act, 2005; section 25 Trinidad and Tobago Occupational Safety and Health Chapter 88:08; section 87 Guyana Occupational Safety and Health Act, Chapter 88:08.
133 CAS 2015/A/3874, award of 10 July 2015.

down by the cords from which the banner hung. As soon as the player grabbed the banner, two Albanian players were seen to approach him and take the banner from his hands, which resulted in greater chaos erupting across the playing field. The CAS ultimately refused to vary the fine imposed, finding that

> the use of a drone in such circumstances constitutes a new and a very serious threat for the security of a football match, much more serious than a banner shown or hung within the stadium's stands and which can be easily removed.[134]

Similarly, in a related case heard by the CAS,[135] the Football Association of Serbia was subject to a three-point deduction and a 100,000 euros fine in circumstances where its supporters had made brutal chants, threw rocks, chairs, flares and other dangerous objects from the stands, confronted Albanian players, invaded the field, attacked the Albanian players and ultimately interrupted the match. The CAS chided the Serbian team, noting that

> these are the exact kind of incidents that are typically at risk to occur during the course of a football match of high risk and for which an association must be prepared in co-ordination with the governmental and local authorities.[136]

It also expressed worry that, in future, supporters of a team may invade the field armed with switchblades or other dangerous weapons that could lead to permanent injury or even the death of members of the opposing team or referees, if, for example, there had been a penalty kick awarded against the home team.

Whether other sporting bodies would follow the robust approach of UEFA in future is yet to be seen, but there is a strong argument to be made, in similar vein to what the CAS indicated above, that, in future, increasingly stringent measures may need to be taken to protect the integrity of sport from wanton violence and other security concerns.[137] Indeed, the authors Tomlinson and others have argued that clubs would need to identify any appreciable hazards; assess their facility for adequacy; put in place effective standardized procedures to ensure that the premises are properly inspected, maintained, repaired and monitored; and, overall, take proactive measures to avert any risks.

The need to put these measures in place is particularly apt in the Caribbean, where there have been at least two incidents, within the context of cricket, that demonstrate poor crowd management and the potential for harm to players from spectator intrusion. By way of example, in the fifth one-day international (ODI) between the West Indies and Australia, played at the Bourda Cricket Ground in Guyana in 1999, the crowd rushed onto the field immediately after the last ball was bowled by Keith Athurton to Steve Waugh, who had hit the ball into the mid-wicket area. At the time, Australia had needed four runs to win off the final ball.[138] Legendary cricket commentator, the late Tony Cozier, aptly described the scene:

> this is absolute chaos; it's happened over and over again here in the Caribbean. Nothing has been done about it. One of these days, a player is going to get seriously injured in the melee. It happened before just an over ago; the warnings were there. Absolutely nothing done to control the crowd in their excitement.

134 Ibid [206].
135 CAS 2015/A/3875 *Football Association of Serbia (FAS) v Union des Associations Européennes de Football (UEFA)*, award of 10 July 2015.
136 Ibid [122].
137 Note that some States/countries have passed legislation to address these concerns. See, for example, Major Events (Crowd Management) Act 2003 Act No 19/2003 (Victoria, Australia).
138 Rick Eyre, 'Chaotic Tie in Georgetown' (*EspnCricInfo*, 21 April 1999) http://static.espncricinfo.com/db/ARCHIVE/1998-99/AUS_IN_WI/SCORECARDS/AUS_WI_ODI5_21APR1999_CI_MR.html.

Indeed, just an over before these wild scenes, at the end of the 29th over, the crowd had run onto the field wrongfully believing that the West Indies had won the match. The security personnel present at the scene were not prepared for this intrusion and, though they had lined the boundaries of the field subsequently, this did not stop the spectators from running onto the field. Steve Waugh, who had been batting at the time, indicated that he had never felt more in fear of losing his life as he did then when thousands of spectators rushed onto the field, pushing and shoving him and the other players. The match was ultimately declared a tie.

These wild scenes continued subsequently, this time at the Kensington Oval in Barbados, again between the West Indies and Australia. In this instance, Sherwin Campbell, the former Barbadian and West Indian opening batsman, was run out because, while going for a run, he collided with the Australian fast bowler Brendan Julien, who came across the pitch trying to stop the run.[139] The late Tony Cozier once again described the tense scenes:

> Ugly scenes here at Kensington Oval. Bottles are on the ground. The police are surrounding and the Australians are going off the ground to a hostile reception from the crowd following the run out of Sherwin Campbell who collided with Brendan Julien in trying to take a run. The Australians are leaving the field. They do feel like they are in some danger out there. The safety of the players must become ... And a bottle coming very, very close to Steve Waugh's head. He had to duck as it came to him. And they are running for their safety, the Australians ... the Australians have sought shelter in the players' dressing room, most of them.
>
> ... bottles are on the ground; ugly scenes here at Kensington Oval. The crowd is chanting, 'We want Campbell!' Similar scenes took place in the World Series in 1979 when Roy Frederick was given out leg before wicket on that occasion. The Crowd shouted the same thing – 'We want Frederick!' In the end, that match was abandoned. There are bottles on the ground. I'd be surprised if we resumed here today. It's a hostile crowd.

Michael Holding, who was also providing commentary at the time, expressed his concern in overly cynical terms:

> Well, I'm not too sure why those people are chanting and having smiles on their faces. This is nothing to be proud of ... this is not looking good on the West Indian public. We are trying to host the World Cup in the next seven to eight years and this won't go down well for us at all.

Although the Caribbean eventually hosted the ICC Cricket World Cup in 2007, and, thankfully, there was no similar recurrence, the foregoing incidents are stark reminders that clubs, and, indeed, the State, need to be more proactive to prevent conduct of this nature that has the potential to harm players and malign the integrity of sport.

## 5.8 VICARIOUS LIABILITY

Vicarious liability is imposed in circumstances where a club whose relationship with the employee (whether a full-time or part-time player, coach or other match official) puts it in a position to use the employee to carry on its business or to further its own interests, and has done so in a manner that has created or significantly enhanced the risk that a person might suffer harm as a result of the tortious act of its employee.[140] Whether the tortious act of the employee has been proved as being 'so closely connected with his employment that it would be fair and just to hold the

139 Gayle Alleyne, 'Bottle field: Fans protest Campbell runout' (*ESPN CricInfo*, 26 April 1999) www.espncricinfo.com/ci/content/story/77877.html.

140 Bruce Gardiner, 'Liability for sporting injuries' (2008) Journal of Personal Injury Law 16.

employer vicariously liable' is the essential issue under consideration.[141] The burden of proof is on the claimant to establish that this is the case. If so established, the club will be held liable for any culpable act or omission on the part of the employee. This is notwithstanding the fact that the employee, and not the club per se, is at fault. The policy considerations behind this mode of liability were outlined in the case of *Gravil v Carroll, Redruth Rugby Football Club*:[142]

> Both the desirability of an adequate and just remedy for the Claimant on the one hand and deterrence of the club by bringing home this liability on the other, so as to prevent or minimise the risk of foul play in the future, lead to the conclusion that it would be fair and just to hold that a club is vicariously liable. Clubs are no doubt better placed than individual players to obtain insurance against liability of this kind, although we recognise that some insurers exclude liability for criminal acts.[143]

In this case, the Redruth Rugby Football Club was held to have been vicariously liable in circumstances where, after a collapsed scrum, and an ensuing melee, the first defendant punched another rugby player in the face after the whistle had blown, causing facial injuries. The court found that there was a very close connection between the punch and the first defendant's employment. He was employed to play rugby for the club and was doing so at the time as a second row forward, and the punch accordingly amounted to a failure to perform this duty. His employment as a second row forward did not merely give him the opportunity to punch the claimant; it was an act done in the course of his employment. On the question of whether it was fair and just to hold the club liable, the court found in the affirmative, citing policy reasons:

> It is incumbent on both players and clubs to take all reasonable steps to eradicate, or at least minimize, the risk of foul play which might cause injury. As we see it, this involves clubs taking proactive steps to stamp it out. There is an obvious temptation for clubs to turn a blind eye to foul play. They naturally want their side to win and, no doubt, to play hard to do so. The line between playing hard and playing dirty may be seen as a fine one. The temptation for players to cross the line in the scrum may be considerable unless active steps are taken by clubs to deter them from doing so.[144]

In short, the club, as employer, was liable because the risk of one of its employees punching another player and causing him injury was a reasonably incidental risk to the type of employment being carried on, namely playing rugby.

Similarly, in *Vowles v Evans and The Welsh Rugby Union (WRU)*,[145] the WRU was held vicariously liable for damages in negligence in circumstances where one of its referees, during the course of a rugby match, had abdicated his responsibility and had therefore committed a tortious act by permitting a player who lacked suitable training and experience to play in the front row and, also, in failing to decide whether the situation had been reached where it was mandatory to insist upon non-contestable scrummages. The court found that the tortious act was committed in the course of the referee's employment and, therefore, it was fair, just and reasonable for the club to be vicariously liable for the serious injuries sustained by the claimant.

Notwithstanding these decisions, however, it must be noted that where the tortious conduct of a club's employee (player, coach or other match official) falls outside the scope of that

141 *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215*; Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366*; Mattis v Pollock (trading as Flamingos Nightclub)* [2003] EWCA Civ 887, [2003] 1WLR 2158*; Bernard v Attorney General of Jamaica* [2004] UKPC 47.
142 [2008] EWCA Civ 689, 2008 WL 2311367.
143 Ibid [28].
144 Ibid [26].
145 [2003] EWCA Civ 318.

person's employment, it is arguable that the club will not be vicariously liable, since it may not be successfully contended that the conduct was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable.[146] Put another way, if the unauthorized and wrongful act of the employee is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the club is not responsible. This principle was espoused in *GB v Stoke City Football Club Ltd*,[147] a case that raised some rather interesting, if not strange, issues. Here, a former youth footballer who had played for Stoke City Football Club alleged that the club's then goalkeeper, between 1986 and 1988, had engaged in a practice called 'gloving', wherein he allegedly put on a football/goalkeeper's glove, smeared it or at least a finger (the middle finger) with a hot rubbing ointment or gel and then applied his gloved hand to the claimant's bare backside, not simply running the finger over or between the buttocks but inserting it into the anus and holding it for a few seconds. According to the claimant, this practice occurred during his apprenticeship years, and was effectively an accepted form of punishment meted out to apprentices by professionals if the apprentices had 'prodded them too far'. The claimant sought damages on the basis that he felt 'destroyed as a person' by the assaults, alleging that he had to take antidepressant medication and undergo therapy. Interestingly, while the court accepted that the tort of trespass protects players' bodily inviolability, the claimant could not, unfortunately, discharge the burden of proof placed on him to establish, on a balance of probabilities, that the alleged unlawful conduct did in fact occur. On the question of vicarious liability, the court also found that even if the alleged assaults had occurred (as to which the claimant did not discharge the burden of proof), it would have been deliberate and intentional or reckless conduct involving a serious assault outside the course of the goalkeeper's employment. In other words, it would have been conduct of a kind in which it was inappropriate to impose vicarious liability, since it would have been deemed to have occurred outside his scope of employment. In short, the alleged tortious act of the goalkeeper, the club's former employee, even if it were proved, could not be said to have been so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. If, on the other hand, the allegations had been proved against the club's youth development leader (or possibly the coach/trainer) who had been given direct authority over the apprentices and duties in relation to them including disciplinary powers, then the club would probably have been vicariously liable.

## 5.9 REMEDIES

Although a range of remedies are available to a claimant who has sustained injuries as a result of the negligence or assault/battery of a player, coach, match official, club or governing body, including a declaration and an injunction, by far the most sought-after remedy, having regard to the existing corpus of jurisprudence, is that of damages. The aim of damages awarded in the sporting context is to put the claimant back in the position that he would have been had the tortious act or omission not been committed.

In civil litigation, damages fall into two broad categories: special damages and general damages.

146 Mark James, 'Liability for Professional Athletes' Injuries: a comparative analysis of where the risk lies' [2006] 1 Web Journal of Current Legal Issues. James argues that, 'where the line is to be drawn between actions that are within the course of the employment and those that are outwit it is unclear. It is likely, however, that any injury-causing act except fighting at some distance from the play will be considered to be within the course of a player's employment. This will include acts of deliberate foul play and perhaps even some acts of dangerous play.'

147 [2015] EWHC 2862 (Law Com).

### 5.9.1 Special damages

A claimant may recover all expenses that he has incurred between the date of the accident and the trial and which, but for his injury, he would not have incurred. Although, in general, special damages (for example, medical expenses, the cost of prosthesis, transportation costs, the cost of home care) must be specifically pleaded and proved by the claimant, there are cases where this is impossible, and the court will accordingly adopt a flexible approach to the determination of the requisite quantum, such as where the claimant utilizes public transportation to attend physiotherapy sessions post-injury, but has no receipt to substantiate this claim.[148] In such a case, the court will make an award of a reasonable sum in damages, having regard to the nature of the activity in relation to which damages are sought as well as contemporary customary practices.

In practice, claimants in the sporting context typically seek special damages for the loss of earnings occurring from the date of the incident to the date of the trial. This will typically entail the court computing the approximate amount of money in salary, bonuses and other fees that the claimant would likely have earned, but for the injuries sustained, in the years following the incident, but preceding the trial. The amount arrived at, usually supported by receipts, is pleaded before the court as a prayer for loss of earnings.

The court may also make an award of damages on a *quantum meruit* basis in circumstances where the claimant was provided with certain services by a person, for example a caregiver, after he had sustained the relevant injuries, even in the absence of a formal contractual arrangement between himself and that other person.[149] Notwithstanding the court's relatively strict approach to the need to specifically plead and prove special damages, allowance is made for the award of a reasonable amount in damages on a *quantum meruit* basis reflective of the likely value of the services provided to the claimant, though he may not have a formal receipt or contract to show that this is the case.

### 5.9.2 General damages

Compared to special damages, general damages are speculative as they attempt to account for intangibles, such as pain and suffering and the loss of amenities, and are very much concerned with future, and therefore potentially hypothetical, developments. In the Caribbean, the classic principles regarding the award of general damages were outlined by Wooding CJ in the oft-cited case of *Cornilliac v St Louis*.[150] In that case, his lordship noted that when assessing general damages, careful consideration must be given to:

- *The nature and extent of the injuries sustained* – this will typically be gleaned from the claimant's medical report. The claimant will typically indicate in his affidavit the nature of the injuries sustained;
- *The nature and extent of any disability*. The claimant would typically indicate precisely what his disabilities are, and the medical report would provide information on this too. For example, a 100% permanent partial disability (*PPD*) in the claimant's right upper limb would be of profound concern if the person's dominant hand, as a tennis player, is his right hand. The disability can, however, be less severe, since 100% PPD reflects a grave injury. At trial, the medical practitioner would typically give evidence as to the nature and extent of any disability sustained by the claimant. If the claimant has to give evidence of the disability, the

148 *Desjardins v McGowan (*1973) 6 NBR (2d) 536.
149 *Rayner v Knickle* (1991), 88 Nfld & PEIR 214 (PEISCAD).
150 (1965) 7 WIR 491.

nature and extent of the disability will be determined by *what the claimant cannot do since the injury*. In his examination-in-chief, the claimant will have to proffer evidence to establish a *causal link between the incident and the disability*. Really and truly, one here is looking at the *impact* that the incident in question has had on the claimant;

- *The extent of pain and suffering*. One can ascertain the level of pain and suffering that a person has suffered as a result of an incident by looking at the particulars of treatment. In addition to the pain that the claimant would have felt from the injuries, the treatment, such as injections or pain killers which the claimant had to be given, or any physiotherapy treatment, among other things, could indicate the threshold of pain experienced;
- *Loss of amenities*. In addition to the medical report that will outline the nature and extent of disability, the claimant will have to provide details regarding the nature of the activities he performed before the incident and how his ability to engage in these activities has since been negatively impacted by the harm sustained. The mere fact that the claimant has had to spend time in bed because of the injury is a loss of amenity. Indeed, it is indisputable that a footballer, or other sportsperson for that matter, who is unable to play because of injuries to his leg or arm has lost an important amenity, for which he must be adequately compensated;
- *The extent to which the claimant's pecuniary prospects have been affected*. In the particulars of damages, the claimant would typically include *future loss of earnings to date* as a head of general damages, which would account for the earnings that he would have been able to make, post-trial, had it not been for the injuries he sustained at the hands of the defendant.

#### *5.9.2.1 Future loss of earnings*

The aforementioned principles were applied in the case of *Benjamin Collett v Gary Smith, Middlesbrough Football and Athletics Co.*[151] Here, the claimant had been a sensational junior footballer, who was recruited by Manchester United's Youth Academy at the age of 9 years, and was, by the age of 16, offered a two-year scholarship contract with Manchester United, subject to renewal for a third year. Unfortunately, however, at the age of 18 years, while playing for Manchester United's Reserves team in a match against the second defendant's reserves team, the claimant was tackled by the first defendant, resulting in him sustaining a fracture of the tibia and fibula of his right leg. Sadly, despite a rather promising future pointed to by, among others, Sir Alex Ferguson, the claimant never regained his pre-injury standard of play and, in 2005, was informed that his contract with Manchester United would not be renewed. Two years later, the claimant, recognizing that he would not have a chance of a successful career in professional football, retired from the game. He brought a claim for damages against the defendants in negligence, to which the defendants admitted liability, though it fell for the court to determine the amount of general damages to be awarded.

On the question of future loss of earnings, the court considered the two possible career options that were available to a talented player such as the claimant: a career at the Championship level and a career (or part of a career) at the Premiership level. In respect of the former, the court sought to compute the amount of damages to be awarded by:

- finding a starting point annual basic wage for 2005/2006;
- increasing this average basic wage by 25% to reflect the fact that the claimant would at least have played much of his career in the Championship, and would have been contracted to an 'aspiring' club;

151 (1986) Ltd [2008] EWHC 1962 (Law Com).

- deducting agents' fees from the amount arrived at above, which leaves the 'multiplicand';
- applying the conventional multiplier/multiplicand approach:
  - In determining the appropriate *multiplier*, the court considered at what age the claimant was likely to have retired from the professional game (which was held to be 35 years);
  - The court then subtracted the claimant's age at the date of trial (24 years) from his likely retirement age (35 years), arriving at a notional multiplier of 11 years;
  - It then reduced this multiplier to 9 having regard to 'vicissitudes of life';
  - Finally, the court multiplied the multiplier (9) by the multiplicand.

The court applied a similar approach to the claimant's likely future loss of earnings at the Premiership level, and, when combined with the amount of damages awarded in respect of the Championship level, arrived at a staggering amount of £4,534,503 in damages.

#### *5.9.2.2 Loss of earning capacity*

Future loss of earnings is to be distinguished from loss of earning capacity.[152] The loss of earning capacity is not concerned with loss of earnings but, rather, compensating the claimant for a capital asset (i.e. the capacity to earn) that has been lost.[153] A claimant is entitled to this compensation because, for the rest of his life, some occupations will be closed to him and it is impossible to say that over his working life the impairment will not harm his income-earning capacity. In other words, compensation is apposite because there is now a disability that restricts the scope of other employment that might become available in the future to the claimant.[154] In this context, courts consider a number of factors in determining whether to make an award of damages for a loss of earning capacity, including:

- Whether the claimant has been rendered less capable overall from earning income from all types of employment;
- Whether the claimant is less marketable or attractive as an employee to potential employers;
- The fact that the claimant has lost the ability to take advantage of all job opportunities that might otherwise have been open to him, had he not been injured; and
- The fact that the claimant is less valuable to himself as a person capable of earning income in a competitive labour market.

In calculating the amount of compensation to award to a claimant for loss of earning capacity, the claimant is not entitled to compensation based solely on the type of work he was performing at the time of the accident; the court must base its decision on what is reasonable in all of the circumstances. In *Benjamin Collett*, for example, in arriving at the sum of £128,482 for loss of earning capacity, the court applied the multiplier/multiplicand method, giving careful consideration to the fact that the claimant was at the time about to embark upon an English degree course at university, but may have been unable, in future, to find work, thereby resulting in a reduction in his average earnings.

#### *5.9.2.3 Loss of a chance*

People who suffer injury at the hands of a defendant in the sporting context may claim damages on a loss of a chance basis. Under this head of damages, the claimant essentially alleges

152 *Ibbitson v Cooper*, 2012 BCCA 249.
153 *Parypa v Wickware*, 1999 BCCA 88 (CanLII).
154 *Demers v Monty*, 2012 ONCA 384 (CanLII).

that as a result of the defendant's wrongdoing, he has lost a chance to obtain a favourable opportunity or some other benefit[155] or a chance of avoiding a detrimental event.[156] In other words, it is not so much the actual loss that the court is seeking to compensate, but rather the disappearance, because of the occurrence of the fault, of the chance either to avoid a loss or to make a profit.[157]

The theoretical difficulty with this head of damages, however, is that the damages that are being claimed for is not only future but, by definition, even uncertain. Indeed, no one can say with certainty whether the loss could have been avoided or the profit made if the injury had not occurred. However, the courts, recognizing that merely being deprived of a possibility is a direct damage, have applied this concept. Unfortunately, however, in *Benjamin Collett*, the court rejected the claimant's claim for damages on a loss of a chance basis, notwithstanding his argument that he had a realistic prospect of achieving a career in management or coaching. In other words, the possibility that the claimant might have made a good career for himself in management and coaching was too speculative to form a basis for an award of damages.

## 5.10 MITIGATION

Although it has been frequently stated both in the court's jurisprudence and in the existing literature that there is a duty on injured claimants to mitigate their loss, this is somewhat of a misnomer as a claimant is actually completely free to act as he judges to be in his best interests. Instead, if the defendant wishes to obtain any benefit accruing from the claimant's seeking to take steps to mitigate his loss consequent upon the defendant's breach of duty, the onus is upon him to prove that the benefit obtained by the claimant should inure to his advantage. To succeed, the defendant would need to file a notice of such contention before the court so that the claimant would have enough time to prepare to respond to the claim.[158] This notice would outline, among other things, the ways in which the claimant, because of some inertia or reticence on his part, failed in his duty to do what was reasonable to mitigate losses arising from the defendant's breach of duty.

## 5.11 DEFENCES

Two defences are typically relied upon by sports participants (including players, coaches, referees and clubs) who are alleged to have engaged in negligent conduct: *volenti non fit injuria* or consent and contributory negligence. The role of each of these defences in the sporting context is hereafter examined.

### 5.11.1 *Volenti non fit injuria*

Unlike contributory negligence, discussed below, the defence of *volenti* is a complete defence against a claim brought in negligence or occupiers' liability for damages in circumstances where

155 *Strategic Acquisition Corp v Starke Capital Corp*, 2017 ABCA 250.
156 *Cottrelle v Gerrard*, 2003 CanLII 50091 (ON CA).
157 *Laferrière v Lawson*, [1991] 1 SC*R* 541, 1991 CanLII 87 (SCC).
158 *Geest plc v Lansiquot (St Lucia)* [2002] UKPC 48; see also *Gilbert Kodilinye, Commonwealth Caribbean Tort Law* (Routledge, 2014) 415.

injury has been sustained in the sporting context.[159] This defence is not restricted to players, but can be relied upon by a number of other sportspeople, including referees and coaches.[160]

In order to successfully rely on the defence of *volenti*, the onus lies on the defendant to prove that, notwithstanding the fact that a duty was owed to the injured party, the claimant, having full knowledge of the nature and extent of the risk of physical injury, nonetheless entered into an agreement, whether expressly or impliedly, to exempt the defendant from the legal consequences of his act or omission.[161] According to Lord Denning MR in *Lane v Holloway*,[162] no liability arises in this context because the claimant is deemed in law to have voluntarily taken upon himself the risk of incidental injuries to himself.[163]

The application of the defence of *volenti* was aptly illustrated in the case of *Caldwell v Maguire*, examined earlier in this chapter. Here, the defendant, a professional jockey, was exempted from liability in circumstances where the claimant, also a professional jockey, had been injured when he was unseated and thrown to the ground as a result of manoeuvres by two fellow jockeys. On the facts, the court held that by engaging in a sport such as horse racing, the claimant had accepted risks that were inherent in that sport. Having regard to all the circumstances of the case, the errors of judgement, oversights or lapses made by the defendant in the heat of the race, as alleged by the claimant, could not give rise to liability. Importantly, the court considered that even if the impugned conduct was outside of the rules of the game, provided that it fell within the 'playing culture' of the game, the defence of *volenti* was still applicable.

Similarly, in *Wooldridge v Sumner*, also discussed earlier, the court exempted the defendant, a jockey, from liability in circumstances where his filly seriously injured the claimant, a photographer/spectator, who, having been inappropriately seated, was held to have voluntarily consented to the breach of duty in full knowledge of the nature and extent of the risk. Diplock LJ, in particular, considered that:

> The maxim in English law presupposes a tortious act by the Defendant. The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk ... and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran.[164]

Notwithstanding the foregoing, however, there have been cases in the sporting context where an injured claimant has been held to not have consented to the injury sustained, typically in situations where more is in issue than the ordinary incidents of the game. By way of illustration, in *Smoldon v Whitworth & Nolan*, discussed earlier, the defendant referee was unable to rely on the defence of *volenti* to exonerate him from injuries sustained by a rugby player as a result of his (the referee's) failure to enforce the crouch – touch – pause – engage scrummaging sequence. In that case, the court considered that although the claimant had consented to the risk of injury in this game of rugby, he could not by inference be held to have consented to the referee's breach of duty. In other words, the claimant had consented to the ordinary incidents of the game of

159 *Levita v Alan Crew* 2015 ONSC 5316. The court stated that, 'to establish volenti, it must be clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the Defendant's part ... The defence will arise only where there can truly be said to be an understanding on the part of both parties that the Defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.'

160 See Ben Livings, 'A different ball game – why the nature of consent in contact sports undermines a unitary approach' (2007) Journal of Criminal Law 534; Bruce Gardiner, 'Liability for sporting injuries' (2008) Journal of Personal Injury Law 16.

161 *Bartlett v English Cricket Board Association of Cricket Officials* 2015 WL 5037730, [51]–[54].

162 [1967] 3 WLR 1003.

163 [1968]1 Law Com 379 [386]–[387].

164 Ibid 69.

rugby football of the kind in which he was taking part, but given that the rules were framed for the protection of him and other players in the same position, he could not possibly be said to have consented to a breach of duty on the part of the referee whose duty it was to apply the rules and ensure, so far as possible, that they were observed. Similarly, in *Vowles v Evans*, discussed earlier, the injured rugby player could not be said to have consented to the referee's breach of duty in that the referee had failed to make the requisite enquiries as to the suitability or training of the inexperienced replacement player who played in the front row, resulting in a multitude of collapsed scrums, including the one in relation to which the claimant was injured.

### 5.11.2 Contributory negligence

Where a sportsperson suffers harm as a result partly of his own fault and partly of the fault of any other person(s) (for example, another player, club or match official), a claim in respect of that harm is not automatically defeated by reason of that person's fault, but the damages recoverable from the court in respect of the harm sustained will be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage. This rule is provided for in the Law Reform (Contributory Negligence) Acts of some Caribbean jurisdictions,[165] and is a general principle of law in other Caribbean jurisdictions.

Although the apportionment of damages, in this context, has proven to be a very difficult task for courts, courts have nonetheless arrived at their determination by asking – what would the hypothetical 'reasonable person' do in the circumstances that confronted the claimant? And what would 'reasonable care' for his own safety have required the 'reasonable person' to say or do in all of the circumstances of the case? By way of illustration, in the case of *Anderson v Lyotier, Lyotier (t/a Snowbizz), Jerome Portejoie*,[166] already discussed above, the court reduced the amount of damages that would otherwise have been awarded by one-third in circumstances where the inexperienced skier was rendered a complete tetraplegic after he ran into a tree on an off-piste terrain. The court felt that although the instructor had failed to exercise reasonable care by failing to identify the claimant's inexperience and incompetence in so far as the fatal skiing off-piste manoeuvre was concerned, the skier could not abdicate all personal responsibility for deciding whether to do or not to do something the instructor suggested. In other words, the law did not require that the instructor take total responsibility in a situation such as occurred in this case. In this regard, it is clear that if an instructor/coach suggests something to a player under his supervision that the player believes to be beyond what it is reasonable for him to attempt, there is an onus on the player to say so. He must say something in this situation in order to avoid the suggestion that he or she is not taking sufficient care for his or her own safety.

Similarly, in the Caribbean case of *Strickland v Barbados Rally Club*,[167] also discussed earlier, the court reduced the amount of damages that would otherwise have been awarded to the mother of the deceased spectator by 30% in circumstances where he had put himself so close to the road that he ran the risk of being hurt if a car skidded off the road, as it did on the facts. Although the court ultimately found the defendant club liable for failing to erect a fence, rope, or barrier through which spectators could be contained or which would have demarcated a safe distance from the track, the deceased had, to some extent, also failed in his personal responsibility to take sufficient care for his own safety.

165 Law Reform (Contributory Negligence) Act, Chapter 205 (Barbados); Law Reform (Miscellaneous Provisions) Act, Law Reform (Miscellaneous Provisions) Act, Chapter 6:02 (Guyana); Law Reform (Miscellaneous Provisions) Act (Jamaica).
166 [2008] EWHC 2790 (Law Com).
167 BB 2012 HC 17.

By contrast, a different outcome was arrived at in the case of *Phee v Gordon, Niddry Castle Golf Club.*[168] Here, the claimant, who had never played golf prior to the date of the incident and who was therefore not versed or familiar with the rules or etiquette of golf or any local rules, was the unfortunate victim of a serious accident, which occurred when he was struck by a golf ball which had been driven by Gordon. At the material time, the claimant and his three companions were proceeding in single file from the sixth green to the seventh tee, pulling a golf trolley. When the claimant was just short of the seventh tee, Gordon struck his tee shot. Gordon was aiming at a target area at least 65 yards left of the claimant, but the shot was a bad one. When he realized that the shot had veered sharply to the left and the ball was therefore travelling directly in the direction of the group of golfers, Gordon shouted 'fore' in a loud voice. Unfortunately, the claimant did not know where the shout of 'fore' had come from, and his immediate reaction was to crouch down and place his left, or free, hand (the other hand holding the trolley) over his head, whilst at the same time trying to look upwards. Whilst in this position, he was struck in the eye by the golf ball. Although the court heard evidence that the claimant, having previously watched golf tournaments on television, was aware that the shout of 'fore' was a warning call shouted by golfers to alert other golfers when a bad or dangerous shot had been struck, it nonetheless refused to find the claimant contributorily negligent. Instructive in its determination appears to have been the fact that there were no warnings signs alerting users of the path to any potential danger or hazard caused by golfers driving from the eighteenth tee at or about the sixth green. On the facts, the court found Gordon liable in negligence and the golf club liable under the Occupiers Liability Act.

With regard to Gordon, the court considered that when he arrived at the eighteenth tee on the day in question he had made the error of overestimating the likelihood of his tee shot following its desired or intended path to its intended target and, simultaneously, underestimating the degree of risk to which his shot would place the claimant and his three companions, then proceeding on the path between the sixth green and the seventh tee. These errors, according to the court, were caused by an inflated degree of confidence occasioned by what Gordon wrongly considered to be the very good round of golf he was having. As a result of this overconfidence, Gordon made his tee shot at a time when the exercise of reasonable care should have informed him that there was a foreseeable risk that his shot might be bad and, further, might encroach on the area being traversed by the claimant. In relation to the club, the court held that they had, at the time of the incident, made no effort to conduct a formal risk assessment of their course, though its safety committee had apparently informally discussed the risk. In short, in failing to take a proactive approach, which might have included the erection of signs, the club had failed in its duty to provide a safe environment for golfers. The club was accordingly 80% liable, whereas Gordon was 20% liable.

On the question of contributory negligence, the court rejected the defendants' argument that the claimant had not paid attention whilst proceeding from the sixth green to the seventh tee and therefore failed to see, and take precautions, when Gordon drove off from the eighteenth tee. It also rejected the argument that the claimant failed to act in a proper and recognized manner on hearing the shout of 'fore'. Of crucial importance, in this connection, was the fact that there was a very short lapse of time (4.6 seconds) between the uttering of the shout of 'fore' and the golf ball striking the claimant. His Lordship noted that he did 'not consider that a person in the position of the [Claimant] on the golf course that day should be judged too finely in any avoiding action he may, or may not, have taken'.

It is submitted that although the defendants were clearly liable in that their conduct fell below the standard of care that was to be objectively expected of them, respectively, in all of

168 [2013] CSIH 18.

the circumstances of the case, a strong argument can be made that the question of contributory negligence might have been decided incorrectly, particularly when viewed in light of the latter case of *Anderson v Lyotier*. Indeed, it can be argued that the claimant in *Phee* should have done more to ensure his safety from the stray ball, including keeping his head down, rather than looking up, after he had heard the shout of 'fore'. Although he had not been very familiar with golfing terminologies on a whole, the evidence clearly revealed that he was very much cognizant of what the shout of 'fore' meant, and should have accordingly taken the necessary precautions in full, which were, in any event, seemingly instinctive. Interestingly also, the claimant had fully let go of the trolley that he was carrying at the time so that he could have placed both hands over his head whilst ducking. In short, the claimant should not have been allowed to abdicate his personal responsibility to take care to ensure his own safety by adopting, on the day in question, a common-sense approach, which certainly did not involve looking up after he had already been in a crouched position after hearing the shout of 'fore'.

Notwithstanding the foregoing criticism, however, the case of *Phee v Gordon* underlines once again the importance of clubs carrying out a formal risk assessment with respect to the safety of persons, whether players or spectators, who use their facilities. Indeed, as Julian Fulbrook notes, this need not be elaborate, but at least a simple and routine analysis that results in the erection of appropriate signage along hazardous paths.[169]

## CONCLUSION

This chapter illustrated the numerous ways in which the law of tort intersects with sport, and the implications that this close and dynamic interaction has on players, spectators, match officials, professional bodies, clubs and even governments. Through the nuanced discussions of three important causes of action – assault/battery, negligence and occupiers' liability – this chapter demonstrated that the law has had to take an increasingly interventionist approach to ensuring the protection of persons who suffer injury in sport, whether on or off the field. Indeed, the chapter makes it clear that while the law makes allowance for some forms of physical contact that are deemed to be an inherent part of the risks of sport to which all persons associated therewith consent, there are times when intentional, reckless or careless conduct will result in an award of damages. This is particularly the case in the tort of negligence, where a duty of care has long been held to exist, though the standard of care remains a shifting pendulum between ordinary principles of negligence and recklessness.

Among other things, this chapter demonstrated that the law of tort, as applied to various sporting disciplines, is dynamic, and fully able to offer attractive solutions to the many types of sporting injuries sustained on and off the field, though internal disciplinary procedures, insurance and settlements do continue to have a significant role to play in the resolution of these disputes.

169 Julian Fulbrook, 'Case Comment – Phee v Gordon: personal injury – liability – negligence' (2013) Journal of Personal Injury 135.

# CHAPTER 6

# CRIMINAL LIABILITY, ETHICS AND INTEGRITY IN SPORT

## 6.1 INTRODUCTION

The sporting arena, like any other area of human endeavour, is fraught with passionate pursuits, outright aggression and occasional instances of wonton violence. For this reason, some injuries sustained in a sporting context are not immune from challenge in the criminal courts, though, admittedly, there have been no reported prosecutions in the Caribbean to date and, indeed, very few prosecutions worldwide. Part of the reason behind the general reluctance to pursue criminal prosecutions where sporting injuries are sustained lies in the fact that sporting bodies often have robust internal disciplinary procedures in place to deal with issues of this nature, and, in any event, civil proceedings, as discussed in the previous chapter, offer a more attractive, if not more favourable, prospect of success. That said, there has been a steady increase in the number of prosecutions for injuries sustained in a sporting context, primarily in Canada and the United Kingdom in recent years, which, among other things, has served to shed light on the precise role of the criminal law in circumventing acts of violence and aggression that exceed a particular threshold. Indeed, as will be illustrated in this chapter, although virtually any physical contact between players could *prima facie* fulfil the ingredients of the various criminal offences for which a sportsperson may be prosecuted, the defence of consent, though hugely contentious in practice, remains a fundamental cog in the wheel of criminal prosecutions, preventing the opening of the proverbial floodgates whilst isolating lawful conduct from criminal conduct.

In the first part of this chapter, the focus will be on the circumstances where criminal liability may arise in the sporting context, with an overview of the applicability of existing legislation in the Commonwealth Caribbean. The second half of this chapter will examine the twin themes of ethics and integrity in sport, with special focus being placed on the regulation of sports betting in the Commonwealth Caribbean from a legal, historical and policy perspective. This section will not only analyse the legislative regulation of sports-related betting, but will also examine the relevant, albeit sparse, case law.

## 6.1 CRIMINAL OFFENCES IN THE SPORTING CONTEXT

A range of criminal offences may be committed by a player who engages in either 'on the ball' or 'off the ball' conduct that results in injuries being sustained by another player or, indeed, the death of that player. These offences, though not strictly speaking hierarchical in their orientation, lie on a *de facto* continuum that ranges from mere physical contact to more pronounced physical contact that results in death or serious injury.

### 6.1.1 Fatal offences

Naturally, murder and manslaughter are at the upper end of the continuum of criminal liability. There is no reported Caribbean case to date in which a player has been convicted of murder for an offence committed 'on' or 'off' the ball, but, theoretically, the offence may be committed where a player of sound mind and discretion (i.e. sane) unlawfully kills (i.e. not in

self-defence or otherwise justified) another player with intent[1] to kill or cause grievous bodily harm (GBH).[2] By contrast, in the sporting context, the offence of manslaughter has invariably been successfully prosecuted in relatively more instances than murder, including in *R v Moore*,[3] where the accused footballer was convicted of manslaughter after he had jumped at another player, thereby throwing the latter violently against the goalkeeper's knee, which resulted in his death, and more recently in *R v Forwood*,[4] where the accused footballer was convicted of manslaughter in circumstances where he threw a single punch at another player resulting in the death of that player in a Sunday league football game. In both of these cases, although the charge of murder was proffered, the jury could not find that there was an intention to kill or cause GBH, though the courts found that the ingredients of the offence of manslaughter were made out by the Crown.

Manslaughter may be committed in a number of ways.[5] First, a player may commit manslaughter where he kills by conduct that he knew involved a risk of killing or causing serious harm to another player ('reckless manslaughter'); second, by killing another player by conduct that was grossly negligent in all of the circumstances of the case, given the risk of death ensuing ('gross negligence manslaughter'); third, where he kills by conduct that takes the form of an unlawful act involving a danger of some harm to the person ('unlawful act manslaughter'); or fourth, where he kills with the intent to murder, but in circumstances where a partial defence applies, namely provocation or diminished responsibility.

Although, in theory, the offences of murder and manslaughter play an important role in circumscribing intentional or reckless acts that cause the death of another player, it is clear from even a cursory review of applicable case law that these charges are rarely proffered in practice, which might be on account of the inherent difficulty of proving, beyond a reasonable doubt, an intention to kill or cause GBH, as well as the fact that, in most instances, serious injuries, rather than death, ensue from dangerous 'on' or 'off' the ball conduct. By contrast, non-fatal offences, where they occur in the sporting context, have more frequently been prosecuted in the criminal

1 The intent for murder is the intention to kill or cause grievous bodily harm (GBH), nothing less. Foresight is no more than evidence from which the jury may draw the inference of intent, cf *R v Woollin* [1999] 1 Cr App R 8 (HOL). In contrast to the offence of murder, attempted murder requires the existence of an intention to kill, not merely to cause grievous bodily harm: *R v Grimwood* [1962] 3 All ER 285. The requisite intention to kill can be inferred by the circumstances: *R v Walker and Hayles* (1990) 90 Cr App R 226.

2 Sections 186 and 188 Anguilla Criminal Code (life imprisonment); section 3 Antigua Offences Against the Persons Act (death); section 2 Barbados Offences Against the Persons Act (death); section 287 Bermuda Criminal Code (life imprisonment); sections 290 and 291 The Bahamas Penal Code (death); section 106 Belize Criminal Code (death); section 150 British Virgin Islands Criminal Code (life imprisonment); sections 181–182 The Cayman Islands Penal Code (life imprisonment); section 2 Dominica Offenses Against the Persons Act (death); section 230 Grenada Criminal Code (death); section 101 Guyana Criminal Law Act (death); section 2 Jamaica Offenses Against the Persons Act (death); section 149 Montserrat Penal Code (life imprisonment); section 2 St Kitts and Nevis Offenses Against the Persons Act (death); section 85 St Lucia Criminal Code (death); section 159 St Vincent and the Grenadines Criminal Code (death); section 4 Trinidad and Tobago Offenses Against the Persons Act (death).

3 (1898) 14 TLR 229.

4 Unreported Central Criminal Court,6 July 2009.

5 Section 191 Anguilla Criminal Code (life imprisonment); section 5 Antigua Offences Against the Persons Act (life imprisonment); section 6 Barbados Offences Against the Persons Act (life imprisonment); sections 293–294 Bermuda Criminal Code (life imprisonment or up to four years in the case of gross negligence manslaughter on indictment); sections 293 The Bahamas Penal Code (life imprisonment); section 108 Belize Criminal Code (life imprisonment); section 153 British Virgin Islands Criminal Code (life imprisonment); sections 180 and 183 The Cayman Islands Penal Code (life imprisonment); section 6 Dominica Offenses Against the Persons Act (life imprisonment); section 232 Grenada Criminal Code (five years in the case of gross negligence or up to 15 years otherwise); section 95 Guyana Criminal Law Act (life imprisonment); section 9 Jamaica Offenses Against the Persons Act (life imprisonment); section 154 Montserrat Penal Code (life imprisonment); section 5 St Kitts and Nevis Offenses Against the Persons Act (life imprisonment); section 93 St Lucia Criminal Code (life imprisonment); section 163 St Vincent and the Grenadines Criminal Code (life imprisonment); section 6 Trinidad and Tobago Offenses Against the Persons Act (life imprisonment).

courts, though, as will be discussed hereafter, the courts appear to show a certain reticence to entering convictions for these offences, typically countenancing the defendants' reliance on the defence of consent.

### 6.1.2 Non-fatal offences

In the Commonwealth Caribbean, the principal statutes that deal with offences of violence committed in the sporting context are the respective Offences Against the Person Acts and Criminal/Penal Codes. In general, these Acts prohibit various non-fatal offences that are committed in the sporting context, including common assault;[6] assault occasioning actual bodily harm;[7] malicious wounding or infliction of grievous bodily harm;[8] and wounding or causing grievous bodily harm with intent.[9] As an elementary matter, it should be remembered that each of these offences require satisfaction of certain ingredients/elements,[10] which the prosecution/Crown must prove beyond a reasonable doubt.

6 Section 221 Anguilla Criminal Code; section 48 Antigua Offences Against the Persons Act (two years' imprisonment); section 25 Barbados Offences Against the Persons Act (two years on summary conviction or 10 years on indictment); section 314 Bermuda Criminal Code (one year); sections 133 and 264 The Bahamas Penal Code (three months); section 44 Belize Criminal Code; section 183 British Virgin Islands Criminal Code (one year); section 215 The Cayman Islands Penal Code (one year); section 43 Dominica Offenses Against the Persons Act (two months); section 81 Grenada Criminal Code (three months); section 43 Guyana Criminal Law Act (one year); section 39 Jamaica Offenses Against the Persons Act (two months); section 184 Montserrat Penal Code (one year); section 40 St Kitts and Nevis Offenses Against the Persons Act (two months); section 115 St Lucia Criminal Code (three years); section 192 St Vincent and the Grenadines Criminal Code (one year); section 30 Trinidad and Tobago Offenses Against the Persons Act (two years).

7 Section 222 Anguilla Criminal Code; section 48 Antigua Offences Against the Persons Act (two years' imprisonment); section 26 Barbados Offences Against the Persons Act (two years on summary conviction or 10 years on indictment); section 309 Bermuda Criminal Code (two years on summary conviction or four years on indictment); section 266 The Bahamas Penal Code (one year); section 79 Belize Criminal Code (one year); section 184 British Virgin Islands Criminal Code (five years); section 216 The Cayman Islands Penal Code (five years); section 48 Dominica Offenses Against the Persons Act (one year); section 205 Grenada Criminal Code (three years); section 49 Guyana Criminal Law Act (five years); section 43 Jamaica Offenses Against the Persons Act (one year); section 185 Montserrat Penal Code (five years); section 45 St Kitts and Nevis Offenses Against the Persons Act (two years); section 97 St Lucia Criminal Code (two years); section 193 St Vincent and the Grenadines Criminal Code (five years); section 30 Trinidad and Tobago Offenses Against the Persons Act (five years).

8 Section 204 Anguilla Criminal Code; section 22 Antigua Offences Against the Persons Act (five years' imprisonment); section 17 Barbados Offences Against the Persons Act (10 years on indictment); section 306 Bermuda Criminal Code (seven years); section 271 The Bahamas Penal Code (18 months); section 80 Belize Criminal Code (two years); section 164 British Virgin Islands Criminal Code (five years); section 204 The Cayman Islands Penal Code (seven years); section 22 Dominica Offenses Against the Persons Act (two years); section 206 Grenada Criminal Code (five years); section 50 Guyana Criminal Law Act (five years); section 22 Jamaica Offenses Against the Persons Act (three years); section 164 Montserrat (five years); section 19 St Kitts and Nevis Offenses Against the Persons Act (two years); section 174 St Vincent and the Grenadines Criminal Code (14 years); section 14 Trinidad and Tobago Offenses Against the Persons Act (five years).

9 Section 203 Anguilla Criminal Code; section 20 Antigua Offences Against the Persons Act (15 years' imprisonment); section 16 Barbados Offences Against the Persons Act (10 years on indictment); section 305 Bermuda Criminal Code (10 years on indictment); section 270 The Bahamas Penal Code (seven years); section 81 Belize Criminal Code (five years); section 163 British Virgin Islands Criminal Code (life imprisonment); section 203 The Cayman Islands Penal Code (life imprisonment); section 20 Dominica Offenses Against the Persons Act (10 years); section 208 Grenada Criminal Code (15 years); section 57 Guyana Criminal Law Act (life imprisonment); section 20 Jamaica Offenses Against the Persons Act (life imprisonment); section 163 Montserrat Penal Code (life imprisonment); section 17 St Kitts and Nevis Offenses Against the Persons Act (10 years); section 99 St Lucia Criminal Code (20 years); section 173 St Vincent and the Grenadines Criminal Code (life imprisonment); section 12 Trinidad and Tobago Offenses Against the Persons Act (14 years).

10 See, for example, *R v Sloane* (2010) ONCJ 58 (CanLII). Here, the accused player, in the context of a football match, was attempting to play the ball, when he lost his balance effectively when he put his leg forward

#### *6.1.2.1 Common assault*

Strictly speaking, at common law, 'assault' and 'battery' are separate offences, the former being used to describe any intentional or reckless conduct that causes someone to apprehend the infliction of immediate unlawful violence, while the latter describes any unlawful physical contact, however slight.[11] In the sporting context, however, 'common assault' is often used loosely to refer to either or both assault or battery. In the following discussion, when we use the word 'assault' alone, we mean assault in the strict sense (causing someone to apprehend unlawful personal violence), and when we use the term 'common assault', we mean assault and/or battery.

Common assault lies at the lowest level of the typology of non-fatal offences. It may be committed either where a player intentionally or recklessly applies force to or causes an impact on the body of another player without the consent of that other player or where a player apprehends unlawful contact, in circumstances where the aggressor possesses the intention to bring about the unlawful contact or the apprehension of it or is reckless as to whether that unlawful contact or apprehension would ensue. Importantly, unlike assault occasioning actual bodily harm, no harm has to be proved in order to establish a common assault.[12]

Surprisingly, although the ingredients of this offence are relatively easy to satisfy, in the sense that, in the sporting context, there is typically physical contact made between players who may, for example, make contact with another player when attacking a ball, this contact is generally not considered to be unlawful, since it is deemed to either be impliedly or expressly consented to by the victim. The defence of consent is dealt with later in this chapter in fuller detail, but it suffices here to note that if a player is subject to physical force in a manner that does not exceed the threshold of what is considered acceptable in the particular sport, no liability for common assault is likely to ensue.

Interestingly, there have been very few cases to date where a charge of common assault has been proffered,[13] which might be on account of the fact that other, more serious, offences, which attract higher penalties, are often pursued instead of common assault. For this reason, it should come as no surprise that incidents that may otherwise constitute common assault are dealt with primarily through the application of a disciplinary body's internal processes rather than by the courts. It would seem that the court's jurisdiction is reserved for cases where more serious charges are in issue.

#### *6.1.2.2 Assault occasioning actual bodily harm*

The next offence in the typology of non-fatal offences is that of assault occasioning actual bodily harm. This offence arises where a player commits common assault, described above, which causes some harm to the victim. There is no requirement that the player either intended

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and, while attempting to balance himself, his elbow came up and hit the complainant in the face, thereby causing injuries. The court acquitted the accused on account of the fact that the Crown had not proven the essential elements of the charge beyond a reasonable doubt. On the facts, the accused's conduct was within the accepted standards of play of the soccer rules and any contact was he made with the complainant was therefore unintentional. In short, the Crown had failed to establish beyond a reasonable doubt that the force was applied intentionally to the complainant.

11 The Law Commission, *Reform of Offences against the Person* (Law Com No 361, 2 November 2015).

12 Janet Loveless, *Complete Criminal Law: Text, Cases, and Materials* (Oxford University Press, 2014) 463.

13 For example, in *R v Brownbill* (unreported) Crown Court (Preston), 4 February 2004, the accused hockey player was convicted of common assault after he repeatedly punched an opposing player in the face. Cf *R v Evans* (unreported), Crown Court, (Newcastle), 15 June 2010, the Newcastle Crown Court acquitted the accused player of the offence of common assault in circumstances where he had caused slight bruising to the head of another player by stamping on that player's head during the course of a rugby union match.

to cause the harm or was reckless about that harm being caused, though there must be foresight of a common assault. Actual bodily harm means any hurt or injury that interferes with the health or comfort of the injured player,[14] and which is more than 'transient or trifling'.[15] As well as the more obvious and commonplace types of injury such as bruises and grazes, the offence also captures a wide range of other harms, including conduct that causes a temporary loss of consciousness.[16]

The mental element for assault occasioning actual bodily harm is identical to that required for common assault. What is required is that the accused player intended or was reckless as to a common assault. Again, as with common assault, the vast majority of sporting incidents where actual bodily harm is inflicted do not result in criminal convictions because injured players are taken to have consented, whether impliedly or expressly, to the infliction of harm, though, as will be discussed later, an injured party is not deemed to have consented to conduct that results in harm that is above and beyond that which is reasonably expected in the context of a lawfully executed sport. To date, there have been very few successful prosecutions against sportspersons who engage in conduct that results in actual bodily harm. That said, among the notable cases in this area are *R v Birkin*,[17] where the court convicted the accused player for punching another player while playing football, and *R v Ward*,[18] in which an amateur football player was found guilty of assault occasioning actual bodily harm following a two-footed 'hard and late' tackle that injured his opponent. The judge in the latter case noted that a prison sentence served not only to penalize the accused player, but was also serves as 'a clear deterrent to others', since 'this kind of behaviour on the pitch is intolerable'.[19]

#### *6.1.2.3 Wounding or inflicting grievous bodily harm*

By far, the offence of wounding or inflicting grievous bodily harm (GBH) has been the most litigated offence in the sporting context to date. As a matter of law, the offence is more serious than assault occasioning actual bodily harm.[20] There are two modes of committing the offence: by wounding, and by inflicting GBH. Wounding refers to any break through all the layers of the skin, which need not be substantial, but which must be more than a scratch, while 'grievous bodily harm' is generally taken to mean harm which is 'really serious'.[21]

The offence requires proof of malice; that is, it must be done either intentionally or recklessly, in the sense that the accused player must have taken an unjustified risk of causing harm. In other words, the accused player must have intended or been reckless about causing *some harm*.[22] There is no requirement to prove that he intended or was reckless as to the specific wound or grievous bodily harm *actually* caused to the injured player.

To date, a number of accused players have been convicted for the offence of wounding or inflicting grievous bodily harm, chief among which are the defendants in *R v Chapman*[23] and

14 *R v Miller* [1954] 2 Law Com 282, [1954] 2 All ER 529.
15 Note that the remit of the offence excludes from being actual bodily harm, harm which is both transient and trifling, and not simply harm which is transient or trifling. Richard Card and Jill Molloy Card, *Cross and Jones Criminal Law* (Oxford University Press, 2016) 178.
16 *T v DPP* [2003] EWHC 266 (Admin), [2003] Crim LR 622.
17 [1988] Crim LR 855.
18 (2009) cited in Curtis Fogel, 'Ultra-Violence on the Pitch: Establishing a Threshold for the Intervention of Criminal Law in English Football' (2014) 2(2) Journal of Law and Criminal Justice 11, 17.
19 Ibid.
20 Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (Oxford University Press, 2012) 388.
21 Jonathan Herring. *Criminal Law: The Basics* (Routledge, 2009) 63.
22 Jacqueline Martin and Tony Storey, *Unlocking Criminal Law* (3rd edn, Routledge, 2013) 327.
23 *R v Chapman* [1989] 11 Cr App R(S) 93.

*R v Goodwin*,[24] respectively, although the case of *R v Barnes* remains the *locus classicus* in this area. In *Chapman*, during the course of a rugby football game, the defendant challenged an opposing player who was at the time shadowing the ball towards the touchline as it was running out of play. Chapman's challenge involved him raising his foot and, with his studs fully exposed, stamped on the back and side of the opposing player's right leg. As a result, the opposing player suffered serious injuries to his leg, which required reconstructive surgery and a skin graft. Although Chapman was suspended from rugby football for 84 days by the Birmingham County Football Association, charges were nonetheless laid against him alleging that he had unlawfully and maliciously inflicted grievous bodily harm on the opposing player. Interestingly, unlike Barnes, Chapman pleaded guilty to the offence, and was sentenced to six months' imprisonment, with Judge Robert Orme noting that Chapman's conduct amounted to a deliberate and premeditated act, to which the injured player could not be deemed to have consented.

Similarly, in *R v Goodwin*, the opposing player suffered a broken cheekbone after being struck in the face by Goodwin's elbow in circumstances where he had chipped the ball over Goodwin's head in an attempt to then retain possession of the ball. The court convicted Goodwin of the offence of inflicting grievous bodily harm, as the evidence indicated that, after he had failed to obtain possession of the ball, he then deliberately swung his elbow at the player's head causing serious harm. Apart from being subject to a sanction of 14 months' suspension from the sport of football by his club, Goodwin was also sentenced to four months' imprisonment, after the Court of Appeal reduced his sentence from six months' imprisonment seemingly because this was an 'on the ball', as opposed to 'off the ball', incident.[25]

There are a number of other cases[26] that illustrate the operation of the offence of wounding or inflicting grievous bodily harm, but it suffices here to note that the offence would primarily arise where really serious harm has been sustained, even if it is only proved that the defendant intended some harm, as opposed to really serious harm. Another important point to note in this connection is that, like the other offences, the defence of consent, as illustrated in *R v Barnes*, may exonerate an accused player who causes harm to another player, though the accused will not automatically succeed in his reliance on the defence.

#### *6.1.2.4 Intentionally causing grievous bodily harm*

The most serious offence in the non-fatal offence hierarchy is intentionally causing grievous bodily harm. This offence may be committed in different ways, namely *wounding* with intent to do grievous bodily harm or *causing grievous bodily harm* with intent to do grievous bodily harm. As indicated above, wounding is taken to mean a break through all the layers of the skin, while GBH means really serious harm. The *mens rea* for the offence is that the accused must intend to do GBH.[27] Given that both really serious harm plus the requisite intent to do such harm must be proved beyond a reasonable doubt, there have been very few cases in which this offence has been successfully made out in practice, albeit that it carries a higher sentence than the other

24 *R v Goodwin* [1995] 16 Cr App R(S) 885.

25 Citing the judgment of Mitchell J at 887 in *R v Goodwin*, Adam Pendlebury is of the view that the fact the incident was during the course of play or on-the-ball was seen by the Court of Appeal as a relevant factor in ascertaining the appropriate sentence for Goodwin. See Adam Pendlebury, 'The Regulation of on-the-ball Offences: Challenges in Court' (2012) 1 ESLJ 10.

26 See, for example, *R v Chester* (unreported), Crown Court (York), 16 August 2010.

27 To intend to do something in law includes 'oblique intent', as well as direct intention. Oblique intent covers the case where the accused was aware that a particular outcome was a virtually certain consequence of acting to bring about is desired outcome, that outcome was in fact virtually certain, but he continued with his actions anyway. See Nicola Monaghan, *Criminal Law* (Oxford University Press, 2016) 177.

non-fatal offences described above. One of the few cases in which a successful prosecution was obtained is that of *R v Johnson*,[28] a case in which the accused rugby player was sentenced to six months' imprisonment after he bit an opposing player, thereby tearing away part of that player's ear lobe. A similar sentence was imposed in another case where a player head-butted an opposing player, thereby causing a fractured cheekbone and eye socket,[29] and an even higher sentence of 15 months' imprisonment was imposed on an accused player who stamped on the head of another player, thereby causing a laceration to that player's left eye.[30] Although it is clear from these cases that where an accused player intentionally causes really serious harm to another player the court will be prepared to impose a custodial sentence commensurate with the seriousness of the offence, there conceivably might be cases in which the defence of consent may be invoked in accordance with the decision of *R v Barnes*, discussed later in this chapter.

### 6.1.3 Defences

There are a number of defences that may be invoked by an accused player to either fully or partially exonerate himself from liability. In respect of murder and manslaughter, provocation, diminished responsibility or self-defence may very well provide partial or, in the latter instance, complete justification for conduct that would otherwise be considered criminal. For non-fatal offences, the defences of self-defence and consent may be invoked in appropriate circumstances, though the prospect of success is heavily fact-dependent.

#### *6.1.3.1 Self-defence*

In the sporting context, self-defence is available as a full defence to crimes committed by use of force by one player on another player, including the offences described above. The basic principles of self-defence were set out in *Palmer v R*,[31] in which the court explained that it is both good law and good sense that a man who is attacked may defend himself by using such force as is reasonably necessary. The notion of force being 'reasonably necessary' necessitates consideration of whether there was in fact a need for any force to be used at all, and whether the force was proportionate in all of the circumstances of the case, having regard to the facts as the accused player honestly believed them to be at the relevant time.[32] To the extent that there is consideration of facts as the accused player honestly believed them to be introduces a subjective element into the test, but even if this subjective element is satisfied, the jury must then go on to ask themselves whether, on the basis of the facts as the accused believed them to be, a reasonable person would regard the force used by the accused player as reasonable or excessive. It is not, however, expected that the accused would, in those circumstances, weigh to a nicety the exact measure of his defensive action.[33]

One of the few instances in which the defence of self-defence has been successfully relied upon in the sporting context arose in the Canadian case of *R v Mula*.[34] Here, during an amateur soccer match, the opposing player began tapping the ankles of the accused player who had possession of the ball from behind in an effort to take away his attention from the ball.

28 (1986) 8 Cr App R(S) 343.
29 *R v Piff* (1994) 15 Cr App R(S) 737.
30 *R v Garfield* [2008] EWCA Crim 130.
31 [1971] AC 814; approved in *R v McInnes*, 55 Cr App R 551.
32 *R v Williams (G)* 78 Cr App R 276.
33 Hungerford Welch, *Sourcebook Criminal Law* (Cavendish Publishing, 2001) 578.
34 (2000) CanLII 10716 (QC CQ).

The accused player suddenly turned around and punched the opposing player in the face. The injured player had to undergo surgery for a broken jaw, and was hospitalized for several days, with his jaw wired shut. Although the referee was five yards away from the two players when the incident occurred, he did not actually see what the injured player was doing behind the accused's back. The court accepted that the injured player had been the instigator in that he had kicked the accused player five or six times in the back of his Achilles' tendon in an illegal way, even when the accused had lost possession of the ball, and that the accused, being hurt and feeling threatened, justifiably turned around and hit him. In short, the court exonerated the accused player on account of him successfully making out the defence of self-defence, finding that the accused had not applied disproportionate force. It noted that the reasonableness of the force applied is to be measured by the nature of the blow and not necessarily by the consequences, and that the court was obliged to take into account the agony of the situation in determining the intention and the force of the blow that was used by the accused. Given that the accused had submitted evidence that he was subjected to an unprovoked and illegal attack, and had used no more force than necessary to repel the attack, he was held to have successfully made out the defence.

In hindsight, although it may be argued that punching another player and in so doing fracturing his jaw is not ordinarily part and parcel of the playing culture of sport, and, indeed, appears, on the face of it, to be disproportionate, it must be borne in mind that the circumstances were such as to not afford the accused player the luxury of weighing to a nicety the exact measure of his defensive action. The victim's constant tapping at the accused's ankles was both unprovoked and illegal, and could have resulted in the accused having a limp for over six months. In those circumstances, it can hardly be argued that the accused used force intentionally to inflict bodily injury, as it is clear that his intent was to stop the blows, and thereby avoid serious injury to himself. On the question of proportionality, the evidence was that the accused player only struck the victim one blow, and while his fist was clenched, in the heat of the action, he did not expect that it would fracture the jaw of the victim.

#### *6.1.3.2 Consent*

Undoubtedly, the defence that is most commonly relied upon in practice in the sporting context is that of consent.[35] Where the accused relies on consent, the prosecution must adduce evidence to negative this defence.

Although there are instances in which a player may expressly consent to being subject to physical contact by another player, this is relatively rare in practice. By contrast, in the vast majority of cases, a player who is subjected to physical contact by another player is deemed to have impliedly consented to such contact, though the threshold beyond which this consent may, by law, be invalidated remains a highly contentious issue in modern Sports Law. Among the issues that arise in this context are whether an accused player may rely on the defence of consent when he inflicts harm on another player as a result of 'off the ball', as opposed to 'on the ball', contact; whether the determination of consent should be based on subjective or objective criteria; and, ultimately, what role does the 'playing culture' have in excusing conduct that would otherwise amount to a criminal offence.[36]

35 Stephen Leake and D.C. Ormerod, 'Contact sports: application of defence of consent' (2005) Criminal Law Review 381.

36 Ben Livings, '"Legitimate sport" or criminal assault? What are the roles of the rules and the rule-makers in determining criminal liability for violence on the sports field?' (2006) Journal of Criminal Law 495.

Over the last decade, courts have attempted to provide answers to these vexing questions, though there remains some uncertainty in individual cases, as the outcome of each case appears to be highly fact-dependent. That said, both the Canadian[37] and English courts have had opportunity to explore the limits of the defence of consent, and have provided some useful context and guidance, which it is submitted is likely to heavily influence Caribbean courts should this issue arise for determination in future.

#### 6.1.3.2.1 The Canadian approach to consent

Canada, like the United Kingdom, has adopted the general principle that a person cannot consent to bodily injury, as it is not in the public interest for people to engage in conduct that could seriously injure or kill each other.[38] To this general rule, however, are some exceptions, including bodily injury sustained in the context of lawful sports, in relation to which the injured player is deemed to have either expressly or impliedly consented.[39]

Canadian courts have repeatedly indicated that although players agree to the risk of unintentional, instinctive blows or those blows that are reasonably incidental to the game, this does not automatically mean that players consent to all risks.[40] Indeed, while injuries that are inherently part and parcel of a vigorous contest are impliedly consented to, since players cannot be expected to stop and check themselves from committing what would normally be considered assaults in ordinary walks of life, it cannot be said that players consent to injuries inflicted in circumstances that show a definite resolve to cause serious injury to another.[41] In other words, although players consent to normal blows and collisions incidental to play, this does not license the use of unlimited force against himself; no athlete should be presumed to accept malicious, unprovoked or overly violent attacks.[42]

The *locus classicus* in this area in the context of Canadian Sports Law is the case of *R v Cey.*[43] In that case, the accused hockey player followed another player, who was at the time attempting to retrieve the puck, to the boards some two feet past the goal line, and then cross-checked that player in the neck by holding out his stick. As a result, the opposing player's face was pushed into the boards and he suffered injuries to his mouth and nose, and sustained a concussion and a whiplash. On appeal, the Saskatchewan Court of Appeal reversed the trial judge's decision to acquit the accused, and ordered a retrial. More important than the eventual outcome, however, was the fact that the court took the opportunity to outline a number of important principles that have since significantly informed judicial developments in this area all across the common law world.

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37 On the Canadian approach to consent, see Curtis Fogel, 'On-Ice Assault: Difficulties in Discerning Consent in Canadian Ice Hockey' (2013) 2(1) International Law Research 96.

38 *R v Paice* [2005] 1 SCR 339 [11]–[18].

39 *R v Jobidon* [1991] 2 SCR 714, 766–67. The exception applies to lawfully conducted sport because games are deemed to have 'significant social value'.

40 When violence has arisen in circumstances where play has stopped, and a party moves into the scene from the bench or elsewhere on the ice to deliver a blow or to strike with a stick, it has generally been seen as beyond the area of consent and therefore a criminal act, as in the following cases: *R v Gray* [1981] 6 WWR 654*; R v Mayer* (1985) 41 Man R (2d) 73*; R. v Watson* (1975) 26 CCC (2d) 150.

41 *R v Henderson* [1976] 5 WWR 119. The judge noted, 'an incision across his face which would require 75 stitches ... one of the players continues to pummel the other, who at that time is either unconscious or rendered helpless ... the use of an instrument such as a hockey stick ... one of the players uses the ice in such a way that the opposing player's head comes into frequent and violent contact with it ... Surely these are not the risks which the injured player assumed by participation in the sport ... where there is conduct which shows a deliberate purpose to inflict injury, then no immunity is accorded to the offending player.'

42 *R v Maki* [1970] 3 OR 780.

43 *R v Cey* (1989) 48 CCC 3d 480.

Firstly, the court pointed out that in agreeing to participate in a particular sport, a player consents to some forms of intentional bodily contact and to the risk of injury therefrom. More specifically, that player consents to forms of bodily contact that are sanctioned by the rules of the sport, but also, quite instructively, other forms of contact, though denounced by the rules, nonetheless fall within the accepted standards by which the game is played.[44] The implications of this pronouncement are profound, in that the court appeared to have given a certain degree of deference or margin of appreciation to the rules constituted by sporting bodies, so that if the conduct falls within the rules of the game it is highly likely that the accused player will be exonerated. Interestingly, it also appears that conduct causing injury that falls within the 'playing culture' of the particular sport, though not formally sanctioned by the rules of the game, may also not result in criminal liability, provided that such conduct does not amount to a malicious, unprovoked or overly violent attack. For example, in *R v Adamiec*,[45] although it was accepted that the accused's conduct was contrary to the rules of soccer, such conduct was held not to fall beyond soccer's playing culture, so that the accused was able to successfully rely on the defence of consent. The circumstances of that case were that, late in a soccer match, with the score tied, the accused, a midfielder, and the complainant, the opposing team's goalkeeper, vied for control of a loose ball in the complainant's penalty area. The complainant dived towards the ball, grabbing it and the accused's right leg at the same time. The accused stumbled and attempted to get his foot out of the complainant's grasp by kicking. Once free of the complainant's grasp, the accused lost his balance and fell backwards away from the complainant. While falling, he continued kicking the complainant. When he hit the ground, he continued to kick the complainant from the seated position. The accused stopped kicking the complainant once the whistle was blown. However, by that time, the kicking by the accused had already resulted in his cleats striking the complainant several times in the jaw, neck, chest, and left hip. The complainant received serious long-lasting injuries to his neck and jaw and significant bruising to his left hip.

Although the referee did not believe it was an intentional act to injure, and was not convinced that the degree of force used by the accused necessitated a red card sending him off the field of play, the accused was nonetheless charged with assault causing bodily harm. The court began its analysis by explaining that, although unlawful violence needs to be discouraged on the soccer pitch or other sporting forum just as much as elsewhere in society, because of the social utility of sports like soccer, the application of the criminal law is adjusted in the sporting context.[46] In this regard, the common law accepts that players of organized contact sports implicitly consent to some forms of intentional contact, and the risk of injury that, outside the sporting arena, would constitute the crime of assault. The court considered that by taking part in a game, a player assumes the risk that deliberate contact with his person may have unintended effects, conceivably of sufficient severity as to amount to grievous bodily harm. That said, he does not agree that this more serious kind of injury may be inflicted deliberately. Interestingly, the court concluded that the criminal law tolerates a certain degree of physical contact on the playing field, which may be contrary to the formal rules of the particular sport, but it is acknowledged by tradition to be part of the 'playing culture' of that sport.[47] By way of example, the court pointed to a mistimed tackle in soccer, which is part of the playing culture of the game. It further noted that not every improper tackle during play, regardless of the injuries inflicted, warrants criminal prosecution, and that this was one of the cases in which no conviction should result.

44 Ibid 7.
45 (2013) MB Law Com 246.
46 Ibid [27].
47 Ibid [32].

In reviewing the trial judge's reasoning, the court held that the trial judge had over-emphasized the importance of the degree of force employed against the complainant and the resulting injuries and ignored or de-emphasized the importance of other objective criteria outlined in *Cey*. On the facts, it held that it was foreseeable that a goalkeeper in a competitive amateur soccer game would face the risk of being stepped on or kicked in a struggle for control of the ball, and that there was a legitimate sporting interest in both players striving to gain control of the ball; one to score, the other to defend.[48] It also noted that part of the accused's kicking was due to the fact the complainant had grabbed his right leg when attempting to take possession of the ball, and that the accused was quite within his rights under the 'playing culture' of soccer to pursue his scoring chance, particularly as he was being grabbed at the same time by the complainant. There was no evidence to suggest that the accused's actions were anything more than reckless reactive kicks in the heat of the game, and, given the absence of intent to injure the complainant, the accused could rely on the defence of consent, notwithstanding the fact that the accused conducted himself in a manner contrary to the rules of soccer.

Second, in keeping with the decision of *R v Cey*, in determining whether the threshold of consent prescribed by the law is exceeded in the sporting context, the court suggested that reference must be made to certain objective criteria, against which the accused's conduct must be judged.[49] Among other things, the court in any individual case ought to consider the type of sport in question and the conditions under which it is played; whether the rules of the game contemplate contact or non-contact; the level at which the sport is played, whether professional, amateur, recreational and so on; the nature of the act or acts which forms the subject matter of the charge; the degree of force employed; the degree of risk of injury, and the probabilities of serious harm; and the state of mind of the accused.[50] These criteria ought not to be rigidly applied, however, as the court is obliged to consider all the circumstances of the case before arriving at a decision.

The need to adopt a flexible approach to the application of the *Cey* criteria was considered in the case of *R v Leclerc*[51] in which the court, on appeal, acquitted the accused on a charge of aggravated assault in the context of a hockey game. The court found that the trial judge had been too rigid in his application of the *Cey* criteria and that the evidence was such as to demonstrate that the prosecution did not in fact negative the accused's defence of implied consent. The circumstances of *Leclerc* were that, during the course of a hockey game, the accused pursued the complainant, who was attempting to retrieve the puck that had been shot into his own end, at which point the accused's gloves and stick came into contact with complainant's upper back, resulting in the complainant tumbling head first into the end boards. The violent contact with the end boards caused a fracture dislocation of two of the complainant's cervical vertebrae provoking permanent paralysis. On the facts, the Court of Appeal found that although the injuries sustained by the complainant were no doubt serious, the prosecution had failed in its duty to negative the defence of consent, and that, in any event, in applying the *Cey* criteria, it was not sufficient to rigidly consider the force applied, as all the circumstances of the case had to be properly taken into account before a reasoned decision could be arrived at.

The third point to note from the judgment in *R v Cey* is that there is a greater likelihood that an accused player will be unable to successfully rely on the defence of consent where he engages in 'off the ball', as opposed to 'on the ball', contact with another player. This is because 'on the ball' contact generally occurs in the heat of the moment, when players use

48 Ibid [48].
49 *R v Cey* (n 43) 10.
50 Ibid 11.
51 (1991) CanLII 7389 (ON CA).

force instinctively, in sort of a reflect reaction to the circumstances of the moment,[52] as opposed to 'off the ball' contact, which generally represents violent forms of force that clearly extend beyond the ordinary norms of conduct expected as part of the particular sport in question. The dichotomy between the respective implications of 'on' and 'off' the ball contact is not, however, to be strictly adhered to, as both types of contact can result in criminal liability, where consent is negatived by the prosecution. For example, in *R v Owen*,[53] the complainant was involved in accidental contact with another player in which he and that player fell to the ground following a play in which the two players went for the ball in an amateur, recreational soccer game. For this, the complainant was yellow carded by the referee, while the other player was red carded and consequently ejected from the game. After the referee carded the two players, the accused in this case approached the complainant saying loudly, 'don't worry guys; I'm going to take care of him', together with some profanities. At a point in the second half of the game, the accused ran as fast as he could across a 10-yard distance toward the complainant and struck the rear of the complainant's calf with his soccer boot, leaving cleat marks. The complainant's leg was broken in two places.

Although the court accepted that, in games like football, consent by players to the use of moderate force is clearly valid,[54] and that players are even deemed to consent to the application of force that is in breach of the rules of the game if it is the sort of thing that may be expected to happen during the game, this does not mean that there is immunity from criminal liability on the basis of implied consent in cases of retaliatory conduct, conduct intended to do bodily harm or force creating a distinct probability of serious harm. On the facts, the court found that the accused did issue a threat to the complainant to break his legs and that the utterance was not mere 'trash talk' in the ordinary course of the game, but a statement of intent ultimately acted upon in a retributive attack on an opposing player.[55] In short, the accused intentionally, and outside any contemplated scope of game play, hit the opposing player from behind in a designed manoeuvre destined to harm him, and that given that such conduct was motivated by circumstances earlier in the game, the offence was clearly made out. In short, the court considered that the application of physical force from behind, outside any attempt at all to secure control of the ball, and beyond any scope of implied consent to contact in the soccer game, carried with it the clear foreseeability of bodily harm to the blind-sided player. Although the player's behaviour was characterized as a major foul with in-game consequences for the offending player under the rules of the sport, neither those rules nor notions of consent could oust the operation of the criminal law.[56]

Similarly, in *R v SRH*,[57] the accused, a teenager, was charged with the offence of aggravated assault, after he engaged in 'off the ball' conduct during the course of a hockey game. The circumstances of the case were that as the complainant headed into the opposing team's zone, the accused challenged him to a fight, to which the complainant sarcastically responded, 'yeah, right', and continued to follow the play into the other team's zone. The puck was eventually frozen by the opposing team's goalie and the referee blew the whistle signalling a stoppage in play. When the whistle blew, the accused skated slowly towards the complainant and, at the very last second, stuck out his stick and struck the complainant around the belly button area with the butt end of his hockey stick. The complainant's pancreas was bruised and it began producing

52 *R v Cey* (n 43) 8.
53 (2004) CanLII 8637 (ON SC).
54 Ibid [68].
55 Ibid [73].
56 Ibid [71].
57 (2011) ABPC 2.

an enzyme that would not allow his body to digest food properly. The complainant was in the hospital for 17 days.

On the facts, the court was satisfied, beyond a reasonable doubt, that the accused intentionally struck the complainant with the butt end of his stick in the abdominal area, thereby committing an actionable assault. The court noted that it was reasonably foreseeable for the 17-year-old accused player to expect that using a significant amount of force to strike someone with the butt end of a hockey stick in a vulnerable area such as the abdomen would cause bodily harm. While the court accepted that, in principle, there might be implied consent to physical contact when participating in a sport such as hockey, it nonetheless was of the view that to engage in a game of hockey was 'not to enter a forum to which the criminal law does not extend'.[58] It noted that to hold otherwise would be to create the hockey arena as a sanctuary for unbridled violence. On the facts of the instant case, the defence of consent could not be relied upon because the force that was applied by the accused did not occur in the course of a hockey play, but occurred several seconds after the stoppage of play, after the cessation of any aggression between the parties, and was unprovoked, not accidental, substantial, resulted in serious injury, and engaged the use of a hockey stick as a weapon. Under these circumstances, any implied consent that existed previously was, according to the court, vitiated, since the complainant did not consent to the risk of injury beyond what players ordinarily consent to in a hockey game.

#### 6.1.3.2.2 The UK's approach to consent

The UK's approach to consent in the sporting context has been heavily influenced by, and is therefore similar to, the Canadian approach described above.[59] In principle, according to Lord Lane CJ in *Attorney-General's Reference (No.6 of 1980)*,[60] it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for 'no good reason'. However, there has, for a long time, been some recognition, in accordance with the decision of *R v Brown*,[61] that there is an exception to this general principle for lawful sports, as sports, jurisprudentially termed a 'manly diversion', are deemed to provide both social and health benefits. In fact, as early as *R v Bradshaw*,[62] which was decided in 1878, the English courts have considered that,

> if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury. But, independent of the rules, if the prisoner intended to cause serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful.[63]

The latter part of Bramwell B's judgment in *R v Brown* was applied in *R v Billinghurst*,[64] a case in which a rugby player was convicted and sentenced for inflicting grievous bodily harm after he punched another player during a rugby match in an unprovoked attack. In that case, the court considered that although punching may have been commonplace during rugby matches,

58 Ibid [43].
59 Ben Livings, 'A different ball game – why the nature of consent in contact sports undermines a unitary approach' (2007) Journal of Criminal Law 534.
60 [1981] 2 All ER 1057.
61 [1993] 2 All ER 75.
62 (1878) 14 Cox's CC 83.
63 Ibid.
64 [1978] Crim LR 553.

it was certainly outside the rules of the game and thus the complainant could not be said to have consented to being punched.

Notwithstanding this, however, in principle, by virtue of participating in a particular sport, a player either expressly or impliedly consents to bodily contact, and the player making such contact may escape liability where his conduct does not exceed what is considered to be reasonable in the particular sport in question. That said, it remains the case that this is not 'a license for thuggery';[65] an injured player does not consent to overtly violent attacks.[66]

The leading case on the issue of consent in the sporting context in England and Wales is *R v Barnes*.[67] In that case, after the complaint, during the course of an amateur football match, received the ball, he ran and kicked the ball with his left foot into the net. Immediately thereafter, he was taken down by a tackle from the accused, which made contact with his right ankle. The evidence was that the accused executed the tackle with his two feet, and that said tackle resulted in the complainant sustaining a serious injury to his leg. On the facts, the accused was convicted in the lower court, but was acquitted on appeal, not because there was no evidence of the assault, but because the trial judge had misdirected the jury when he explained to them that if the tackle was done by way of legitimate sport, they should acquit the accused, without explaining what he meant by 'legitimate sport'.

In reviewing the lower court's decision, the Court of Appeal noted that in determining what the approach of the courts should be in cases such as this, the starting point was a recognition that most organized sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct, with the result being that in the majority of situations, there is no need to pursue criminal proceedings. The court also explained that in addition to a criminal prosecution, there is the possibility of an injured player obtaining damages in a civil action from another player, if that other player caused him injuries through negligence or an assault, so that criminal prosecution should be reserved for those situations where the 'conduct is sufficiently grave to be properly categorized as criminal'.[68]

Although it is arguable that the notion of 'conduct sufficiently grave to be properly categorized as criminal' is vague, confusing and, indeed, unhelpful as it tells us nothing about what is the appropriate threshold for a finding of criminal liability in the sporting context,[69] the Court of Appeal must nonetheless be credited for its reliance upon the Canadian decision of *R v Cey* when extrapolating the principles relevant to the application of the defence of consent in the sporting arena in England and Wales. In particular, the court correctly explained that by participating in a football match, a player implicitly consents to bodily contact that can reasonably be regarded as inherent to the sport, though such a player does not consent to being deliberately punched or kicked.[70]

65 *R v Moss* [2000] 1 Cr. App. R. (S.) 307. The accused player was sentenced to eight months' imprisonment for inflicting grievous bodily harm after he punched an opposing player in a rugby match in the face, thereby fracturing that player's eye socket.

66 Jack Anderson, 'No license for thuggery: violence, sport and the criminal law' (2008) Criminal Law Review 751.

67 *R v Barnes* [2004] EWCA Crim 3246.

68 Ibid [5].

69 Stefan Fafinski, 'Consent and the rules of the game: the interplay of civil and criminal liability for sporting injuries' (2005) Journal of Criminal Law 414. Fafinski notes that, 'it could also be argued that in failing to set out clear tests to be applied in the determination of conduct sufficiently grave to be labelled as criminal, the court of Appeal is either acknowledging that it is impossible to lay down clear guidance, or delegating the determination of criminal liability to the CPS and the jury; whether infliction of a sporting injury is criminal will depend, in reality, on what those who can enforce the law choose to do.'

70 *R v Barnes* (n 67) [13].

Following the decision in *Cey*, the court in *Barnes* also considered that the fact that the play is within the rules and practice of the game and does not go beyond it is 'a firm indication that what has happened is not criminal'.[71] Conduct outside the rules of the game that can be expected to occur in the heat of the moment is similarly impliedly consented to, even if the conduct justifies a warning or even a sending off. This point is important as it demonstrates the English court's appropriation of *Cey's* notion of the 'playing culture', which accounts for those practices which, though not fully in keeping with the rules of the game, do not nonetheless rise to the level of criminality.

Perhaps the most important aspect of the *Barnes* judgment is the court's acceptance of *Cey's* objective criteria, finding that in determining whether the threshold of consent has been exceeded so that conduct becomes criminal, consideration must be given to the type of the sport, the level at which it is played, the nature of the act, the degree of force used, the extent of the risk of injury, and the state of mind of the accused.[72] Having regard to all the circumstances of an individual case, the accused conduct is to be measured against the backdrop of these criteria. Where there is a 'grey area' in this analysis, the jury must be allowed to determine whether they believe, having regard to all the evidence presented, that the accused's conduct could be properly construed as criminal.[73]

As a matter of practical guidance, the court noted that, in directing the jury, a judge must be prepared to explain to the jury what exactly is meant by 'legitimate sport', and must also alert the jury that even if the conduct of the accused falls outside the rules of the game, this does not automatically give rise to criminal liability, since 'even serious breaches of the rules of the game do not equate to a criminal offence',[74] as all depends on the circumstances of each case. On the facts, the judge should have also directed the jury to consider whether what happened may have been an accident, and should have, moreover, identified objective criteria which would have had a bearing on what conduct was 'generally acceptable in a football game'.[75] Finally, the jury also had to be told of the importance of the distinction between the accused going for the ball, albeit late, and his 'going for' the victim.[76]

The importance of this decision lies in the fact that it provides authoritative clarification on when it is likely that a player may be subject to criminal liability for conduct that injures another player, and, in particular, what criteria ought to be applied in so finding an accused liable. That said, as illustrated in *Cey* and subsequent cases, these objective criteria merely provide guidance and should not be applied rigidly, as inflexibility may produce unfair results in individual cases.

## 6.2 GENERAL REFLECTIONS

It appears that there is some degree of confluence between the Canadian and the UK approach to consent, which would usefully inform the development of the criminal law on sporting violence in the Caribbean should cases of this nature arise in future.

On the face of it, it appears that, in both jurisdictions, there is a general public interest in not allowing widespread immunity against prosecution for violence inflicted in the sporting arena, though appropriate exceptions exist where injury that is not deliberate is inflicted within

71 Ibid [15].
72 Ibid.
73 Ibid [16].
74 Ibid [25].
75 Ibid [27].
76 Ibid [29].

the rules of the game or, at the very least, within the 'playing culture' of the particular sport.[77] There also appears to be some semblance of synergy between the Canadian and UK approach with regard to the relevant objective criteria that ought to be considered in sporting cases where consent is in issue, though the exact weight to be placed on each of the respective criterion is very much fact-dependent.[78]

One interesting question that has arisen in this context is that, even where there is harmony in the jurisdictional approaches to consent, how do we account for the sport of boxing where the very intent of boxers is to knock each other out? The answer to this question is naturally not easily defensible, but it appears from existing case law that boxing is *sui generis* in nature,[79] and given the many safeguards in place to ensure that boxers are not grievously injured, boxing is a justifiable exception to the general rule that it is in the public interest that players should not go around inflicting bodily harm on each other. Moreover, although the threshold for a finding of criminal liability in boxing is undeniably high, it is clear from the cases discussed above that if the conduct in question on the part of a boxer is beyond the rules of the game or, indeed, the playing culture, such conduct will be properly regarded as criminal.

An interesting provision which challenges this conventional understanding is that of section 40 of the Criminal Code of Belize,[80] which provides:

> 40. The use of force against a person may be justified on the ground of his consent, subject as follows -
>
> (b) A wound or grievous harm cannot be justified on the ground of consent, unless the consent is given and the wound or harm is caused in good faith for the purposes or in the course of medical or surgical treatment.
>
> (c) *A party to a fight, whether lawful or unlawful, cannot justify on the ground of the consent of another party any force which he uses with intent to cause harm to the other party*. (Emphasis added).

Although boxing is a lawful fight, this provision appears to have the effect of nullifying consent in circumstances where a boxer, during the course of a fight, applies force with the intent to cause harm. Presumably, this provision effectively renders boxing, in its purest form, illegal in Belize, as the very objective of a boxer is to knock out another player so as to win the fight, as indicated by Lord Mustill in *R v Brown*, where he gave the following description of professional boxing:

> For money, not recreation or personal improvement, each boxer tries to hurt the opponent more than he is hurt himself, and aims to end the contest prematurely by inflicting a brain injury serious enough to make the opponent unconscious, or temporarily by impairing his central nervous system through a blow to the midriff, or cutting his skin to a degree which would ordinarily be well within the scope of section 20 [of the Offences against the Person Act 1861 (24 & 25 Vict c 100)]. The boxers display skill, strength and courage, but nobody pretends that they do good to themselves or others. The onlookers derive entertainment, but none of the physical and moral benefits which have been seen as the fruits of engagement in manly sports.[81]

77 Ben Livings, '"Legitimate sport" or criminal assault? What are the roles of the rules and the rule-makers in determining criminal liability for violence on the sports field?' (2006) Journal of Criminal Law 495.

78 Jack Anderson, 'Policing the sports field: the role of the criminal law' (2005) International Sports Law Review 25.

79 Jack Anderson, 'No license for thuggery: violence, sport and the criminal law' (2008) Criminal Law Review 751 (citing *R v Brown*); see also Stephen Leake and D.C. Ormerod, 'Contact sports: application of defence of consent' (2005) Criminal Law Review 381.

80 A similar provision exists in section 66(b)–(c) of the Grenada Criminal Code.

81 [1994] 1 AC 212 [265].

However, it might be argued that, loosely speaking, the boxer's intention is not to harm the other boxer as such, but to achieve a strictly plausible sporting function, namely to technically disable the other player while protecting himself from being disabled in the process. Whether this approach will be countenanced by the courts in Belize and other jurisdictions whose legislation contain a similar provision is still, however, left to be seen.

Notwithstanding the foregoing, it would appear that the general principle that players consent to the inherent risks associated with the game remains good law. Thus, a fielder who chooses to field at short leg, short cover, leg slip or even in the slips may be taken to voluntarily consent to the risk of injury. Similarly, it is arguable that batsmen impliedly consent to the inherent risks associated with batting, which include being hit by bouncers bowled by fast bowlers. Interestingly, like boxing, fast bowlers who aim to 'bounce out' batsmen may in fact evince an intention to make the batsman's life difficult or, indeed, to even hit the opposing batsman through delivering a series of menacing bouncers, as evidenced by the conduct of former West Indian fast bowlers Andy Roberts, Michael Holding, Joel Garner, Colin Croft and Malcolm Marshall, who all demonstrated a tremendous inclination toward hitting opposing batsmen, especially Australian batsmen, with often unplayable and arguably deadly bouncers. Bowling bouncers is clearly allowed as part of the rules of cricket. Although bowling more than two bouncers per over may result in a call of 'no ball', such conduct may still fall within the 'playing culture' under *Barnes* and *Cey*, and may thus not result in criminal liability if a batsman is hit. However, it can be argued that if the bowler intentionally bowls bouncers to hit the head of a batsman who is not wearing a helmet, as often happens in recreational and amateur games, this may amount to criminal conduct,[82] having regard to the objective criteria outlined in *Barnes* and *Cey*. Though debatable, this view was countenanced by the Law Commission in its consultation paper on consent, when it noted that,

> the fast bowler will only be at risk of criminal prosecution if his conduct is clearly outside the rules of the game. If, despite warnings by the umpire, he persists in bowling dangerously and the batsman is injured, then there is no reason why he should not be convicted of a criminal offence if the Court is sure that he intended to inflict injury. Even if this intention could not be proved, he would nevertheless be convicted if he inflicted seriously disabling injury on the batsman, if a jury or magistrates were sure that he was aware of the risk that he might inflict such injury on the batsman and the risk was not a reasonable one for him to take. In those circumstances, we believe that he would be rightly regarded as culpably reckless and deserve punishment.[83]

In closing, this section of the chapter attempted to provide a thorough articulation of the criminal law's approach to injuries sustained in the sporting context. Among other things, this chapter makes it clear that the criminal law is not ideally suited for the resolution of these

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82 *'Consent and Offences Against the Person: A Consultation Paper'* (Law Commission Consultation Paper No 134, 14 December 1993) noting that

> fast bowling in modern professional cricket is potentially extremely dangerous. To avoid or greatly minimize that danger batsmen are permitted, though not obliged, to wear a variety of protective clothing, particularly helmets. A batsman who declined to protect himself in that way would undoubtedly be creating a situation where a bowler bowling normally would be creating a significant risk of causing serious injury. That is, in the first place, a question for the cricket authorities; but the implication of the scheme that we provisionally propose is that a bowler who continued in his usual way and injured the batsman would be risking criminal liability, because above a certain level of hazard the consent or connivance of the victim is no defence. Similar considerations will apply, with increased force, if very fast, dangerous bowling is permitted in cricket at a lower level than the modern first-class game, particularly if the batsman's ability to cope with very fast bowling is obviously limited.

83 'Consent In the Criminal Law' (Law Commission Consultation Paper No 139, November 1, 1995).

types of disputes, but nonetheless has some role to play in so far as penalizing deliberate and unprovoked attacks that cannot properly be deemed to have been consented to. Naturally, part of the criminal law's challenge is that it is heavily punitive, and therefore unable to fully account for the nuances of sport, particularly where injuries are sustained in the context of fast-moving, highly competitive sporting events. That said, thanks to the decisions of *R v Barnes* and *R v Cey*, respectively, courts are now better placed to competently decide upon issues of criminal liability in sport, largely by reference to certain objective criteria. These decisions have also made it clear that the 'playing culture' is highly relevant to the determination of criminal liability, and that mere errors of judgement or lapses of skill are not suitable for the criminal courts. Notwithstanding these important decisions, however, vexing questions still remain as to the precise scope of the defence of consent, in particular in relation to boxing and, to a lesser extent, hostile fast bowling, which inherently go against the traditionally accepted principle that there is a public interest in criminalizing conduct that demonstrates an intention to injure others.

## 6.3 ETHICS AND INTEGRITY IN SPORT[84]

This geographical region of the world has become associated with gambling primarily as a result of the widespread practice of offshore betting and gaming in several Caribbean countries, with Antigua and Barbuda being the standout nation. The very expansion of the global sporting industry together with technological advances have added new dimensions to regulating sports betting, including online or internet gambling and the explosion of e-sports. As in many other jurisdictions, football, cricket and horse racing form the nucleus of what, at this time, appears to be a limited practice of sports betting in the Caribbean.

Underlying the broader theme of sporting integrity is the common thread of solidarity, goodwill and sportsmanship, concepts that have taken a hit in the current climate of an over-commercialized sports industry. For example, as recently as the 2017 edition of the Caribbean Premier League (CPL) T/20 cricket tournament, Trinidadian cricketer Kieron Pollard faced public backlash and regulatory scrutiny after what appeared to be a deliberately bowled no ball to prevent batsman Evin Lewis from making a century against Pollard's franchise team, the Barbados Tridents.[85] CPL organizers took the opportunity to remind all parties that cricket owed much of its appeal to the spirit in which it is played, with much value being accorded to fair play and sportsmanship.[86]

As the discussion in this section of the chapter turns to matters of ethics in sport, the salient observations of leading Sports Lawyer, Michael Beloff QC, remain relevant:

> Sport's attraction depends upon its unpredictability. By contrast, in other forms of entertainment, theatrical or musical performances, the outcome is pre-ordained. But is it the case that we are watching competitions, whose results are *not* fashioned by a combination of talent, application, tactics, playing conditions and, of course, sometimes luck, but instead manufactured by some form of unacceptable manipulation?

84 This section of the chapter is an adapted and updated version of J. Tyrone Marcus, 'Sports Betting: Law and Policy – The Regulation of Sports Betting in the Caribbean' in Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek (eds), *Sports Betting: Law and Policy* (TMC Asser Press, 2012) Chapter 16.

85 'Kieron Pollard criticised after no-ball denies Evin Lewis chance of century' (*BBC Sport*, 4 September 2017) www.bbc.com/sport/cricket/41145541.

86 'CPL to review Pollard no ball' (*Cricket.com.au*, 6 September 2017) www.cricket.com.au/news/kieron-pollard-no-ball-caribbean-premier-league-cpl-review-evin-lewis-barbados-st-kitts/2017–09–06.

> A few years ago Jacques Rogge, the then President of the International Olympic Association, said that corruption was now a bigger threat to the integrity of sport than drugs. The two in fact have much in common. Both undermine in their different ways fair competition which is – or should be – sport's overriding objective. Indeed, sometimes these two evils coincide.[87]

Indeed, a fundamental feature of sport's magnetic effect is the uncertainty of outcome. If the unpredictable nature of sport is jeopardized, the potential fallout from fans and sponsors alike could be devastating for the future of the industry.

## 6.4 THE CURRENT GLOBAL SPORTING INTEGRITY CLIMATE

Sports betting shot into the limelight again in a significant way in the early part of 2018 with the decision in *Murphy v National Collegiate Athletic Association*.[88] The following case summary offers a useful starting point in assessing the implications of this ruling:

> The Professional and Amateur Sports Protection Act (*PASPA*) makes it unlawful for a state or its subdivisions 'to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on' competitive sporting events, 28 U.S.C. 3702(1), and for 'a person to sponsor, operate, advertise, or promote' those same gambling schemes if done 'pursuant to the law or compact of a governmental entity,' 3702(2), but does not make sports gambling itself a federal crime. [*PASPA*] allows existing forms of sports gambling to continue in four states. [*PASPA*] would have permitted New Jersey to permit sports gambling in Atlantic City within a year of *PASPA*'s enactment but New Jersey did not do so. Voters later approved a state constitutional amendment, permitting the legislature to legalize sports gambling in Atlantic City and at horse-racing tracks. In 2014, New Jersey enacted a law that repeals state-law provisions that prohibited gambling schemes concerning wagering on sporting events by persons 21 years of age or older; at a horse-racing track or a casino in Atlantic City; and not involving a New Jersey college team or a collegiate event. The Third Circuit held that the law violated *PASPA*. The Supreme Court reversed. When a state repeals laws banning sports gambling, it 'authorize[s]' those schemes under *PASPA*. *PASPA*'s provision prohibiting state authorization of sports gambling schemes violates the anti-commandeering rule. Under the Tenth Amendment, legislative power not conferred on Congress by the Constitution is reserved for the states. Congress may not 'commandeer' the state legislative process by directly compelling them to enact and enforce a federal regulatory program. *PASPA*'s anti-authorization provision dictates what a state legislature may and may not do. There is no distinction between compelling a state to enact legislation and prohibiting a state from enacting new laws. Nor does the anti-authorization provision constitute a valid preemption provision because it is not a regulation of private actors. It issues a direct order to the state legislature.[89]

The above cited Professional and Amateur Sports Protection Act (PASPA) became law in the United States in 1992 the but decision of the US Supreme Court of 14 May 2018 struck down this federal law and, in so doing, gave the green light for the legalization of betting on sports in the United States.[90] The impact across American sport was astounding and the momentum that was built across sports, leagues and states was remarkably rapid with states like New Jersey, Delaware, New York and Rhode Island being the early pace-setters in enacting state legislation to

87 'Sport, ethics and the law' (2017) International Sports Law Review 3–10.
88 584 US (2018) May 14, 2018.
89 'Opinion Summary' (*Justia*, May 15, 2018) https://supreme.justia.com/cases/federal/us/584/16-476/?utm_source=summary-newsletters&utm_medium=email&utm_campaign=2018-05-15-us-supreme-court-73091fe88f&utm_content=text-case-read-more-2.
90 'Supreme Court strikes down federal law prohibiting sports gambling' (*ESPN*, 15 May 2018) www.espn.com/chalk/story/_/id/23501236/supreme-court-strikes-federal-law-prohibiting-sports-gambling.

legalize betting in sports. Notably, at the federal level in the United States, the PASPA has been used in tandem with the 1961 Wire Communications Act, the 1961 Transportation in Aid of Racketeering Enterprises Act, the 1970 Illegal Gambling Business Act and the Racketeer Influenced and Corrupt Organizations Act to establish a regulatory framework for sports betting.[91]

Not only was the year 2018 a significant one for US sports betting, but it was one where the international calendar was packed with major events, including the Pyeongchang Winter Olympics, the Gold Coast, Australia Commonwealth Games, the FIFA World Cup in Russia and the Youth Olympic Games in Buenos Aires, Argentina. The presence of so many major games, especially when placed so closely together, could present a fertile ground for illegal or corrupt activity. Blackshaw's warning, therefore, serves as an enduring one:

> Clearly corruption is rife and affects every sphere of life, including sport, and it behoves the International Sports Governing Bodies to take all possible steps to eradicate corruption and corrupt practices from their respective sports, especially corruption that tends to result from Sports Betting and the corresponding possibilities of Match Fixing, in cahoots with corrupt bookmakers, that present themselves in various parts of the world. Of course, the civil authorities also have a role to play in the fight against corruption generally and corruption-in one form or another-engendered by Sports Betting through the introduction of appropriate policies and legal controls.[92]

Blackshaw's observations are a much-needed reminder of the need for mechanisms to be created and enforced to preserve and protect the integrity of sport.

Allegations of corruption together with actual corrupt practices in global sporting events have had a long history. Just recently, in the first half of 2018, Australian sport was rocked by two sets of shocking revelations in sports that are, admittedly, usually susceptible to ethical breaches. The ball-tampering scandal, addressed later in this chapter, made greater headlines than did the horse racing debacle, which was described as dishonest, corrupt, fraudulent, improper and dishonourable actions of the highest order.[93]

The horse racing impropriety involved the administration of race-day drug treatments to over 100 horses over a seven-year period, leading the Victoria Racing Appeals and Disciplinary Board to conclude that the case involved perhaps the biggest scandal and most widespread investigation in the history of Australian racing.[94]

The early part of 2018 also saw the dramatic unfolding of questionable conduct in American college sports, which, having been described as an underground economy, *prima facie* appeared to breach the amateurism rules of the National Collegiate Athletic Association (NCAA).[95] Documents revealing cash advances, entertainment and travel expenses for high school and college prospects and their families caught the eyes of criminal investigators.[96]

In the Caribbean, the most high-profile sporting integrity issues in recent years have both involved cricket, one involving billionaire sponsor Sir Allen Stanford and, the other, West Indies middle-order batsman, Marlon Samuels. The Stanford fiasco did not involve sports betting but rather an alleged Ponzi scheme, while the Samuels affair involved allegations of contact with an

91 Paul Anderson, 'The Regulation of Gambling Under U.S. Federal and State Law' in Paul Anderson, Ian Blackshaw, Robert Siekmann and Janwillem Soek (eds), *Sports Betting: Law and Policy* (TMC Asser Press, 2012) chapter 52, 854, 855.

92 Ibid 958–959.

93 'Horse trainers guilty in Australia's "biggest" racing scandal' (*BBC*, 8 May 2018) www.bbc.com/news/world-australia-44035667.

94 Ibid.

95 'Exclusive: Federal documents detail sweeping potential NCAA violations involving high-profile players, schools' (*Yahoo Sports*, 23 February 2018) https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html.

96 Ibid.

Indian bookmaker on the eve of a one-day international match between the West Indies and India in January 2007. Samuels was subsequently banned for two years.

Yet, this region was not spared negative headlines when, in the 1990s, during the days of the Shell Caribbean Cup, the following indescribable scenario, recounted in the third edition of *Sports Law*, occurred:

> not even the bigwigs at the Football Association could have concocted a rule so daft that both sides ended a competitive cup match attacking their own goals, the farcical situation that occurred at the end of a recent match between Barbados and Grenada in the final group match of the Shell Caribbean Cup.
>
> Needing to beat Grenada by two clear goals to qualify for the finals in Trinidad and Tobago, Barbados had established a 2–0 lead midway through the second half and were seemingly well in control of the game. However an own goal by a Bajan defender made the score 2–1 and brought a new ruling into play, which led to farce. Under the new rule, devised by the competition committee to ensure a result, a match decided by sudden death in extra time was deemed to be equivalent of a 2–0 victory. With three minutes remaining, the score still 2–1 and Grenada about to qualify for the finals in April, Barbados realised that their only chance lay in taking the match to sudden death. They stopped attacking their opponents' goal and turned on their own. In the 87th minute, two Barbadian defenders, Sealy and Stoute, exchanged passes before Sealy hammered the ball past his own goalkeeper for the equaliser.
>
> The Grenada players, momentarily stunned by the goal, realized too late what was happening and immediately started to attack their own goal as well to stop sudden death. Sealy, though, had anticipated the response and stood beside the Grenada goalkeeper as the Bajans defended their opponents' goal. Grenada were unable to score at either end, the match ended 2–2 after 90 minutes, and after four minutes of extra time, Thorne scored the winner for Barbados amid scenes of celebration and laughter in the National Stadium in Bridgetown.
>
> James Clarkson, the Grenadian coach, provided an unusual variation on the disappointed manager's speech: 'I feel cheated' he said. 'The person who came up with these rules must be a candidate for the madhouse. The game should never be played with so many players on the field confused. Our players did not even know which direction to attack. Our goal or their goal. I have never seen this happen before. In football, you are supposed to score against the opponents to win, not for them', he added. Nobody should tell the organising committee of the World Cup. They might get ideas.[97]

While that exceptional situation likely stands out because of the peculiar nature of the facts, the idea of winning at all costs is not new to the sports sector. When one further considers the regular occurrence of unusual betting patterns or the rise of spot-fixing[98] and ball-tampering in cricket, it is clear that effective and proper regulation is not only relevant, but paramount. It is in this light that the role of the Sporting Integrity Global Alliance (SIGA) will take on great significance in the foreseeable future. This organization is a welcome addition to existing entities like the Tennis Integrity Unit,[99] the ICC's Anti-Corruption Unit and the IAAF's recently formed Athletics Integrity Unit.

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97 Simon Gardiner, John O'Leary, Roger Welch, Simon Boyes and Urvasi Naidoo, *Sports Law* (Routledge, 12 March 2012) 75–76. Citing an article by Andrew Longman entitled 'Absurd cup rule obscures football's final goal'.

98 Spot-fixing's notoriety came to the fore in *R v Amir, Asif and Butt* [2011] EWCA Crim 2914 where three Pakistani cricketers, Mohammed Amir, Mohammad Asif and Salman Butt took bribes in exchange for bowling 'no balls' at predetermined moments. They all received prison sentences. While match-fixing seeks to affect the overall outcome of the particular game or match in question, spot-fixing involves the manipulation of narrower aspects of the game as in the *Amir, Asif and Butt* case.

99 This body is funded by seven major tennis stakeholders: The International Tennis Federation, Association of Tennis Professionals (ATP), the Women's Tennis Association (WTA), Australian Open, French Open, Wimbledon and the US Open.

## 6.5 A BRIEF WORD ON SPOT-FIXING

The spot-fixing practices of Pakistani cricketers Salman Butt, Mohammad Amir and Mohammad Asif[100] yielded punishment both under sporting law and under the criminal law, the former being imposed pursuant to the ICC's Anti-Corruption Code and the latter under English law through the jurisdiction of the English Crown Court. Amir and Butt's appeals to the English Court of Criminal Appeal were dismissed while the three players' appeals to the Court of Arbitration for Sport[101] against the ICC's imposition of a period of ineligibility were also dismissed.[102]

The disciplinary process under the ICC's governance brought further awareness to the consistent threat posed by those who cheat. In *International Cricket Council v Salman Butt, Mohammad Asif and Mohammad Amir*, the Disciplinary Committee chaired by Michael Beloff QC, noted:

> Fundamental sporting imperatives are described in the following terms [Art 1.2]:
>
> > *Public confidence in the authenticity and integrity of the sporting contest is ... vital. If that confidence is undermined, then the very essence of cricket will be shaken to the core.... Advancing technology and increasing popularity have led to a substantial increase in the amount and sophistication of betting on cricket matches. The development of new betting products, including spread-betting and betting exchanges, as well as internet and phone accounts that allow people to place a bet at any time and from any place, even after a cricket match has started, have all increased the potential for the development of corrupt betting practices.... [I]t is of the nature of this type of misconduct that is carried out under cover and in secret, thereby creating significant challenges for the ICC in the enforcement of rules of conduct. [Arts. 1.1.2, 3 and 4].* [Italics original].

The committee's reference to the sophistication of sports betting is significant, and accurately reflects the magnitude of the challenge faced by modern-day integrity watchdogs. This is one reason why the Sport Integrity Global Alliance (SIGA's) initiatives and vision have been opportune.

## 6.6 SIGA'S SPORT INTEGRITY PRINCIPLES

SIGA has approached the question of sporting integrity with a three-tiered focus, namely, good governance, financial integrity and sports betting integrity. Its core integrity principles are so critical to the maintenance of high ethical sporting standards that they warrant being cited in full:

> *Core principles on sport integrity*
>
> **In the case of Good Governance, to:**
>
> 1 Agree that the conduct and operation of sport must always take place within the boundaries of all applicable laws and regulations, and in conformity with the good governance principles of democracy, transparency, accountability and meaningful stakeholder representation across the sporting community;
> 2 Uphold and respect the universal principles of sports ethics such as fair play, solidarity, respect for human rights, dignity, integrity and diversity, and rejection of any form of discrimination;
> 3 Implement the highest governance standards, including, but not limited to, democratic and transparent electoral processes, term limits, separation of powers between their regulatory

100 Jack Anderson, *Leading Cases in Sports Law* (Springer, 2013) 303.
101 Note that Mohammad Amir ultimately withdrew his appeal to CAS.
102 Ian Blackshaw, *International Sports Law: An Introductory Guide* (Asser Press, 2017) 19–20.

and commercial functions, monitoring of potential conflicts of interest, risk management procedures, gender equality at the board level, independent directors, meaningful stakeholder representation in the decision-making organs, transparent and accountable financial management, and proper oversight;

4 Maintain, at all levels in the sports sector, a zero-tolerance policy towards all forms of corruption, bribery and illegal financial dealings, including, but not limited to, the implementation of adequate criteria and transparent bidding processes for the organization of major sports events, selling of broadcasting rights, sponsorship deals and other commercial arrangements;

## In the case of Financial Integrity, to:

5 Uphold the highest standards in terms of financial integrity and transparency across the sports sector, including the implementation of club licensing systems both at national and international level, with appropriate financial criteria, due diligence and effective supervision mechanisms;

6 Establish international financial integrity standards, appropriate financial reporting, audit and compliance practices, and a strong "culture of compliance" and full transparency in the allocation, distribution, use and scrutiny of sports development and solidarity funds;

7 Build core financial capacity throughout the networks of clubs, federations, leagues, athletes' unions and other organizations to ensure adoption of universally recognized principles for accounting and finance and issuance of regular annual reports;

8 Assess existing club ownership regulatory frameworks and develop fit and proper club owners and directors tests, to ensure that those who own and administer sports organizations enjoy appropriate moral and professional credentials and prevent the risks of potential criminal infiltration, conflicts of interests and other detrimental consequences;

9 Support the establishment of independent monitoring, audit and oversight in relation to all sports-related development programmes and financial transactions, including, but not limited to, athletes' transfer fees, agents and other third party commissions, sale of commercial and sponsorship rights, acquisition of sports clubs and offshore vehicles and transactions, through the establishment of a clearing house or similar system, at both national and international levels; and

## In the case of Sports Betting Integrity, to:

10 Promote the adequate regulation of the sports betting market worldwide and commit to prevent and combat all forms of illegal sports betting in order to eradicate sports betting fraud and match-fixing, while recognizing sports competitions organizers' rights and safeguarding the integrity of sports competitions and the economic viability and social role of sport;

11 Encourage governments and sports bodies to enact the necessary laws and regulations, and their harmonized development and concerted implementation and monitoring, including the establishment of national integrity units, codes of conduct on sports betting integrity and robust prevention/ education policies targeting all key participants in sport, in particular the most vulnerable ones, young people; and

12 Support the establishment of an independent betting monitoring platform, capable of providing sport integrity intelligence alerts to sporting, law enforcement, betting regulators and operators and government stakeholders to assure early warning advice on corrupt practices, potential manipulation of sports competitions and/or illicit methodologies and criminal networks activities, as well as to ensure the basis for adequate cooperation and information sharing providing reliable, accurate and independent data for sports disciplinary procedures and evidence for criminal prosecution.[103]

103 'Declaration Of Core Principles On Sport Integrity' (*SIGA*, 2018) http://siga-sport.net/declaration-of-core-principles-on-sport-integrity/.

The above principles represent an impressive, and perhaps even utopian, set of objectives that sit at the heart of fair play in sport. It is hard to miss the genuine call to best practice from an ethical perspective with foundational elements including:

- Democracy
- Transparency
- Accountability
- Fair play
- Gender equality
- Solidarity
- Respect for human rights
- Dignity
- Diversity and
- The rejection of discrimination

This pursuit of sporting purity is reminiscent of the vision espoused by Edward Grayson, regarded by many as the 'father of Sports Law'. In the third edition of *Sport and the Law*, Grayson noted:

> Preservation of Corinthian values of fair play, self-discipline, health and education within the Rule of Law on and off the fields of play led to Sport and the Law's inevitable birth during the early 1950s with an authentic legal-sporting pedigree.[104]

The previously mentioned juridification and commercialization of the industry have often obscured this side of the practice of sport, which from its onset was intended to be played in the right spirit. Indeed, an oversimplification of the various influences that negatively affect sport would be neither helpful nor accurate. Yet, the pellucid articulation of sporting ideals by SIGA is a welcome shot in the arm for stakeholders in this sector and consistent promotion of these values should be advocated in order to ensure sport's sustainability.

## 6.7 HISTORICAL OVERVIEW: GAMBLING AND BETTING IN THE CARIBBEAN

Beloff's reminder that the broader problem of unethical practices in sport is a long-standing one is worth remembering:

> Corruption in sport is not new. A document, transcribed and translated from a cache of 500,000 fragments of papyrus at a rubbish dump in the ancient Egyptian settlement near modern Cairo, reveals that a wrestler, managed by his father, agreed to accept a bribe of 3,800 drachmas to lose to his opponent at a regional sporting contest called the Great Antinoeria.
>
> As it was with sportsmen so it was with officials. The most famous classical Olympic controversy involved the notorious Roman Emperor Nero in the Games of AD 67. Not only did Nero bribe Olympic officials to postpone the Games by two years, he also bribed his way to several Olympic laurel wreaths. On one occasion Nero competed in the races with a 10-horse team, only to be thrown from his chariot. But even though he did not complete the race – no Ben Hurhe – he was still proclaimed the winner on the grounds that he *would* have won had he been able to finish.[105]

104 Edward Grayson, *Sport and the Law* (Butterworths, 2000) 65.
105 Michael Beloff, 'Sport, ethics and the law' (2017) International Sports Law Review 3.

In other words, the scourge of corruption in sport goes a long way back and is inextricably linked to the general yearning for power, money and influence.

Historically, the Caribbean region has been shaped by myriad social, political, economic and even religious influences. These have had a significant bearing not only on general societal development, but especially on personal habits and choices. Betting has generally been viewed as a vice to be avoided, since it goes against the principles of diligence and sacrifice. The conservative view is that gambling encourages the taking of short-cuts and promotes quick rewards without the requisite investments of hard work and productive hours. This perspective has predominated West Indian society and continues to influence the degree of participation in gambling up to the present time. These cultural mores are so germane to Caribbean societies that they have already impacted on the outcome of betting-related litigation. For example, in the Trinidad and Tobago case of *Kearne Govia v Gambling and Betting Authority*,[106] a key consideration in the final outcome of the case was the way that society viewed gambling. The Appeal Court noted:

> The view of the objectors that gambling is contrary to their church's doctrine and thus a sin is not dissimilar from the views of many other denominational churches and indeed other faiths that comprise our cosmopolitan society. Naturally, then, the majority in our society would view the court's countenancing of a betting office immediately adjacent to a church, as a further erosion of our collapsing society ... The consideration therefore of the Church's stance on gambling was therefore a pertinent consideration in assessing the suitability of the premises for use as a betting office.[107]

In the Caribbean, social and moral arguments play a significant role in the regulation of gambling and betting generally and often impact on policy-making. The 2009 Betting, Gaming and Lotteries (Amendment) Act of Jamaica stipulates in section 63 that licensed premises must be closed to the public on Good Friday, Christmas Day and every Sunday. Those dates of closure are well-established in Jamaica and many parts of the Caribbean as 'holy days' on which activities like gambling should not occur. Moorman recounts a similar reality in North America noting that 'historically, almost all forms of gambling were illegal and also viewed as immoral'.[108] Likewise, Smith observes that the 'main opposition to sports betting in this era came from anti-gambling moralists' as he evaluated Canadian sports betting in the twentieth century.[109]

In recounting the history of gambling in Trinidad, Gray noted:

> when the first group of Chinese came to Trinidad as immigrant labourers in 1806, they not only brought their knack for small business ... but a traditional numbers gambling game from the Southern Provinces of China. Their numbers gambling game was later modified to suit the traditions and experiences of the Trinidad population and renamed Whe Whe in the then dominant patois language of the island.[110]

Further, playing whe whe was a gambling offence that was caught by *Ordinance 6 of 1868* under sections that addressed all games of chance.[111] Gray also noted the irony and/or hypocrisy of a strong anti-gambling stance in the late nineteenth century by the elite of society, while horse

106 *Kearne Govia v Gambling and Betting Authority, Warrick and St John's Baptist Church-Mag*. App. 145 of 2005.
107 Ibid 10–11.
108 Anita Moorman, 'Gambling and professional athletics' (2009) 1(2) The International Sports Law Journal 90.
109 Garry Smith, 'Sports Betting in Canada' (2011) The International Sports Law Journal 288.
110 Christopher Gray, 'History of the Game' (*Trinidad Guardian Newspaper*, 26 May 1990) 8.
111 Ibid.

racing, on the other hand, was not only legal, but also supported and organized by the very elite.[112]

It is beyond dispute that one of the sports most closely related to betting and gambling is horse racing. Trinidad and Tobago saw one of its first formal racing meets under the auspices of the Trinidad Turf Club on 27 October 1828. Cozier noted that although

> the meeting in 1828 heralded the beginning of the organised era, match races had been taking place from as early as the late 18th century even before the British occupation of 1797. The French plantocracy kept horses specifically for festive occasions when they were matched against each other particularly on Paradise Pastures in the south.[113]

Cozier added that on that historic day in 1828, the second race, the Trinidad Turf Club Cup, was won by a horse called Independence, 'despite strong favouritism for Marigold indicated by *numerous bets* of Marigold against the field'[114] (emphasis added).

Betting on horse racing evidently had an early start in Trinidad. A similar story is told on the island of St Croix in the US Virgin Islands. In fact, Malec observes that organized horse racing existed on St Croix since the late 1800s.[115] In describing the social role of sport in national rebuilding after the destruction of Hurricane Hugo there in September 1989, Malec made the observation that one reason why horse racing best served the idea of a socio-emotional function was the added element of gambling.[116] He recounted the views of Loy, McPherson and Kenyon that people gamble in order:

> to escape the boredom of a routine life, to relieve societally induced tensions, to strive for social mobility by winning money, and to indicate to themselves and others that they can regulate and control their destiny. The horse races and the element of gambling allow for all these needs to be met.[117]

These views, to some degree, represent an unorthodox approach to gambling in the Caribbean, whose society, more often than not, holds conservative views on key social issues.

Horse racing in Barbados has had a history of over 150 years, with racing at the Garrison dating back to the 1840s at a time when the British cavalry raced against the local plantocracy for bragging rights.[118] Today, one of the marquee events in the horse racing calendar in Barbados is the Sandy Lane Gold Cup Festival. The Barbados Turf Club, founded in 1905, administers and promotes racing in Barbados.[119]

In assessing the history of football in the Caribbean, Ferguson believes that organized football arrived with the British in the Caribbean in the last decade of the nineteenth century.[120] Unlike horse racing, there was no inherent relationship with gambling and this was perhaps partly due to the fact that in the early twentieth century, football was exclusively amateur and largely run by schoolmasters, churchmen and local philanthropists.[121] It is, nevertheless, a bit surprising that the practice and scope of gambling in the Caribbean is not greater given its geographical proximity to the Americas, in particular Central and South America.

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112 Ibid.
113 John Derek Cozier, 'The History of Horse Racing in Trinidad and Tobago' (1994) Caribbean Information Systems and Services.
114 Ibid.
115 Michael A. Malec, *The Social Roles of Sport in Caribbean Societies* (Routledge, 2013) 246.
116 Ibid.
117 Ibid.
118 'Sporting Barbados' (Bridgetown, 2006 edn) 66.
119 'Sporting Barbados' (Bridgetown, 2009 edn) 98.
120 James Ferguson, *World Class: An illustrated history of Caribbean Football* (Macmillan International, 2006) 31.
121 Ibid.

Although Cuba, the Dominican Republic and Puerto Rico sometimes carry an uncertain geographical status, sometimes being considered Latin American nations and at other times, being labelled as Caribbean territories, Craig has noted that 'Latin America also included in its list of traditional sports and games a number of varieties of ball games, a strong affinity for the bow and arrow, pockets of intensive wrestling, and an affinity for gambling-oriented games.'[122] Notably, Craig juxtaposed the gambling cultures of Latin and South America (where Guyana is located, although it is considered a Caribbean nation) adding that while, historically, gambling was widely practised by Latin Americans, by contrast, many South American tribes did not 'seem to have had any interest in gambling, nor did they practice the rudimentary play with dice or lots that is extremely common throughout the world'.[123] It was more likely that games of chance would take place, but even this was limited to societies that were more advanced, like the Mayans and the Aztecs in Central America or the Incas in South America.[124] For this reason, Craig concluded that for large sections of South America, it looked like gambling was non-existent or at least had gone undetected in terms of traditional play.[125]

Undetected gambling seems to aptly describe the general position in the Caribbean even up to today. It will be discovered during this chapter that 'informal gambling' tends to characterize the practice of many inhabitants. Should law enforcement agencies decide to increase their vigilance in policing betting and gaming in the Caribbean, it may not be surprising if many offences, at different levels, are being committed across the region on a consistent basis. However, it is arguable that perhaps Caribbean law enforcement authorities share Moorman's view that 'informal gambling or wagering is acceptable, provided that the primary purpose is the playing of the game for enjoyment, not for financial gain'.[126]

### 6.7.1 The policy framework and regulatory climate in the Caribbean

> In order to ensure that the conduct of betting, gaming and lotteries is fair and free from criminal influence, the Betting, Gaming and Lotteries Commission has made several recommendations to the Government regarding measures aimed at strengthening the regulatory framework and rules governing the operations of licensees under the Betting, Gaming and Lotteries Act.[127]

Caribbean governments have approached gambling and betting in a way that reflects society's views on the practice. Budgets seldom speak to this issue and most public discussions tend to discourage any form of gambling. Across the region, various commissions have been established to regulate gambling. In Jamaica, the Betting and Gaming Lotteries Commission has been mandated, in conjunction with other stakeholders, to develop a long-term structural plan that will see, *inter alia*, the introduction of telephone and internet betting. The backdrop of the recent policy initiatives in that country was the need to strengthen the regulatory landscape of betting and gambling. The end product was the Betting and Gaming Lotteries (Amendment) Act, 2009. The above quoted memorandum of objects and reasons not only highlighted the social concern of immunization from criminal influences, but also presented the economic

122 Steve Craig, *Sports and Games of the Ancients* (Greenwood Publishing Group, 2002) 115.
123 Ibid.
124 Ibid.
125 Ibid.
126 Anita Moorman, 'Gambling and Professional Athletics' (n 108) 96.
127 Audley Shaw, 'Betting, Gaming and Lotteries (Amendment) Act, 2009 – Memorandum of Objects and Reasons' (Ministry of Finance and the Public Service, Jamaica, 2009).

motivation behind the legislative amendments in Jamaica. The memorandum added that the new gaming and wagering measures were:

> expected to bolster the betting and gaming industry by enabling licensees to respond rapidly and effectively to technological and consumer-led development, which will enhance the contribution of the industry to the Jamaican economy, while protecting the interests of the public.[128]

As is often the case in the sporting industry, competing interests must be balanced, the same being true for Jamaica.

More generally, Zagaris notes that virtually all jurisdictions in the region permit various types of gaming with many Caribbean gaming laws following British law. He adds that many require reconsideration for the purpose of modernization.[129] These prophetic comments have been heeded in some Caribbean territories. In Jamaica, for example, the regulatory environment is a strong one consisting primarily of the Jamaica Racing Commission and the Betting Gaming and Lotteries Commission. In Trinidad and Tobago, a racing authority exists, which is specific to horse racing, and which was established by the Trinidad and Tobago Racing Authority Act Chapter 21:50, while the duties of the Betting Levy Board, a body corporate established under the Betting Levy Board Act No 35 of 1989, are equally limited in scope. Under section 9 of the Betting Levy Board Act, the board is 'responsible for the development and improvement of every aspect of horse and dog racing, including the breeding of race horses and dogs and the provision of benefits for jockeys and stable lads'. The broad language used does not disclose how much of a regulatory function that the board was meant to assume with regard to betting practices. That said, it appears that the focus of the board's functions is the collection of taxes, duties and fees payable to it under the Gambling and Betting Act.[130]

As far as lotteries are concerned, the National Lotteries Control Board was established under the National Lotteries Act of 1968, which was later amended by the 2006 National Lotteries (Amendment) Act. Section 9 of that Act states that notwithstanding 'any other written law respecting gambling, betting or lotteries, the Board may carry on the business of promoting, organising and conducting national lotteries'. The only noteworthy connection between sport and the lottery system in Trinidad and Tobago appears to be the stipulation in section 23A that an instant lottery surplus must be paid into the Sport and Culture Fund established under section 3 of the Sport and Culture Fund Act.[131] Although section 4 of that Act mentions the undertaking of any other activity related to sport or culture as one of the purposes of the Fund, it is does not appear to be the case that the regulation of sports betting was part of Parliament's intent in 1988.

In the Bahamas, one of the regulatory bodies is the Gaming Board, established under the Lotteries and Gaming Act Chapter 387, while horse racing is regulated by the Racing Commission established under the Racecourse Betting Act Chapter 386. The Racing Commission has been given a wide advisory function with regards to all matters connected with racing and betting on racecourses within The Bahamas.[132] Although the Bahamas passed a Sports Act that took effect in 1964 and which was later repealed by the 2011 Sports Act,[133] there is no mention of sports betting in either the former or the latter statute.

128 Ibid.
129 Bruce Zagaris, 'Selected Developments in Latin America and the Caribbean in Anti-Money Laundering' (Paper presented to the Fourth International Money Laundering Conference, Miami Beach, Florida, 22–23 April 1999).
130 Section 9, Betting Levy Board Act No 35 of 1989.
131 Act No 31 of 1988.
132 Section 4 (a), Racecourse Betting Act Chapter 386.
133 Act No 28 of 2011.

In Antigua and Barbuda, the Commissioner of Inland Revenue plays the major regulatory role as stipulated in the Betting and Gaming Act Chapter 47. This resembles the position that existed in Trinidad and Tobago in the early 1960s when the Chief Magistrate exercised the function of the licensing authority for the purposes of granting betting licences and permits. The Betting and Gaming Act in Antigua, like in Trinidad and Tobago, was passed in 1963. The scope of the Act was also limited to games of chance whose definition, like most others in the Caribbean, elucidated that such games do 'not include any athletic game or sport'.

The 1902 Gambling Prevention Act of Guyana, with its most recent amendment being in 1997, is one of the regional statutes that does not define 'game of chance', although it does state that gambling means 'to play at or engage in any game of chance, or pretended game of chance, for money or money's worth'. The most notable feature of the Guyanese legislation is the role played by the Demerara Turf Club. In this regard, section 21(1) of the Act states, *inter alia*, that:

> it shall be lawful for the Demerara Turf Club Limited (hereinafter referred to as 'the Club') to organise and conduct a lottery or sweepstake in connection with any race meeting held under the auspices of the Club or under the auspices of any racing club or association affiliated thereto or in connection with any race run in England under Jockey Club Rules or National Hunt Rules.

The exemptions made for the Demerara Turf Club reflect the reality of sports betting in the Caribbean where, outside of horse racing and more recently dog racing, very little is said from a legislative viewpoint. Likewise, at the level of sports bodies, a similar dearth of policy directives exists as is evident in the conspicuous absence of sporting integrity provisions in governance documents of many governing bodies throughout the region. There is still room for optimism, though, as more and more Caribbean countries are adopting comprehensive national sports policies whose objectives include the upholding of high ethical standards in the practice of sport. By way of example, the recently launched *2017–2027 National Sports Policy of Trinidad and Tobago* lists seven elements that constitute its policy values: commitment, respect, integrity, democracy, tolerance, fair play and the achievement of excellence.[134] Policy and legislation, therefore, will continue to play a crucial role on the journey to sporting best practice.

## 6.8 THE LEGISLATIVE LANDSCAPE

As already seen, there is a vast, but old, body of legislation in the Caribbean dealing with gambling and betting. In this section, the legislative framework for betting in four countries will be featured.

### 6.8.1 Jamaica

Historically, gambling in Jamaica was governed by the Betting, Gaming and Lotteries Act. The Casino Gambling Act was passed in 2010,[135] with the goal of governing casino gambling. Its enactment, then, was not expected to have any direct bearing on sports betting in Jamaica, but instead, it was the Betting, Gaming and Lotteries (Amendment) Act, 2009 that was earmarked to effect such change.

134 '2017–2027 National Sports Policy of Trinidad and Tobago' (Ministry of Sport, Trinidad and Tobago, 2017) 20.
135 Act No 11 of 2010.

In conjunction with the 2009 Provisional Collection of Tax (Betting, Gaming and Lotteries) Order, the 2009 Amendment Act introduced a pool betting duty and a sports betting tax. 'Sports betting' is defined as 'the making of a wager on the outcome of a sports event'.[136] The Act also defines 'online betting' as:

> betting by electronic means including any form of betting via telephone or the Internet or such other communication system approved by the Commission, while 'electronic betting' refers to 'betting using a telecommunications network, using either a telephone line, the Internet, a mobile phone or other means approved by the Commission.'

The commission mentioned in these definitions is the Betting, Gaming and Lotteries Commission. With the introduction of clear provisions on sports betting, a corresponding sports betting tax was also imposed at a rate of 7% of gross profit accruing to an operator.[137]

When the Jamaican cabinet gave its approval in September 2009 for the amendment of the Betting Gaming and Lotteries Act to introduce sports betting and the payment of a sports betting tax, it was envisioned that overseas sports betting would be embraced.[138] As a result, betting could now take place on popular global sports like the various European football competitions and the National Basketball Association (NBA) in the United States.[139] Notably, the 2009 Amendment Act broadened the definition of a 'racing promoter' to mean:

> a person who with the approval of the a) Jamaica Racing Commission, promotes horse-racing or racing of any approved species of animal at an approved racecourse; b) Betting, Gaming and Lotteries Commission, accepts bets on *approved sports betting activities*. [Emphasis added].

The 2009 Amendment Act therefore envisaged sports betting activities taking place once the requisite approval had been granted. This was a clear and bold step towards legalizing betting on the outcome of sports events in a way that did not previously exist.

In like manner, section 25 of the 2009 Amendment Act regulated the setting up of a totalisator on specified premises, where the operation of the said totalisator would only be for betting transactions on, *inter alia*, sports betting activities approved by the commission. The legislative intent was therefore clear: betting on sports is lawful once the requisite commission approval has been granted. Further amendments took place in Jamaica pursuant to the Betting, Gaming and Lotteries (Amendment) Act, 2014. The main revision, from a sports betting perspective, was the inclusion of a definition for 'sports betting outlet' as follows: 'sports betting outlet means any premises or such other type of location, conveyance or medium as may be approved by the Commission, for the purposes of conducting the business of sports betting.'[140] As a means of generating more revenue for the Jamaican economy, the aforementioned 7% sports betting tax was introduced by the 2009 Amendment Act. According to section 33 (3) the tax 'shall be applicable to any bet made by a bettor (a) with a bookmaker (b) with a non-promoter of pool betting under section 31A or (c) by means of a totalisator on an approved racecourse, licensed track or other premises approved by the Commission.' As such, there is wide applicability of the sports betting tax, confirming the economic policy motivation behind its introduction. As a country that has a strong tourism sector, especially in Western Jamaica in places like Montego Bay and Negril, the face of sports betting was enhanced as a mechanism to reap rewards for that nation.

136 The Provisional Collection of Tax (Betting, Gaming and Lotteries) Order, 2009; amendment to section 2 of the Betting, Gaming and Lotteries Act.
137 Ibid amendment to section 33.
138 'Jamaica Cabinet approves sports betting amendment' (*Caribbean Net News*, 11 September 2009).
139 Ibid.
140 Section 2(1).

### 6.8.2 Trinidad and Tobago

Gambling in Trinidad and Tobago is primarily regulated by the Gambling and Betting Act of 1963[141] (the 'Gambling Act'). The Act has undergone many subsequent amendments between 1973 and 1997. Although the legislative draftsmen did not include the term 'lotteries' in the short title to the original Gambling Act, lotteries are also governed by this legislation.

Section 27(1) of the Gambling Act contains a general prohibition on the use of premises for betting with a penalty of TT$2500 (approximately USD $600/250 Euros) or 12 months' imprisonment. Notably, there is a presumption that someone found on premises being used for betting transactions was there for such a purpose. Another general prohibition exists on receiving bets, negotiating bets or conducting pool betting operations. Of particular relevance to the sports betting context is the role of the foreign pool operator who is defined in section 26 as: 'an agent or representative of a principal who, in his own right and not as agent of another, carries on pool betting business in respect of football pools, outside of Trinidad and Tobago'. The Act qualifies this provision in section 29(5) by adding that a 'betting office licence granted to a foreign pools operator entitles that person to carry on pool betting business as a foreign pools operator only' so that such a person cannot assume that he can conduct pool betting business locally if the requisite authorization has not been granted. Further, 'football pools' is itself defined in section 26 as: 'any pool betting that is effected on or by way of the result of football matches wherever played'. Evidently, betting on local football in Trinidad and Tobago is sporadic, as compared to a greater incidence of betting on both European and international football, especially in World Cup years. Serac noted that the ICC's Cricket World Cup, hosted in the West Indies in 2007, struggled to keep pace with the extent of betting that occurred during the FIFA World Cup in Germany the year before. In 2007, she noted:

> Local bookies are not too ecstatic either about the ICC CWC and recall better days for last year's FIFA World Cup in Germany. A local bookmaker said CWC betting in Trinidad represents ten per cent of the activity during World Cup tournament.[142]

Under the rules of the Trinidad and Tobago Professional Football League (TT Pro League), the Code of Conduct for Managers simply states that a manager 'shall conduct himself at all times in an ethical and professional manner and shall observe the highest standards of integrity and fair dealing'.[143] This broad mandate does not reveal whether betting integrity issues were envisaged.

The Third Schedule to the Gambling Act regulates the conduct of pool betting business by stating that a holder of a betting licence must comply with certain requirements. One such stipulation is that the pool betting: 'shall take the form of the promotion of competitions for prizes for making forecasts as to sporting or other events, the bets being entries in the competitions and the winnings in respect of the bets being the prizes or share in the prizes'. The goal of the provision is to restrict betting on sports to the context of prize promotions. This leaves little room for profit-making, which appears to be neither the intent nor the reality of sports betting in Trinidad and Tobago.

Surprisingly, one of the older pieces of legislation in Trinidad and Tobago is relevant to sports betting. The 1933 Boxing Control Act, another Act piloted for amendment, almost incidentally mentions betting in section 24 of Part 1 of the Schedule to the Act, stating that:

141 Chapter 11:19 of the Laws of Trinidad and Tobago.
142 Stephanie Serac, 'A Gambler's Gloom' (*Trinidad Guardian Newspaper*, 18 April 2007) 35.
143 Appendix 1, Rule N 1.1, Clause 8.

> No betting shall take place during the progress of any boxing contest and any member of the Board may request the removal of any person offending in this manner and his request must be complied with by the promoter of the contest.

The Act, therefore, gives the power to physically remove someone found betting during the course of a boxing match. There is little evidence to indicate how often this provision has been invoked over the course of the approximately 85 years of its existence.

#### *6.8.2.1 The controversy surrounding the national tote system*

> Private betting shops would either have to close or join the National Tote System.[144]

These were the two options that the then Trade Minister of Trinidad and Tobago, Mervyn Assam, gave to the owners of private betting shops in 1998. The context was a move by the government to nationalize horse racing by establishing a national racing commission to operate the National Tote System established under the 1995 Finance Act.[145] The Trade Minister saw the move as one that would facilitate job-creation through the opening of more betting shops, while private betting shop owners viewed it as a conduit for unemployment.

In addressing the House of Representatives in November 1999 during the parliamentary debates on the Gambling and Betting (Amendment) (No.2) Bill and the National Racing Commission (No.2) Bill, Minister Assam observed that:

> most countries of the world, in order to have a vibrant horse-racing and dog-racing industry have gone this way. They have established national tote systems. Among the countries that have gone this way ... are France, Italy, Canada, Hong Kong, Singapore, Australia, Venezuela, Mexico, Argentina, Chile, Germany, United States of America, India, Japan, Malaysia, New Zealand, Puerto Rico, Panama and Brazil.[146]

The objective was to create, through the national tote system, a centralized mechanism for administering horse and dog racing in Trinidad and Tobago. Opponents of the move expressed the concern that the function of the turf clubs would be compromised and that the closest stakeholders, mainly in the private sector, would ultimately suffer by losing control of the sport of horse racing.

Unfortunately, both the *National Racing Commission Bill* and the *Gambling and Betting Amendment Bill* lapsed. However, the issues ventilated were instructive and will form a useful springboard for future policy and/or legislative amendments in relation to horse racing in Trinidad and Tobago. The idea of potentially significant bills lapsing is, of course, not unique to the Caribbean, with the abovementioned scenario reminiscent of the time around the turn of the millennium where a similar fate befell the Student Athlete Protection Act and the Amateur Sports Integrity Act in the United States.[147]

### 6.8.3 Belize

The Gambling Prevention Act Chapter 109 is the main legislative instrument in Belize to regulate betting and gambling. The very name of the Act tells a story about that government's

144 Kathleen Maharaj, 'Assam sounds warning – Private betting shops fall under NTS' (*Trinidad Express Newspaper*, 7 January 1998) 2.
145 Ibid.
146 *Hansard* (Racing Commission, 19 November 1999).
147 *Sports Betting: Law and Policy* (n 91) 905.

policy. Additionally, Belize passed a Gaming Control Act, which imposes a gaming tax, a Computer Wagering Licensing Act and a Lotteries Control Act. The 2000 Sports Act does not mention betting but may still have some regulatory relevance based on the broad wording of section 25, which provides:

> The Minister may from time to time order all or any of the activities of the Council, sports committee or a sporting organisation to be investigated and reported on by a person or person as he may specify and upon such order being made by the Council, sports committee or sporting organisation shall afford all facilities and furnish all information as the person or persons may require, to carry out every such order.

Investigative powers are always a powerful regulatory tool, so that the Sports Act may have inadvertently given the jurisdiction to the authorities in Belize to monitor sports betting even outside of the more specific gambling laws.

#### *6.8.3.1 Defining gambling in Belize*

In Belize, the Gambling Prevention Act defines 'gamble' as follows: 'to play at or to engage in any game of chance or pretended game of chance, for money or money's worth'. This definition mirrors that in Guyana, where a 'game of chance' is not defined. However, based on the fact that so many of the statutes in the Caribbean follow the British model and contain language similar to each other, it is reasonable to assume that, in Belize, games of chance do not include athletic games or sports. Owners or occupiers of 'common gaming houses' are liable to a fine and imprisonment, albeit minor penalties (fines range from USD $250–500 and imprisonment ranges from 3–6 months). One pertinent section of the Act for the purposes of sports betting is section 11(c), which states that:

> Whoever by fraud, unlawful device or ill-practice–
>
> c) in wagering on the event of any game, sport, pastime or exercise, wins from any person to himself or others any sum of money or valuable thing, shall be deemed guilty of theft of such money or thing by means of deception, and shall be punishable accordingly.

The section appears to permit wagering on sports, but within the required legal limits.

### 6.8.4 Bermuda

1975 was a significant year in Bermuda's betting history. In that year, Parliament enacted the Betting Act, the Betting Regulations and the Betting Duty Act. Prior to the 1975 legislation, the Lotteries Act was passed in 1944, which is consistently referred to in the Betting Act.

#### *6.8.4.1 'Pool betting' defined*

The Act defines 'pool betting' as 'betting based on the forecast of the results of a football match, cricket match, race or other event taking place abroad'. This definition specifically mentions cricket, football and racing, but lumps everything else into the category of 'other event'. Ordinary principles of statutory interpretation would suggest that 'other event' would in the first instance refer to other sports. Instructive, in this context, though, is the reference to 'taking place abroad', so that the legislative intent was to embrace offences taking place outside Bermudian waters. Additionally, the 1944 Lotteries Act made lawful the activity of licensed bookmakers and licensed pool betting agents.

One of the common characteristics of regional legislation in this area is its age, which is not unique to the Caribbean. The United Kingdom, for example, in 1906 enacted the Prevention of Corruption Act which, *inter alia*, criminalized the taking or making of payments by an agent carrying out duties on behalf of his principal.[148] This Act was used in later years for the purpose of sports-related prosecutions.[149] It is envisioned that statutes like the similarly titled Prevention of Corruption Act Chapter 11:11 of Trinidad and Tobago, for instance, can be used in like manner. Notably, in the criminal proceedings brought against Pakistani cricketers, Salman Butt, Mohammad Asif and Mohammad Amir, in tandem with the 2005 Gambling Act, it was section 1 of the 1906 Prevention of Corruption Act that addressed the conspiracies to accept corrupt payments.

### 6.8.5 Lessons from other countries

An examination of analogous models is generally speaking a fruitful exercise in matters of law and policy. One of the most conspicuous features of the Caribbean gambling and betting legislation is the absence of a definition for 'cheating' as is found in the UK Gambling Act of 2005. The section 42(3) definition of cheating in the UK Act focuses on actual or attempted deception or interference in connection with the betting process.[150] Another noteworthy intervention in the United Kingdom was the proposal to introduce a right to bet. Adrian Barr-Smith described it this way:

> Emboldened by the legislative innovation in New Zealand, the state of Victoria, Australia and most recently, France, in the UK a campaign has been waged for the creation of a requirement on bookmakers to obtain a licence from event owners in order to accept bets on their events. The proponents of this "right to bet"-the Sports Rights Owners Coalition (SROC)-accept that legislation would be required in order to introduce the right. They do not believe that bookmakers will voluntarily agree to such arrangements.
>
> SROC argues that it is necessary to introduce this right so that revenues generated in return for the grant of the right to bookmakers may be invested in improving the protection of the integrity of events. It maintains the need for such a right is justified by the specificity of sport and by the public's expectation that the event result should be of unimpeachable integrity.
>
> The proposal is that the legislation would create a civil right, enforceable against both UK-based bookmakers and those accepting bets from UK backers although based elsewhere.[151]

The right to bet proposal from the Sports Rights Owners Coalition combined optimism with realism as they envisioned the revenue-generation potential of such a legislative initiative, but also remained cognizant of the likely resistance from bookmakers to the prospect of having to obtain a licence from event owners. No similar amalgamation of sports rights owners exists in the Caribbean, but it does not prevent the conversation from happening on these shores. Yet, the true size of the sports betting market in the region remains a mystery so any talk of introducing a right to bet through legislation, at best, seems premature for the Caribbean. At the same time, it may very well be worthwhile to follow the initial progression of the *Prevention of Sporting Fraud Bill* which was introduced in New Delhi in 2013, but shelved in 2017.[152] Regional legislatures may be more open to this more conservative approach to addressing latent and

148 Michael Beloff, 'Sport, Ethics and the Law' (n 105) 6.
149 Ibid.
150 *Sports Betting: Law and Policy* (n 91) 849.
151 *Sports Betting: Law and Policy* (n 91) 853.
152 'Government shelves Sports Fraud Bill' (*Tribune India*, 2 June 2017) www.tribuneindia.com/news/sport/government-shelves-sports-fraud-bill/416408.html.

patent threats to sporting integrity and to also glean from the New Delhi experience, even though its legislative journey was truncated.

## 6.9 THE CASE LAW

Litigation has, unsurprisingly, been dominated by horse racing. Yet, it is fair to say that, generally speaking, no substantial body of law exists in the Caribbean as far as it relates to sports betting. Arguably, the highest profile gambling case in the Caribbean involved the dispute between Antigua and Barbuda and the United States over the latter's ban on internet gambling. Of similar high prominence was the Marlon Samuels disciplinary decision arising out of allegations of match-fixing in cricket. A few other cases emanated from Trinidad and Tobago.

### 6.9.1 The Antigua disputes

> A WTO tribunal in April 2005 decided that portions of the Wire Act, Travel Act and Illegal Gambling Business Act violated international trade rules.[153]

This was the heart of the matter. The United States passed laws that made online gambling illegal and, in particular, the use of telephones or the internet to facilitate gambling. The Antigua/US dispute received much publicity and also produced passionate reactions during the period of the conflict between 2004 and 2006, in particular. Charlie Mc Creevy, the Commissioner for the European Union's internal market stated, in 2007, that 'the US is discriminating against foreign gambling companies by banning payments to betting Web sites'.[154] The effect of the US laws, which prevented credit card companies from processing payments to online gaming companies, was to cause companies like Sportingbet plc, Leisure & Gaming plc. PartyGaming plc and Empire Online Ltd to either stop operations in the United States or to be sold at a nominal cost.[155] These events occurred around the same time when Sportingbet itself was considering an all-stock takeover of World Gaming plc, an Antigua-based company that ran websites offering sports bets, poker and casino gambling.[156]

The US ban was vehemently opposed by the Antiguan government in light of recommendations made by the Dispute Settlement Body of the World Trade Organization (WTO). Ultimately, the appeals panel ruled that the provisions of the Wire Act, the Travel Act and the Illegal Gambling Business Act, which prohibited the offering of online gambling services from Antigua, were in contravention of the WTO's General Agreement on Trade in Services (GATS).[157] There was diligent follow-up by Antigua to ensure that the United States complied with the WTO ruling, but to no avail.

Litigation was also started during that period by the Financial Services Regulatory Commission (FSRC) regarding a separate dispute. At the end of 2006, the FSRC sought a restraining order from the High Court of Justice calling for BET on SPORTS (Antigua) Ltd:

> to account for its assets and obligations and otherwise provide such information that will assist the FSRC in ensuring that BET on SPORTS consumers are protected to the maximum extent

153 Jeffrey Sparshott, 'Antigua gambles on trade case with US' (*The Washington Times*, 5 July 2006).
154 'US online gambling ban is protectionist says EU official' (*Caribbean Net News*, 31 January 2007).
155 Ibid.
156 Louisa Nesbitt, 'Sporting bet may bid for Antigua-based gaming company' (*Caribbean Net News*, 8 September 2006).
157 'Gambling Law, Casino Laws in Caribbean Countries' (World Casino Directory Staff, 17 October 2009).

> possible and that Antigua and Barbuda's Laws and Regulations are adhered to effect the orderly closure of BET on SPORTS' US-facing operations.[158]

The application arose following a settlement between the company and the US Government after both criminal and civil charges were laid against BET on SPORTS. The concern in Antigua was first of all a jurisdictional one and, according to Kaye Mc Donald, the Director of Gaming for FSRC: 'the jurisdiction of the United States Government over BET on SPORTS is questionable, by virtue of being the holder of an Interactive Gaming and Interactive Wavering license issued by the Antiguan and Barbudan authorities'.[159] Outside of this, the primary concern was that upon dissolution, the company's assets were properly distributed in the interest of the parties with a legitimate interest.

Back then, Antigua and Barbuda received general commendation for its fortitude and determination to be respected as a world player in the gambling market. It therefore came as no surprise when, in subsequent years, it laid the 2016 Gambling Act/Bill before its parliament, followed the next year by the Gambling (Amendment) Act 2017 in a further move to strengthen its legal and regulatory framework. These Acts further strengthen Antigua and Barbuda's inventory of betting-related laws, which also already included the Football Pool Betting Tax Act of 1975[160], and subsequent amendments.

### 6.9.2 The Marlon Samuels ruling

Rule 8 of the applicable West Indies Players Association Code of Conduct stated as follows:

> *Betting, match-fixing and corruption*
>
> Players or team officials must not, directly or indirectly, engage in the following conduct:
>
> (a) bet, gamble or enter into any other form of financial speculation on any cricket match or on any event connected with any cricket match (for the purposes of this Rule, an Event);
>
> (b) induce or encourage any other person to bet, gamble or enter into any other form of financial speculation on any cricket match or on any Event or to offer the facility for such bets to be placed;
>
> (c) be a party to contriving or attempting to contrive the result of any cricket match or the occurrence of any event in exchange for any benefit or reward ...
>
> (f) for benefit or reward (whether for the player him or herself or any other person) provide any information concerning the weather, the state of the ground, a team or its members, (including without limitation, the team's actual or likely composition, the form of individual players or tactics) the status or possible outcome of any cricket match or the possible occurrence of any event other than in connection with bona fide media interview and commitments.[161]

The aforementioned provisions closely mirrored those of cricket's world governing body, the ICC.

Back in 2007, Jamaican and West Indies batsman Marlon Samuels was banned from all forms of cricket for two years, following allegations of inappropriate contact with an Indian bookmaker on the eve of a one-day international against India. For reasons stated in its very

158 'Antigua-Barbuda Regulator takes legal action against BETonSPORTS' (*Caribbean Net News*, 1 December 2006).
159 Ibid.
160 Chapter 174.
161 West Indies Players Association (WIPA) Code of Conduct, section 1, 'Rules for Behaviour-Offences', Rule 8.

detailed judgment, the Disciplinary Committee of the West Indies Cricket Board (WICB) reluctantly suspended Samuels.

#### *6.9.2.1 The factual matrix*

The charges against Samuels were:

(1) Receipt of any money, benefit or other reward (whether financial or otherwise) which could bring Samuels or the game of cricket into disrepute; and
(2) Engaging in any conduct that, in the opinion of the Executive Board, relates directly to any of the rules of conduct and is prejudicial to the interests of the game of cricket.

The particulars of the first charge were that Samuels received the benefit of having his hotel accommodation in the sum of USD $1,238 (50,486.70 rupees) paid for by Mr Mukesh Kochhar and/or his associates. The hotel expenses arose following the one-day international (ODI) series between India and the West Indies in January 2007. As far as the second charge was concerned, the particulars centred on the fact that Samuels provided Kochhar on the eve of the 21 January ODI with accurate information about the identity of the opening bowlers for the West Indies.[162]

The Disciplinary Committee found that the relationship between Kochhar and Samuels was central to the charges and noted that the two men first met each other in 2002, five years earlier.[163] The committee further noted the increased attention being paid to corruption in sport and acknowledged the promulgation of the ICC Code of Conduct for Players and Team Officials.[164] It did not help Samuels' case that he attended a presentation by Mr Ronald Hope, a regional security manager at the ICC, in which Hope brought awareness to many cricketers about the 'dangers posed by corrupt persons and unregulated gambling and the basic responsibilities of a cricketer in the fight against corruption in the sport'.[165]

It was a salient fact that Mr Kochhar admitted during the proceedings that he was in the habit of betting heavily on cricket. However, he denied being a cricket bookmaker, although he did place bets on the very match for which Samuels furnished him information, some accurate, some inaccurate. Kochhar added that he never discussed his cricket betting with Samuels.[166]

#### *6.9.2.2 The decision of the Disciplinary Committee*

A majority of the committee believed that the first charge relating to the divulging of confidential team information should be thrown out and it was accordingly dismissed. It did not appear to them that:

> the Code, as it is currently worded, prohibits per se the improper divulging even of confidential team information in circumstances where the person giving out the information does not himself: bet on matches (i), or encourage others to bet on matches (ii), or gamble (iii), or encourages others to gamble (iv), or become a party to match-fixing (v), or underperform (vi), or encourage some other to underperform (vii), or trade the information for reward (viii).

162 *WICB v Marlon Samuels, Decision of the WICB Disciplinary Committee*, 'Samuels disciplinary hearing' (*www.caribbeancricket.com*, 16 May 2008) [5].
163 Ibid [15]–[16].
164 Ibid [18].
165 Ibid [20].
166 Ibid [25]–[26].

However, the majority believed that the second charge was proved, noting that 'the gravamen of this charge is the receipt of any money, benefit or other reward (whether financial or otherwise) which could bring the person receiving the benefit or the game of cricket into disrepute'.[167] Although the majority accepted that Samuels was an honest cricketer, who had never bet on cricket matches and who was 'unwittingly and innocently sucked into an unhealthy vortex by an unscrupulous gambler posing as a mentor and father figure',[168] they also concluded that proof of the charge in question did not necessarily require an element of dishonesty on the part of the person charged.[169] The committee did, however, express regret over the 'apparent mandatory nature' of the penalty, viewing the minimum two-year ban as 'entirely disproportionate' in the circumstances.

The Samuels decision is a rare occasion in the Caribbean context where betting on sports outside of horse racing was directly addressed and the regulatory function was performed by a sports body and not a creature of statute.

### 6.9.3 The racing cases in Trinidad and Tobago

The cross-section of cases arising out of Trinidad and Tobago hinged upon the interpretation of the prevailing gambling legislation. In *Ernesto Abraham v The Arima Race Club*,[170] the claimant filed a claim claiming:

> a declaration that upon the true construction of the Gambling and Betting Act Chapter 11:19 the Defendant, the Arima Race Club, its servants and or agents in administering a National Tote system pursuant to Section 34a of the said Act [The Gambling and Betting Act as amended by the Finance Act No. 5 of 1995] will be acting unlawfully and in contravention of the provisions of the said Act.[171]

The claimant also sought injunctive relief that would give effect to the first limb of his claim as well as damages for unlawful interference with his business.[172] Bharath J dismissed the claimant's summons and refused to grant an interlocutory injunction. He noted that:

> Off Track Betting outlets are free to take bets on foreign or overseas racing and that the National Tote System is under the control and the full responsibility of the Arima Race Club with the result that there was no interference or employment of unlawful means to damage the Plaintiff's business.[173]

In *George Guy v The Authority under the Gambling and Betting Act*,[174] the issue in contention was the eligibility of the appellant, George Guy, to receive a renewed betting permit and licence. The Court of Appeal found that the authority was right in refusing the applications for the grant of the permit and licence, based on the need of the applicant to be a holder of a betting licence at the date in question, 31 December 1966.

The facts of *Amin Habib (trading as Amin's Racing Service) v Chief Magistrate, Trinidad and Tobago Licensing Authority*[175] were similar to those in the *George Guy* case. In *Amin Habib*, the Chief

167 Ibid [43].
168 Ibid [44].
169 Ibid [45].
170 High Court Action 1137 of 1996.
171 Ibid 3.
172 Ibid.
173 Ibid 7.
174 Magisterial Appeal No 49/86.
175 Magisterial Appeal No 69 of 1975.

Magistrate, sitting as the licensing authority, refused the appellant's application for a betting office licence and a permit to carry on the business of receiving or negotiating bets or conducting pool betting operations.[176] The appellant's claims of breach of natural justice principles were dismissed as was the overall appeal since he failed to meet the statutory requirements that would enable him to receive the desired permit and licence.

In *John Katwaroo v Jesus Bocas (trading as Diamante Racing Service)*,[177] the claimant, Katwaroo, claimed the sum of TT$11,908.00 (approximately USD$2,000) 'being monies due and owing to him on tote bets placed with the defendant, John Bocas, on 26 September 1967'.[178] Rees J decided in favour of the plaintiff based on the credibility of the witnesses that appeared before him.[179]

In more recent times, racing disputes in Trinidad and Tobago took on a different slant in that leave for judicial review was sought in the Port-of-Spain High Court following the disqualification by the Trinidad and Tobago Racing Authority of 2008 Horse of the Year, Storm Street. As discussed in Chapter 2, such applications have taken on growing interest from the viewpoint of the development of regional Sports Law jurisprudence, especially in light of the general principle from the various jockey club cases, including more recently *Mullins v Jockey Club*,[180] that although sports governing bodies perform a quasi-public law function, their decisions are not usually amenable to judicial review.[181]

### 6.9.4 *Mohamed Bin Hammam v FIFA*:[182] an international case with implications for Caribbean sporting integrity

Mohamed Bin Hammam's challenge in 2011 to the presidency of Joseph 'Sepp' Blatter was a short-lived one. The end result was a number of football-related bans placed on Bin Hammam, but the road there was laden with much controversy and an expected legal challenge at the Court of Arbitration for Sport (CAS). It is the involvement of several member federations of the Caribbean Football Union (CFU), together with high-profile regional administrators, that brings this arbitration into focus from a sporting integrity perspective. In fact, some of the material facts in this case took place in Trinidad and Tobago.

Although paragraphs 63 and 64 of the arbitral award illustrate the extent of the CFU members' involvement, there was no suggestion in the award that there was culpability on the part of any of the named regional administrators.[183] The CFU member federations, whose representatives were interviewed in the hearing, were:

- The Grenada Football Association
- The Barbados Football Association
- The Guyana Football Federation
- The Bahamas Football Association

176 Ibid 1.
177 High Court Action No 2141 of 1967.
178 Ibid 1.
179 Ibid 7.
180 [2006] EWHC 986.
181 See Chapter 2 on 'Sports Governance' for a more detailed analysis of this topic.
182 CAS 2011/A/2625.
183 Notwithstanding this, at least one regional media house report that six football administrators received sanctions from FIFA stemming from the activities that took place in 'Trinidad and Tobago: Six more Caribbean Football Union officials get FIFA bans' (*Searchlight Newspaper*, 22 November 2011) https://searchlight.vc/searchlight/sports/2011/11/22/six-more-caribbean-football-union-officials-get-fifa-bans/.

- The Bermuda Football Association
- The Trinidad and Tobago Football Federation and
- The Cayman Islands Football Association

Potentially, the facts presented at paragraph 9 of the award would have been a trigger for further scrutiny, if there were sufficient concerns about the propriety of the handing out to CFU representatives of unmarked envelopes each containing USD $40,000:

> Some of the delegates were told at that time that the cash was a gift from the CFU to their national association for the development of football. The Panel has seen no evidence that any individuals were told in the boardroom and at that time that the source of money was other than the CFU.

Evidently, the focus of the CAS panel was placed on the conduct of Mr Bin Hammam, as the alleged source of the cash gifts, as well as that of Mr Austin 'Jack' Warner, the influential Trinidad and Tobago administrator, who held multiple leadership positions including FIFA Vice-President, CONCACAF President, CFU President and Special Adviser to the Trinidad and Tobago Football Federation.[184]

The CAS panel was less than complimentary in their assessment of the testimony given by Mr Warner[185] during the hearing:

> Mr Warner appears to be prone to an economy with the truth. He has made numerous statements as to events that are contradicted by other persons, and his own actions are marked by manifest and frequent inconsistency. Most significantly, he made a statement on May 29, 2011, before the FIFA Ethics Committee, declaring that no cash gifts had been offered, a claim that is directly contradicted by the video evidence of his statement on May 11, 2011, when he referred to the gifts that had been given the previous day ... The majority of the Panel concludes that Mr Warner is an unreliable witness, and anything he has said in relation to the matters before the Panel is to be treated with caution. If Mr Warner had been available for examination, it may have been possible to place some degree of reliance on some of his statements, including those against his own interest. The Panel invited him to appear, but he has declined to do so. In these circumstances, the majority of the Panel finds it difficult to place any reliance on any statement he has made, whether in the form of a witness statement or in anything he has said to a third person and which is before the Panel in the form of evidence provided by that third person. As a result, the majority of the Panel regrets that it is unable to place any particular weight or reliance on any statement made by Mr Warner, or alleged to have been made by him, in its assessment of the facts of this case.[186]

The panel, although finding that the case against Mr Bin Hammam alleging breaches of the FIFA Code of Ethics and the FIFA Disciplinary Code remained unproven, nevertheless offered some striking concluding perspectives on the matter:

> The Panel wishes to make clear that this conclusion should not be taken to diminish the significance of its finding that it is more likely than not that Mr Bin Hammam was the source of the monies that were brought into Trinidad and Tobago and eventually distributed at the meeting by Mr Warner, and that in this way, his conduct, in collaboration with and most likely induced by Mr Warner, *may not have complied with the highest ethical standards that should govern the world of football*

184 Mr Warner was subsequently given a life ban from all football-related activity by FIFA and was a target for US extradition proceedings up to the time of writing.

185 Warner, together with the late American administrator, Chuck Blazer, was alleged in the 2013 David Simmons Report commissioned by CONCACAF, to have committed various acts of misconduct, acts that the former vigorously denied.

186 *Mohamed Bin Hammam v FIFA* (n 182) [161].

> *and other sports*. This is all the more so at the elevated levels of football governance at which individuals such as Mr Bin Hammam and Mr Warner have operated in the past. The Panel therefore wishes to make clear that in applying the law, as it is required to do under the CAS Code, it is not making any sort of affirmative finding of innocence in relation to Mr Bin Hammam. The Panel is doing no more than concluding that the evidence is insufficient in that it does not permit the majority of the Panel to reach the standard of comfortable satisfaction in relation to the matters on which the Appellant was charged. It is a situation of '*case not proven*', coupled with concern on the part of the Panel that the FIFA investigation was not complete or comprehensive enough to fill the gaps in the record.[187] [Emphasis added].

The CAS's concern for compliance with high ethical standards both in and out of football was instructive. This remains an ever-increasing concern in the modern-day sports industry as fans, journalists, commentators, state bodies and sponsors are continually faced with the question as to whether their investment is being eroded by an underbelly of rule-breaking, avarice and corruption.

Perhaps there is no bigger threat to sporting integrity than the scourge of doping, which will be comprehensively addressed in the next chapter of this book. It brings into sharp focus the comments of a former Director General[188] of the World Anti-Doping Agency (WADA) whose interview in 2016, was summarized, in part, in the following words:

> One of [WADA's] purposes ... is to discourage the use of performance-enhancing drugs at the amateur as well as elite level, where it also constitutes a "challenge to the values of sport and its integrity." Those values, he specified, included 'ethics, honesty, respect for rules, self-respect and respect for others, fair play and healthy competition'.[189]

It is apparent that the race to restore healthy competition, ethics and honesty as ingredients that infiltrate the practice of daily sport will be a marathon and not a sprint. Endurance over the long haul, by natural means only, of course, will be of paramount importance in reaching the finish line.

### 6.9.5 Ball-tampering in 2018: a growing threat

For one reason or another, cricket has been a regular target for cheating with lengthy bans becoming commonplace within the sport due to indiscretions of varying types. For instance, South African player Gulam Bodi was banned for 20 years in 2016 for his role in fixing domestic T/20 matches.[190] Later that year, in *Du Plessis v International Cricket Council*,[191] South African test cricket captain, Francois Du Plessis (aka Faf Du Plessis), was found guilty of ball-tampering.

The concluding remarks in a recent commentary on the case are noteworthy considerations as cricket seeks to stamp out recurring threats to its integrity:

> It appears that there is a belief current in cricketing circles (whatever its validity) that applying a mixture of saliva and a sweet to a match ball enhances its propensity to swing. This was somewhat hyperbolically described in Marcus Trescothick's memoir (Coming Back to Me) as one of 'the great scientific discoveries'. It was a view shared by the Appellant and indeed by Mr Kettleborough, the on field Umpire.[192]

187 Ibid [204].
188 David Howman, an Attorney-at-Law, was the WADA Director General for 13 years until 2016.
189 Catherine Bennett, 'Cheating in sport is becoming ever harder to judge' (*The Guardian*, 11 June 2016) www.theguardian.com/commentisfree/2016/jun/11/sport-olympics-drugs-maria-sharapova-transgender.
190 'Gulam Bodi: Former South Africa player gets 20 year ban' (*BBC*, 25 January 2016) www.bbc.com/sport/cricket/35402310.
191 (unreported) 21 December 2016 (Dubai).
192 Transcript, p. 10.

> I was shown documents about two cases, one covering the well-known Indian Test batsmen Rahul Dravid and one covering the lesser-known Warwickshire County player, Frederick Coleman, in which each cricketer had been found guilty of an offence under Law 42.3(b) (and of the Code). Neither document contained a reasoned award and, in any event, neither case would constitute a binding precedent. They do, however, show that the provision is not treated as a dead letter.
>
> Furthermore on 6–7 December 2016, at one of its regular meetings, the MCC's World Cricket Committee took the opportunity to consider Law 42.3 in light of this very case. It concluded that Law 42.3(a) is sufficiently clear and no changes should be made to it. Mike Brearley, the chair of the Committee and a distinguished former captain of England, rejected concerns that other players had done what the Appellant did and had not been punished. In media reports Mr Brearley was quoted as saying
>
> If you speed you'd probably get away with it. But not everyone does. Sometimes you are caught. And when you are caught flagrantly doing something, you deserve to face the penalty, whatever that penalty is. Which seems to me as far as I know is what happened to FAF du Plessis. The fact that other people do it doesn't mean that you shouldn't catch the odd person who does it flagrantly.
>
> No doubt there are two possible views on this issue as to where the line should be drawn. Some might say that since shining with natural substances is permissible, there is no reason to prohibit shining with artificial substances. (In the same way that some argue that since good food is performance enhancing, there is no reason – health considerations apart – to prohibit performance enhancing drugs). *But where the line is drawn and what conduct is or is not considered to be offensive to the sport of cricket is a matter for the custodians of the game, (the MCC and ICC) and the rule-makers*. It is emphatically not a matter for the Commissioner, or anyone else, on or off pitch, who have to apply the rules as they stand.
>
> I have accordingly sought in this award to clarify and state, given its continued vitality, what I can conceive to be the true meaning and purpose of Code art.2.2.9 and Law 42.3.
>
> Unless and until my analysis of the relevant provisions is superseded, *it should send a message to the cricketing community as to what behavior in connection with the condition of the match ball will or will not be tolerated in the future*, and make it more difficult for anyone charged with an offence under the relevant provisions to plead ignorance of his (or her) responsibilities.[193] [Emphasis added].

The hope in this ruling, as articulated in the closing paragraphs, was to send a message to the cricketing community that such misdemeanours would be confronted with some aggression. Sadly, the warning does not appear to have been heeded in light of the ball-tampering controversies that affected the 2018 test series between Australia and South Africa as well as the series between Sri Lanka and the West Indies, the latter face-off occurring in the Caribbean.

The fallout from the former series was the suspension of then Australia captain, Steve Smith, his vice-captain, David Warner, and Cameron Bancroft, the latter receiving the most lenient of the sanctions.[194] In the West Indies series, the second test match, played in St Lucia, was shrouded in chaos when allegations surfaced that the Sri Lankan team had engaged in ball-tampering. Specifically, Dinesh Chandimal was accused of altering the condition of the ball using saliva that contained residue of mints that he had in his mouth.[195] He was subsequently banned for one test match.

193 *Case Report* (2017) 3 International Sports Law Review 67–74, 74.

194 'Australia ball-tampering: Steve Smith and Cameron Bancroft will not contest bans' (*BBC*, 4 April 2018) www.bbc.com/sport/cricket/43638316.

195 'Cricket's repository of ball tampering since 2000' (*ESPN CricInfo*, 20 June 2018) www.espncricinfo.com/story/_/id/23851788/cricket-repository-ball-tampering-2000.

## CONCLUSION

Matters of sporting integrity often throw up the question as to whether or not regulators are closing the gap on the cheats. The very nature of the question assumes that cheats are ahead. The answer remains debatable. Naidoo has addressed the matter citing the Code of Ethics of the International Olympic Committee:

> The IOC Code of Ethics lays down the principles that "fairness and fair play are central elements of sports competition. Fair Play is the Spirit of Sport and the values of respect and friendship shall be promoted."
>
> Cheating is the antithesis of this-it is not just breaking the rules but it is the ultimate disregard for the unwritten code of sportsmanship.
>
> If it is so abhorrent why does it occur so frequently and what can be done legally to cure it?[196]

Responding to Naidoo's question is, unfortunately, not as straightforward as it should be on the face of it. Legal regulation has done its part, but often ends up falling short of the mark. From a Commonwealth Caribbean perspective, matters like sports betting seem to be dormant, but could be more prevalent than meets the eye. Betting is primarily confined to the sport of horse racing, although the popularity of football and cricket especially during World Cup years, make these sports vulnerable to illegal betting activity. Few statutes have been enacted across the various jurisdictions and what predominates currently is a slew of laws that are in need of amendment and/or repeal. The Jamaican initiatives back in 2009 would have opened the door for the consideration of subsequent amendments in other Caribbean territories especially as it relates to sports betting. Yet, any expansion in this regard is likely to be slow, deliberate and cautious. More recently, the Barbados Turf Club was quite vocal in advocating that any proposed amendments to the Betting and Gaming Act there must involve consultation with it, especially in view of the tax exemptions it receives from revenue generated through horse racing.[197] These types of negotiations are expected to be a common feature of future regional legislative amendment in the areas of gambling and betting.

In the meantime, informal sports betting in the region is likely to continue as it seems to pose, at the present time, no real or immediate criminal or economic danger. Any peril that exists remains social, moral and ethical, which, ultimately, seems to be a matter of individual decision-making as against one of legal regulation.

This chapter began with an examination of criminal liability in the context of sport, where it was noted that criminal authorities are generally hesitant to intervene in sporting affairs unless it is truly warranted. The potential for one errant act to straddle two punitive systems is particularly evident when there are breaches of ethical codes and integrity principles. Lewis and Taylor, from a UK standpoint, have acknowledged this reality:

> Conduct that breaches a sport's anti-corruption code may also amount to a criminal offence, in the UK and/or overseas. And while it is clear that the police and the Crown Prosecution Service usually prefer to leave it to the sports governing bodies to take action in such cases, there are circumstances where they have to act themselves, for example because the publicity is too great to ignore (as in the Pakistani spot-fixing case), or because the corrupt actions involve serious criminality by notorious criminals who are beyond the sports governing body's reach. Therefore, the

196 Urvasi Naidoo, 'Cheating in sport: Is increased regulation the answer?' (2013) 21(2) Sport and the Law Journal 29.

197 'BTC: Amend Betting Act first' *Nation News* (Bridgetown, 12 November 2017) www.nationnews.com/nationnews/news/102051/btc-amend-betting-act.

> sports governing body needs to be ready to decide what to do with its disciplinary proceedings if the police start investigating the matter and the CPS starts considering criminal charges.[198]

The referenced decision-making process will continue to evolve as national and international sports federations face varying degrees of threats to the honour and virtue of their respective sports. The recent two-year ban placed on the head of the St Vincent and the Grenadines Football Federation, Venold Coombs,[199] was yet another confirmation that the path of sporting, rather than criminal, sanctions is often the first port of call for governing bodies.[200] By contrast, though, in a report entitled *Legal Framework: Gambling and Sports Betting including cricket in India*, the Law Commission of India recently made public its own view that match-fixing in any sport should be made a criminal offence.[201]

It is fitting to conclude this chapter with a reminder of Blackshaw's words in his 2017 publication *International Sports Law: An Introductory Guide*:

> With so much money to be gained or lost in sport nowadays-gone are the so-called halcyon days when sports persons played for the love of their sports and the Corinthian values prevailed-it is perhaps not surprising that corruption in various forms and unfair dealings have crept into sport and are undermining its integrity.[202]

Indeed, the battle lines have been drawn. Yet, the preservation of sport's sanctity is worth every dollar, pound, euro or rupee that is spent in fulfilling that mandate. As we will see in the next chapter, integrity regulators must remain invested for the long haul.

198 *Sport: Law and Practice* (n) 249, [B 2.34].

199 Duncan Mackay, 'FIFA ban St Vincent and the Grenadines Football Federation President for two-years for ticket touting at Brazil 2014' (*InsideTheGames.biz*, 7 July 2018) www.insidethegames.biz/articles/1067191/fifa-ban-st-vincent-and-the-grenadines-football-federation-president-for-two-years-for-ticket-touting-at-brazil-2014.

200 Kenton Chance, 'FIFA bans SVG's football chief' (*IWitness News*, 3 July 2018) www.iwnsvg.com/2018/07/03/fifa-bans-svgs-football-chief/.

201 'Legalise betting and criminalize fixing, says Indian law-reform body' (*ESPN CricInfo*, 6 July 2018) www.espncricinfo.com/story/_/id/24015858/legalise-betting-criminalise-fixing-says-indian-law-reform-body.

202 Ian Blackshaw, *International Sports Law: An Introductory Guide* (TMC Asser Press, 2017) 107.

# CHAPTER 7

# THE LEGAL REGULATION OF DRUGS IN SPORTS

## 7.1 INTRODUCTION

One of the most contentious issues in the modern dispensation of sport is that of doping, which is loosely and, perhaps colloquially, defined to include, among other things, the use of certain prohibited substances and methods that have the effect or potential effect of enhancing sporting performance. The ongoing controversy that arises in this connection lies in the strict dichotomy between those who believe that the regulation of doping is indispensable to achieving equality and fairness in sport, as doping is inherently antithetical to notions of ethics, fair play, honesty, excellence, good character, fun, teamwork, courage, dedication and commitment, while others contend that the very idea of curtailing a person's inherent autonomy to choose whether he or she dopes by penalizing him or her with lengthy periods of ineligibility that could adversely affect his or her livelihood is anything but ludicrous.

Despite the blatant and gaping divergence of opinion on the subject of doping regulation, it is clear that doping in sport has become a monumental issue in the twenty-first century, warranting the adoption of an increasingly prohibitionist approach, especially in so far as state-sponsored doping is concerned. This prohibitionist approach, characteristically marked by a strict liability underpinning, has had immense externalities in practice, ranging from Usain Bolt losing his 4×100-metre relay gold medal at the 2008 Beijing Olympic Games after his colleague, Nesta Carter, tested positive for a banned substance after his samples were retested more than eight years after the Beijing Olympics to, more recently, a member of Jamaica's women's bobsleigh team failing her drug test a month before the Pyeongchang Winter Olympic Games in 2018;[1] and the list goes on.

Against this backdrop, this chapter is of particular significance as it introduces readers to the incredibly important, but at times complex and controversial, topic of doping in sport, largely from a Caribbean perspective. The chapter begins by providing a brief historical overview of doping in sports in an effort to set the scene for more nuanced discussions about the origin and nature of the prohibited list, the principle of strict liability and the circumstances in which anti-doping rule violations may be committed. The chapter also explores the flexible sanctioning regime introduced by the World Anti-Doping Code (WADC), and provides first-class analyses of the mitigating and aggravating circumstances that may affect sanctions imposed on athletes and their support persons upon the commission of an anti-doping rule violation (ADRV).

The importance of this chapter lies in the fact that it provides critical and relevant insights into not only the myriad, and often complex, provisions of the WADC, but also the fact that it provides necessary context and clarity in respect of the application of these provisions in practice, by reference to emerging jurisprudence from across the Caribbean and, indeed, the world.

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1 Liam Morgan, 'Jamaican women's bobsleigh team member failed drugs test month before Pyeongchang 2018' (*Insidethegames.biz*, 3 March 2018) www.insidethegames.biz/articles/1062187/jamaican-womens-bobsleigh-team-member-failed-drugs-test-month-before-pyeongchang-2018.

## 7.2 BRIEF HISTORY OF DOPING IN SPORTS

Doping in sports is not at all a new phenomenon. In fact, historians believe that as early as 776 BC, Greek Olympians used various substances, including dried figs, mushrooms and strychnine to enhance their sporting performance.[2]

While it is certainly debatable whether these seemingly innocuous substances did in fact improve sporting performance, it is clear that, over time, athletes have progressively sought to exploit any and every avenue to achieve better results in their chosen sport.[3] Indeed, with enhances in pharmacology, beginning in the early twentieth century, a number of athletes sought to experiment with not only bizarre categories of substances, such as Thomas Hick's recipe of raw eggs, injections of strychnine and doses of brandy that apparently caused him to win the Olympic marathon of 1904 in St Louis, but various categories of potentially dangerous drugs, including amphetamines and ephedrine, often times resulting in catastrophe.[4]

With the rapid increase in the number of athletes engaging in the use of performance-enhancing substances and against the backdrop of various catastrophes that sent shock waves through sports, such as the death of 23-year-old Danish cyclist, Knud Enemark, who collapsed, fractured his skull and died as a result of using amphetamine and a blood-vessel dilator, international sporting bodies gradually saw the need to regulate the use of certain substances and methods in sports. This began with the International Amateur Athletics Federation (IAAF) banning certain stimulants in 1928, followed by the International Cycling Union (UCI) and the International Olympic Committee (IOC) in 1964. FIFA quickly followed suit, but in quite a revolutionary manner, being the first international sporting body to introduce doping tests at its world championships.

Despite these developments, however, the use of banned substances and consequential deaths and injuries remained a common feature of sport.[5] Sadly, it was only when doped cyclist Tom Simpson tragically died during the 1967 Tour de France that international sporting bodies were once again reminded that their efforts to combat doping in sports were only producing pyrrhic victories. Against this backdrop, the International Olympic Committee, in 1967, established a medical commission with the aim of developing a list of prohibited substances and methods, leading to athletes being subject to routine blood tests to ascertain whether they used any prohibited substance or method from 1968 onwards.[6] Challenges remained, however, as the drug tests were often counterbalanced by poor methods of analysis, so that only a few stimulants and narcotics were ever detected.[7]

Sadly, poor methods of analysis proved to be only part of the problem. Indeed, it has been reported that in the 1970s and 1980s, efforts toward effectively combating the use of prohibited substances and methods in sport were stymied by state-sponsored doping that was practised in some countries,[8] including the German Democratic Republic (GDR). In this connection, it was reported that the GDR government at the time administered various banned substances, especially to female

2 Åke Andrén-Sandberg, *The History of Doping and Anti-doping* (Karolinska Institutet, Sweden, 2016).
3 Ryszard Grucza, *History of Doping* (Institute of Sport, Poland, 2006).
4 Richard Holt, Ioulietta Erotokritou-Mulligan and Peter Sönksen, 'The history of doping and growth hormone abuse in sport' (2009) 19(4) Growth Hormone & IGF Research 320.
5 Gunnar Breivik, 'The doping dilemma. Some game theoretical and philosophical considerations' (1987) 17(1) Sportwissenschaft 83.
6 Charles Yesalis and Michael Bahrke, *History of Doping in Sport* (Pennsylvania State University and Human Kinetics Champaign, USA).
7 Gunnar Breivik (n 5).
8 John Gleaves, 'A Global History of Doping in Sport: Drugs, Nationalism and Politics' (2004) 31 The International Journal of the History of Sport 815.

athletes, thereby resulting in their domination in several sporting disciplines for over a decade. This unfortunate development was complicated by the fact that the GDR used various methods to avoid detection of prohibited substances, while, in other countries, athletes resorted to naturally occurring hormones, namely testosterone, to improve their sporting performance.

The unprecedented use of banned substances in sports once again gained international attention when Ben Johnson, the 100-metre runner, tested positive for an anabolic steroid at the 1988 Olympic Games in Seoul, South Korea, and, again, when police conducted numerous raids at the 1998 Tour de France, in the process recovering a large number of prohibited medical substances.

Against the backdrop of increasing tensions among athletes and governments and suspicions by various media houses of systemic doping in sports, the International Olympic Committee convened the World Conference on Doping in Sport in Lausanne, Switzerland, in 1999.[9] At this Conference, *The Lausanne Declaration on Doping in Sport* was adopted. It recommended the creation of an International Anti-Doping Agency, to be called the World Anti-Doping Agency (WADA). WADA was formed in 1999 on the basis of equal representation from the Olympic movement and public authorities, namely international sport federations and most of the governments across the world, in an effort to develop a single code applicable and acceptable for all stakeholders. This accounts for the drafting of the World Anti-Doping Code, which exists today.[10]

To ensure the effective implementation of the code, some 1,200 delegates representing various stakeholders met at the second World Conference on Doping in Sport in 2003. Against the backdrop of almost universal consensus, the code entered into force on 1 January 2004, and was adopted in late 2005, after some 184 countries signed the *Copenhagen Declaration on Anti-Doping in Sport*. In a distinct show of these governments' intention to implement the World Anti-Doping Code, UNESCO's *International Convention Against Doping in Sports* was ratified.[11]

The convention represents the first time that governments around the world have agreed to apply the force of international law to the regulation of doping. This is important because there are specific areas where only governments possess the means to take the fight against doping forward. The convention also helps to ensure the effectiveness of the World Anti-Doping Code. As the code is a non-governmental document that applies only to members of sports organizations, the convention provides the legal framework under which governments can address specific areas of the doping problem that are outside the domain of the sports movement. As such, the convention helps to formalize global anti-doping rules, policies and guidelines in order to provide an honest and equitable playing environment for all athletes. In this context, signatory governments (States Parties) are required to take specific action to restrict the availability of prohibited substances or methods to athletes (except for legitimate medical purposes), including measures against trafficking; facilitating doping controls and supporting national testing programmes; withholding financial support from athletes and athlete support personnel who commit anti-doping rule violations, or from sporting organizations that are not in compliance with the code; encouraging producers and distributors of nutritional supplements to establish 'best practice' in the labelling, marketing and distribution of products that might contain prohibited

9 Rudhard Klaus Müller, 'History of Doping and Doping Control' (2009) 19 Handbook of Experimental Pharmacology 1.

10 Giuseppe Lippi, Massimo Franchini and Gian Cesare Guidi, 'Doping in competition or doping in sport?' (2008) 86 British Medical Bulletin 95.

11 The following Caribbean Community (CARICOM) countries have ratified or acceded to the Anti-Doping Convention: Jamaica (2 August 2006); The Bahamas (12 October 2006); Barbados (21 December 2006); Trinidad and Tobago (3 September 2007); Saint Lucia (7 December 2007); Saint Kitts and Nevis (14 April 2008); Grenada (12 January 2009); Saint Vincent and the Grenadines (25 August 2009); Haiti (17 September 2009); Guyana (6 May 2010); Dominica (28 November 2011); and Belize (16 December 2011).

substances; and supporting the provision of anti-doping education to athletes and the wider sporting community.

## 7.3 THEORETICAL PERSPECTIVES ON DOPING

The question of whether to regulate the use of performance-enhancing substances and methods in sports is a highly contentious one, particularly in academic circles. Three theoretical approaches have been advanced by Professor Jack Anderson[12] to encapsulate the highly divergent views on whether anti-doping measures are justified. The first is that of the paternalist approach, the second is the libertarian approach and the third can be described as 'soft paternalism'.

### 7.3.1 The paternalistic approach

The central argument advanced by paternalists is that anti-doping regulations are objectively justified on the grounds of fairness, the protection of athletes' health and the promotion of the 'spirit of sport'. Paternalists advance the strict liability model towards penalizing doping violations, and argue that, without such an approach, doping will become the hallmark of the modern sporting arena.

#### *7.3.1.1 Fairness*

The paternalistic approach sees the use of banned substances and methods as a 'moral evil' that must necessarily be eliminated. The 'evil', in this context, apparently lies in the fact that athletes who engage in doping have an unfair advantage over other athletes, which cannot be objectively justified.[13] There are a number of negative externalities associated with the unfairness that is inherent in doping. First, doping displaces the role of natural ability, intense training and full commitment to achieving sporting prowess, and replaces it with a flawed and dubious approach where success is very much dependent on who has better access to performance enhancers. Second, doping unfairly deprives diligent athletes of otherwise well-deserved achievements in favour of athletes who are prepared to forego the discipline inherent in sport in order to achieve success at all cost. Third, it teaches young and impressionable athletes that the way to succeed is through taking short-cuts, which may have serious implications in future, not only in sport, but wider-afield, in other areas of human endeavour where 'cheating' to get ahead might become normalized. Moreover, doping takes away from the intrinsic value of sport, which may have serious adverse effects in the long term, as spectators would become more and more suspicious of their money being used to perpetuate a system that unfairly prejudices those who are unable or unwilling to dope.

#### *7.3.1.2 Protection of health*

Paternalists argue that the strict liability approach to doping is justified on the basis that it seeks to protect the health of athletes. It is argued that without a doping regime that severely circumscribes the use of prohibited substances and methods, athletes, in pursuance of sporting excellence, will

12 Jack Anderson, *Modern Sports Law: A Textbook* (Hart Publishing, 2010) chapter 4.
13 Jerzy Kosiewicz, 'The Ethical Context of Justifying Anti-Doping Attitudes: Critical Reflections' (2011) 53(1) Physical Culture and Sport. Studies and Research 76.

be prepared to do whatever it takes, which may include taking substances that have serious deleterious effects on their health. In fact, some scholars go as far as to argue that athletes cannot be trusted to take full control over their health because they become 'temporarily deranged' when pursuing sporting excellence, being so caught up with momentary glory, that they are prepared to 'die to win'.[14] These concerns are particularly relevant in the case of young and impressionable athletes, as well as athletes from vulnerable socio-economic backgrounds, who, if not subject to anti-doping constraints, may very well be prepared to take especially harmful substances to reach the pinnacle of success, if even just for a short period. These individuals, moreover, would be at the mercy of unscrupulous coaches, personal trainers and medical practitioners, who might wish to exploit them, in the absence of anti-doping constraints, in order to gain financially. In this regard, paternalists argue that anti-doping rules and regulations are not only desirable, but necessary to protect the health and well-being of all athletes, especially those who are vulnerable.[15]

#### *7.3.1.3 The 'spirit' of sport*

The final argument advanced by paternalists, which is somewhat related to the 'unfairness' argument discussed above, is that doping is inherently against the 'spirit of sport'.[16] The values enunciated in the WADC, including fair play, hard work, discipline, diligence and excellence, it is argued, will be compromised if doping were to be allowed in sports.[17] Indeed, it would be shocking to ordinary members of the public if it were revealed that their much beloved athletes and, in some cases, role models, are prepared to compromise basic principles of ethics, inherent in the spirit of sport, to achieve momentary success. At the institutional level, national governing bodies and international federations simply do not wish to be associated with doping, since this not only renders questionable their commitment to the values enunciated in the WADC, but potentially exposes them to public ridicule and even revenue loss. In short, paternalists are of the view that without anti-doping rules and regulations, sport will become a dangerous matchup between athletes who are devoid of talent, ability and skill, and whose display of sporting excellence is anything but real.

### 7.3.2 The libertarian approach

Libertarians adopt a wholly divergent approach from that of the paternalists. Their view is that anti-doping rules and regulations should be abolished, as they infringe upon athletes' privacy and personal autonomy, they are misguided on the question of 'fairness', they are counterproductive in so far as the protection of athletes' health is concerned, and they represent a moral crusade that is based on flawed assumptions and reasoning.

#### *7.3.2.1 Privacy and personal autonomy*

On the question of privacy and personal autonomy, libertarians are of the view that requiring athletes to urinate in full view of doping control officers and/or chaperones during sample

14 Jack Anderson, *Modern Sports Law: A Textbook* (n 12) chapter 4.
15 David Baron, David Martin and Samir Abol, 'Doping in sports and its spread to at-risk populations: an international review' (2007) 6(2) World Psychiatry 118.
16 Warren Fraleigh, 'Performance-Enhancing Drugs in Sport: The Ethical Issue' (1985) 11 Journal of the Philosophy of Sport 23–29.
17 Ian Ritchie, 'Pierre de Coubertin, Doped "Amateurs" and the "Spirit of Sport": The Role of Mythology in Olympic Anti-Doping Policies' in John Gleaves and Thomas Hunt (eds), *A Global History of Doping in Sport: Drugs, Policy, and Politics* (Routledge, 2016) 6.

collection without prior notice and requiring that athletes, under the pain of punishment, update and provide their whereabouts information three months in advance is a serious infringement of their right to privacy, and thus unacceptable in this modern dispensation where 'human rights' is the watchword.[18] A related argument is that, in subjecting athletes to various constraints inherent in anti-doping regulations, athletes' personal autonomy is invariably compromised, namely their right to choose. Grounding their arguments in the work of libertarian scholar, John Stuart Mill, liberalists contend that the only justifiable reason for curtailing an athlete's personal autonomy is where there is a likelihood of harm being inflicted on others.[19] Given that such harm is not likely, in principle, to arise in practice where doping in sport occurs, liberalists argue that there is no justification for telling an adult athlete who is exercising his free and informed choice to dope that he should not do so on the whimsical basis of it likely shortening his life expectancy. In short, liberalists contend that the use of performance-enhancing substances should go totally unregulated, as this is the only means through which an athlete's personal autonomy can be fully respected.

#### *7.3.2.2 Genetic, situational and structural inequalities*

Libertarians reject the argument advanced by paternalists that anti-doping measures ensure fairness in sport. Pointing to physical, situational and structural inequalities that are inherent in the sporting arena,[20] libertarians contend that we should not strive to achieve the absolutist and arguably utopian concept of 'fairness', since it is both problematic and unrealistic in practice.[21] More specifically, libertarians argue that anchoring anti-doping regulation in fair play is misguided because it ignores the fact that a simple genetic mutation may in fact confer a performance advantage over other athletes, such as where there is a mutation in the erythropoietin receptor, resulting in the blood carrying more haemoglobin and therefore more oxygen than in respect of the average athlete. It has also been argued that other situational factors, quite apart from genetics, may contribute to the sporting playing field not being 'level', such as geography, access to healthcare, supervision as well as the quality of medical and technological support provided. By way of example, libertarians point to the fact that Kenyan athletes who participate in elite middle-distance athletics consistently perform exceptionally well, largely due to the fact that they train at altitudes of almost 8,000 feet in Kenya's Great Rift Valley. High altitude training, though not prohibited by the WADC, is known to assist the body in quickly acclimatizing to a hostile environment, thereby positively impacting performance in middle/long distance sporting events.

Furthermore, liberalists contend that the ethical line that is currently drawn between permitted substances and methods and those that are not permitted by anti-doping regulations is problematic. In particular, libertarians take issue with the fact that athletes like Novak Djokovic, who admitted to using an advanced hyperbaric chamber called the 'CVAC pod' in order to aid recovery, are able to escape the prohibition against doping simply by virtue of the fact that their techniques are sophisticated and under-researched. These hyperbaric chambers, though permitted, apparently simulate altitude training, thereby giving the athlete a blood boost by saturating the blood with oxygen and simulating healing. This blurred distinction between what

18 Oskar MacGregor, Richard Griffith, Daniele Ruggiu and Mike McNamee, 'Anti-doping, purported rights to privacy and WADA's whereabouts requirements: a legal analysis' (2013) 1(2) Fair Play 13.
19 Andy Miah, *Genetically Modified Athletes: Biomedical Ethics, Gene Doping and Sport* (Routledge, 2004) 167.
20 John O'Leary, *Drugs & Doping in Sports* (Routledge 2013) 176.
21 Claudio Tamburrini, 'Are Doping Sanctions Justified? A Moral Relativistic View' (2006) 9(2) Journal of Sport in Society 199.

is and what is not permitted is regarded by liberalists as unjustified, and reflects the flawed line between pharmacological aids and intrinsic ability.

A similar argument has recently been advanced by liberalists in relation to the Sir Christopher Froome saga involving the UCI and WADA. In this case, WADA declined to appeal the UCI's decision not to assert an anti-doping rule violation (ADRV) in the case involving British rider Chris Froome, notwithstanding the fact that the analytical result of Froome's sample from 7 September 2017 during the Vuelta a España identified the prohibited substance salbutamol at a concentration in excess of the decision limit of 1200 ng/ml(1).

The background to the case is that the 2017 prohibited list provided that salbutamol was a prohibited beta-2 agonist under section S.3. However, as an exception, inhaled salbutamol was permitted subject to a maximum dose of 1,600 micrograms over 24 hours, not to exceed 800 micrograms every 12 hours. If Salbutamol was reported in a urine sample in a concentration in excess of the decision limit of 1200 ng/ml(1), the prohibited list provided that,

> it is presumed not to be an intended therapeutic use of the substance and will be considered as an AAF unless the athlete proves, through a controlled pharmacokinetic study (CPKS), that the abnormal result was the consequence of the use of the therapeutic dose (by inhalation) up to the maximum dose indicated above.

Although Froome was unable to prove, through the CPKS, that the abnormal result was the consequence of the use of the therapeutic dose (by inhalation) up to the maximum dose indicated above, the UCI and WADA were prepared to surreptitiously circumvent the rules to arrive at the capricious decision that the presence of the prohibited substance did not constitute an adverse analytical finding (AAF). In attempting to *ex post facto* legitimize its decision having regard to the same rules that it considered to be unmalleable, Libertarians argue that WADA's decision is questionable.

(1) Based on a number of factors that are specific to the case of Froome – including, in particular, a significant increase in dose, over a short period prior to the doping control, in connection with a documented illness, as well as, demonstrated within-subject variability in the excretion of salbutamol – WADA concluded that the sample result was not inconsistent with the ingestion of inhaled salbutamol within the permitted maximum dose.

(2) WADA recognizes that, in rare cases, athletes may exceed the decision limit concentration (of 1,200 ng of salbutamol per ml of urine) without exceeding the maximum inhaled dose. This is precisely why the prohibited list allows for athletes that exceed the decision limit to demonstrate, typically through a controlled pharmacokinetic study (CPKS) as permitted by the prohibited list, that the relevant concentration is compatible with a permissible, inhaled dose.

(3) In Froome's case, WADA accepts that a CPKS would not have been practicable as it would not have been possible to adequately recreate the unique circumstances that preceded the 7 September doping control (e.g. illness, use of medication, chronic use of salbutamol at varying doses over the course of weeks of high intensity competition).[22]

A related argument is that anti-doping regulations cannot conceivably target and eliminate the wide range of modern performance enhancers, which have never been commercialized and in relation to which little is presently known. For example, although technological fraud is an infringement of Article 1.3.010 of the UCI regulations, in recent years there have been repeated allegations of mechanical doping in cycling, some of which have been proved, for example, in 2016 involving Belgian cross-racer, Femke Van den Driessche, who is currently

22 'WADA will not appeal UCI decision in Christopher Froome case' (*WADA*, 2 July 2018) www.wada-ama.org/en/media/news/2018-07/wada-will-not-appeal-uci-decision-in-christopher-froome-case.

serving a six-year ban and CHF 20,000 fine.[23] Mechanical doping, which has been described as incredibly difficult to detect, involves the manipulation of a bicycle through the installation and use of a motor which has an internal battery to power a bike for up to 60 minutes, thereby enhancing the performance of riders. To date, despite increasing efforts to keep up to date with technological developments in this field, the UCI has struggled in these efforts, such that curious onlookers remain convinced that the sport of cycling is riddled by doping.[24]

#### *7.3.2.3 The counter-intuitive health argument*

In direct opposition to the argument advanced by paternalists that the inherent health risks associated with doping necessitate the prohibition of certain substances and methods, liberalists contend that this argument is counter-intuitive because sporting events themselves, such as football and boxing, when played at an elite level, present even greater risks to health than pharmacological substances and methods.[25] In this context, liberalists argue that similar to the way in which we consider the risks of injury associated with playing certain types of 'dangerous' sports as inherently part of the nature of sport, we should also consider the risks associated with taking certain pharmacological substances, especially where said substances could assist athletes in quickly repairing from injury, as being inherently part of the nature of sports.[26] Moreover, liberalists contend that just as in the case of the clamping down on the use of syringes to administer drugs and the related fact that HIV and hepatitis are invariably driven underground, the same applies in the anti-doping context; the more stringent anti-doping rules become, the more athletes who dope will be driven underground, thereby creating a dangerous platform for increased health risks.[27]

Interestingly, liberalists go even further by arguing that it is somewhat paradoxical that it is anti-doping organizations, sports administrators and spectators who call for super-intensive training, increasingly exhaustive fights, matches, races, and other forms of competition, but are not prepared to equip athletes with the assistance needed to repair from the psychological, social, and physical destruction caused by engaging in these intense activities. In other words, by restricting athletes' use of certain 'banned' substances and methods, we are inadvertently, and perhaps unfairly, limiting athletes' ability to successfully recover from traumatic injuries, stress injuries, inflammation and immunosuppression caused by our own commodification of athletes as sporting superheroes. In short, liberalists contend that the concern about the protection of athletes' health through anti-doping measures is built upon a flawed premise, namely fear-mongering.[28]

#### *7.3.2.4 Expensive and ineffective*

Liberalists further contend that anti-doping efforts are incredibly costly and produce questionable, if not limited, results.[29] In particular, liberalists argue that although elite athletes only represent a small fraction of athletes who engage in doping, most of the anti-doping efforts are

23 'Mechanical doping: A brief history' (*Cycling News*, 9 November 2017) www.cyclingnews.com/features/mechanical-doping-a-brief-history/.
24 Joe Lindsey, 'How Does Mechanical Doping Work?' (*Bicycling.com*, 1 February 2016) www.bicycling.com/bikes-gear/a20010594/how-does-mechanical-doping-work/.
25 Bengt Kayser, Alexandre Mauron and Andy Miah, 'Current anti-doping policy: a critical appraisal' (2007) 8(2) BMC Medical Ethics 1.
26 Angela Schneider, 'The Concept of Doping' in Verner Møller, Ivan Waddington, John Hoberman (eds), *Routledge Handbook of Drugs and Sport* (Routledge, 2015) 12.
27 Bengt Kayser, 'Globalisation of anti-doping: the reverse side of the medal' (2008) 337 BMJ 584.
28 Bernat López, 'Creating fear: the "doping deaths", risk communication and the anti-doping campaign' (2014) 6(2) International journal of sport policy and politics 213.
29 Stephen Moston and Terry Engelberg, *Detecting Doping in Sport* (Taylor & Francis, 2016) 29.

directed at this exclusively small group, while other categories of athletes generally go virtually unchecked. Describing this exercise as a 'futile but expensive strategy',[30] liberalists are of the view that these resources could be better directed at harm prevention and reduction. This is particularly true from the perspective of Serena Williams, among other leading athletes, who have repeatedly questioned their supposed 'over-testing' by doping control agencies.[31]

On a practical level, liberalists note that anti-doping efforts, despite the massive investment therein, will always remain one step behind because of the personal quest for money, fame or the thrill of winning on the part of athletes, which is so high that risk taking is likely to continue. In other words, because the rewards associated with winning by virtue of doping are so high, athletes would continually avail themselves of more sophisticated, undetectable, 'designer' drugs, which are unlikely to be discovered through doping control. In any event, even with the massive investment in anti-doping efforts, liberalists argue that the perception still remains amongst the sporting public that only 'the unlucky or pharmacologically unsophisticated' get caught.[32]

The inordinate expense and inconvenience associated with a flawed approach to establishing an anti-doping rule regulation was recently illustrated in a consolidation of cases heard by the CAS involving several Russian athletes.[33] Here, following an investigation performed by Professor Richard McLaren with respect to the manipulation of anti-doping procedures during the Olympic Winter Games in Sochi 2014, the IOC Disciplinary Committee had found 42 Russian athletes to have committed anti-doping rule violations during the 2014 Olympic Winter Games, and accordingly disqualified them from the events in which they participated in Sochi and forfeited all medals won by them. The athletes were also declared ineligible to participate in any capacity in all subsequent editions of the Olympic Games. On appeal, the CAS found that, in 28 of the 42 cases, the evidence collected was insufficient to establish that an anti-doping rule violation (ADRV) was committed by the athletes concerned. In this regard, the CAS, having upheld the appeals of the 28 athletes, annulled the sanctions imposed, and reinstated their individual results achieved in Sochi 2014.

#### *7.3.2.5 Moral crusade*

Another argument advanced by liberalists is that anti-doping efforts in reality represent a moral crusade aimed at stipulating a static notion of 'right' or 'wrong' behaviour on the part of adult athletes.[34] More specifically, liberalists argue that although it is dubious that cannabis (i.e. marijuana, hashish), with its active substance being THC, definitively enhances performance, paternalists have succeeded in having substances of this nature placed on the prohibited list, albeit in-competition. According to liberalists, the 'role model' argument used to justify the inclusion of these substances is problematic,[35] in that it imposes on athletes an unreasonable burden that is not imposed on other public figures, like politicians and musicians. Requiring athletes

30 Bengt Kayser, Alexandre Mauron and Andy Miah, 'Viewpoint: Legalisation of performance-enhancing drugs' (2005) 366(21) Lancet 366.

31 Alanna Vagianos, 'Serena Williams Wants To Know Why She's Drug-Tested More Than Other Athletes' (*Huffington Post*, 2 July 2018 www.huffingtonpost.com/entry/serena-williams-drug-tested-wimbledon_us_5b3a24d8e4b08c3a8f6c44df.

32 Mazanov Connor and Jason Mazanov, 'Would you dope? A general population test of the Goldman dilemma' (2009) 43(11) British Journal of Sports Medicine 871.

33 'Media Release Anti-Doping – Sochi 2014: The Court Of Arbitration For Sport (CAS) Delivers its Decisions *in The Matter of* 39 *Russian Athletes v The IOC* – 28 Appeals Upheld, 11 Partially Upheld' (CAS, Lausanne, 1 February 2018).

34 Chas Critcher, 'New perspectives on anti-doping policy: From moral panic to moral regulation' (2014) 6(2) International Journal of Sport Policy and Politics 153.

35 Wayne Wilson and Ed Derse, *Doping in Elite Sport: The Politics of Drugs in the Olympic Movement* (Human Kinetics, 2001) 141–143.

to be good moral citizens through strict compliance with the anti-doping regime exposes these athletes to unnecessary public surveillance, scrutiny, ridicule and negative stigma, should they fall afoul of the relevant rules, a fate not experienced by other public figures. Moreover, the creeping movement of anti-doping organizations into the private recreational lives of athletes is both intrusive and unjustified, according to liberalists.

#### *7.3.2.6 Arbitrary and unreasonable*

The final argument advanced by liberalists is that it is particularly problematic to group all possible violations into a single instance of 'cheating', as this does not properly acknowledge that some athletes in relation to whom banned substances may have been found are really not 'cheaters'. For this reason, liberalists label the current anti-doping regime as arbitrary, hypocritical, and over-inclusive, which places an unreasonable burden on athletes. Liberalists also point to the fact that where a non-cheater is impugned as having committed an anti-doping offence, the impact of a doping charge is often times deleterious, resulting in, among other things, public condemnation, loss of sponsorships, forfeited titles, disqualification and suspension.[36] This argument is particularly apt in the case of West Indian cricketer, Andre Russell, who was banned for a year and labelled a cheat for missing three consecutive doping tests, though there was no evidence that he ever engaged in the use of banned substances.[37]

Liberalists view the current obsession with eliminating the use of certain substances and methods in sport as arbitrary and unreasonable, and reflective of a fixation on short-term solutions, rather than identifying the broader risks that make athletes susceptible to using performance-enhancing drugs. Moreover, the frequency with which amendments are made to anti-doping regulations, according to liberalists, may mean that athletes do not always have constructive notice of what substance or method is prohibited at a given time.

In short, some liberalists contend that 'the propensity for penal excess, the corrosive sense of anxiety, the erosion of trust between the regulator and the regulated, the collective characterization of athletes as "bad" people, as aggravated by lack of a genuine voice for athletes in policy-making' are all problematic features of the current anti-doping regime.

A recent case, decided upon by the CAS in mid-2018, illustrates the seemingly arbitrary and, arguably, unfair nature of the anti-doping regime. In *Nesta Carter v International Olympic Committee*,[38] the Jamaican athlete, who along with Usain Bolt, Michael Frater and Asafa Powell, had won the 4x100 metre event at the 2008 Beijing Olympic Games, was stripped of that medal after the Lausanne laboratory retest of the samples from 2008 eight years later in 2016 revealed the presence of MHA, a prohibited stimulant. Among other things, the athlete argued that one of his fundamental rights was breached in that his sample was tested by the Lausanne laboratory outside the scope and specific instructions issued by the IOC to the laboratory; in other words, the laboratory tested for products for which it was not requested to test. The CAS, however, held that although the Lausanne laboratory could not itself have decided unilaterally to undertake the reanalysis of the stored Beijing samples, under Article 6.5 of the IOC Anti-Doping Rules (ADR), the IOC had a broad and discretionary power to test for any and all prohibited substances at any time within the statute of limitation period which, in relation to the samples from the Beijing Games, stood at eight years. While it accepted that the application

36 Matthew Hard, 'Caught in the Net: Athletes' rights and the World Anti-doping Agency' (2009) 19 S Cal Interdisc LJ 533.

37 Ali Martin, 'West Indies' Andre Russell given one-year ban for doping test rule breach' (*The Guardian*, 31 January 2017) www.theguardian.com/sport/2017/jan/31/andre-russell-west-indies-one-year-ban.

38 CAS 2017/A/49984 *Nesta Carter v International Olympic Committee*.

of this discretionary power had to be applied in good faith, without prejudice or bias and not in an arbitrary or capricious manner, there was no evidence to support bad faith – not in regard to the IOC's instructions and actions and not in regard to the activities of the Lausanne laboratory. Having regard to the fact the International Standards on Testing simply provided that the laboratory had to apply a 'fit for purpose' method capable of detecting the prohibited substances, the laboratory had the choice of the methods it applied, so that the 'dilute and shoot' method ultimately chosen was an adequate and, indeed, efficient one, which was regularly used by the Lausanne laboratory.

One of the interesting features of this case, which liberalists see as particularly troubling, was the fact that, although the initial test results of 2008 were negative, the IOC was able to exercise its discretion, almost eight years later to retest those samples,[39] which, in this case, revealed a positive result for MHA. Liberalists view this as both unpredictable and problematic, since it leaves athletes uncertain for an extended period of time as to whether their results were legitimately obtained, since, as demonstrated in this case, up to ten years later (under the new rules), samples may be retested. In *Carter*, the CAS, however, quickly dismissed this argument, finding that the reanalysis program,e, which was introduced after the 2004 Olympics,

> is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute of limitation period found to have competed with a prohibited substance in their bodily systems.[40]

It further found that,

> these rules send a message to all participants at the Olympic Games that they have the fundamental duty not to use any prohibited substance and to ensure that no prohibited substance is effectively present in their systems and in their samples. If they fail to do so, they will not be entirely safe until the expiry of the statute of limitations, which was eight years during the relevant period to this case, and has now been extended to ten years.[41]
>
> This is an absolute duty and is not linked with the detectability of the substance. Therefore, a failure to discover the substance during an earlier period (a negative test) or by one laboratory, is not a guarantee against a later finding of an ADRV, provided it is within the period of limitation, also considering the well-known possibility of so called 'false negatives'.[42]

With respect to the policy justification for retesting the samples collected almost immediately prior to the end of the then eight-year limitation period, the CAS explained that:

> The program tries to avoid an injustice to the athletes performing within the rules, by limiting the chance of athletes who have failed to ensure that they compete without prohibited substances in their bodily systems to escape detection and enjoy the benefit of results unduly obtained. The intention is to correct, to the extent possible, including in the face of technological and testing developments, that prejudice and injustice.[43]

39 Note that the WADA Code 2004 provided for a limitation period of eight years between the date of an alleged violation and an action being commenced. It was accordingly an adequate exercise of the IOC's right to re-analyze provided for in Article 6.5 of the IOC ADR. The rules, however, did not form an obligation on the IOC to perform re-analysis at all, or to do so as early as possible, when any new testing method becomes available.
40 Ibid [140].
41 Ibid [123].
42 Ibid [124].
43 Ibid [125].

> The more time which elapses between the sample collection and the retest, the more significant the improvements in the detection capabilities may indeed be.[44]
>
> The Panel notes that there is logic in conducting a large scale re-analysis of a large number of samples towards the expiry of the statute of limitation period: this may maximize the possibility to obtain materially significant results, proportionate to the huge logistical operation and substantial costs, which the re-analysis of several hundreds of samples represents. This makes best use of the limited amount of urine available and maximizes the effects of the advances in research and technology over time.[45]

Notwithstanding the seeming rationality of these sentiments, liberalists maintain that the exercise of the IOC's discretion to retest, especially after a prolonged period of time has elapsed, is arbitrary, uncertain and unfair to athletes.

### 7.3.3 Soft paternalism

Soft paternalists argue that in order to circumvent the inequalities that are inherent in the lived experiences of individual sportspersons, including inequalities arising from genetics, the environment and other situational factors, while simultaneously alleviating some of the health risks associated with using performance-enhancing drugs, trained medical professionals should supervise and monitor the use of these drugs.[46] Advancing an athlete–physician model, soft paternalists, like Jack Anderson, contend that the current anti-doping regime has failed to curtail the low-risk high-reward scenario averred to above, thereby necessitating resort to supervised use of performance-enhancing drugs. According to soft paternalists, although there are some drugs that will clearly not be appropriate for use, such as anabolic steroids, because of their harmful side effects, other drugs, even where they enhance performance, should be freely used by athletes under the watchful eyes of a physician. In this way, sporting success will no longer be dependent on genetic ability, a conducive training environment or socio-economic background, since all athletes will be afforded the opportunity to benefit from the use of medically recommended drugs and methods. The knock-on effect of this is that athletes would no longer wish to resort to the use of drugs on the black market, such as oral analogues of nandrolone, which have more side effects but which are more rapidly eliminated from the body and thus less easy to detect. Instead, athletes will endeavour to utilize medically approved drugs and methods under close supervision when recovering from their intense training regime and injury. Similarly, the complication and costs associated with applying for a therapeutic use exemption (TUE) will be eliminated, according to soft paternalists, since athletes suffering from asthma, for example, would be permitted to resort to medically supervised drugs whenever the need arises.

Overall, soft paternalists contend that their approach would result in athletes being better informed about the risks of using certain drugs, thus allowing them to become more transparent and forthright in their dealings. The soft paternalistic approach would also respect the principle of personal autonomy, and will allow physicians to become direct partners with athletes who are inclined to achieve maximum sporting success.

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44 Ibid [126].
45 Ibid [146].
46 Jack Anderson, 'Doping, sport and the law: time for repeal of prohibition?' (2013) 9(2) International Journal of Law in Context 135.

### 7.3.4 General reflections

The foregoing discussion demonstrates the hugely divergent manner in which anti-doping regulations have been theorized in the existing literature. While it is true that the libertarian and 'soft paternalism' views are attractive, and represent a provocative attack on the existing anti-doping regime, it is clear that anti-doping regulations are here to stay, and for good reason. Apart from the axiomatic reality that these regulations will continue to remain intact for the foreseeable future, it is submitted that the arguments advanced in support of their existence are both compelling and objectively justifiable, even from a purely human rights perspective. Indeed, although the existing anti-doping regime admittedly impinges on privacy and personal autonomy, this is arguably justified on the basis of ensuring fair competition between athletes. Sport, like other human endeavours, should represent the very best of the human spirit, commitment and resolve; to replace these foundational tenets with a free-for-all doping regime on the tenuous basis of personal choice is both problematic and unrealistic.

Second, the triumph of numerous athletes who are genetically, situationally or structurally disadvantaged, such as Usain Bolt, illustrate in no uncertain terms that even though some inherent inequalities exist in sport, said inequalities do not invariably mean that an abolitionist approach to doping is justified. In any event, these inequalities are part and parcel of the intrigue of sport, since, at any time, under the right circumstances, different athletes have the opportunity to succeed, as opposed to a select group of artificially enhanced athletes who would otherwise, because of doping, be bound to succeed.

Third, although it is true that athletes sacrifice their health and well-being just to demonstrate their sporting prowess to an increasingly impatient sporting spectatorship and administrators and that, invariably, some athletes will resort to the black market even where anti-doping rules exist, this cannot provide the sole basis for adopting an abolitionist approach to doping. In this context, it is submitted that anti-doping rules serve the important purpose of reminding athletes of the value of maintaining good health by taking personal responsibility for what enters their body, and provides a structured approach to them getting exemptions that allow them to use certain otherwise prohibited substances, where the situation so warrants. Without the existence of the current anti-doping regime, it is arguable that there will be a race to the bottom, as athletes will more likely than not resort to dangerous substances to keep up with well-resourced and sophisticated athletes who dope.

On the question of the expense associated with the existing anti-doping regime, it is submitted that this expense is justified on the ground of protecting fair play. Indeed, even if a relatively small number of elite athletes are discovered to be dopers, and even if some sophisticated athletes manage to avoid being detected as cheats, the fact that *some* or, indeed, most athletes are penalized for having engaged in doping justifies the resources expended on anti-doping programmes. In the same way as one would not abolish the criminal justice system because not all criminals are caught or because too much money is expended on maintaining a growing prison population, the anti-doping regime should not be abolished simply because considerable resources are expended on anti-doping efforts. The fact that in only 11 of the 42 cases involving the Russian doping scandal, described above, the CAS found that the evidence collected was sufficient to establish an individual anti-doping rule violation means that at least sport has been purged of 11 athletes who were prepared to compromise the 'spirit of sport' on the altar of their own personal success, not by any stretch of the imagination a revolutionary result, but a positive result nonetheless.[47]

47 Sean Ingle, 'IOC dismayed after doping bans on 28 Russian athletes overturned by CAS' (*The Guardian*, 1 February 2018) www.theguardian.com/sport/2018/feb/01/russian-doping-scandal-athletes-bans-overturned-courts-of-arbitration-for-sport-athletics.

With regard to the argument that an athlete's privacy's is subverted by the anti-doping rules,[48] it is arguable that a legitimate aim is pursued by these rules, in particular, including the contentious rule that an athlete must file his whereabouts information at the beginning of every quarter for the forthcoming three months, failing which an anti-doping rule violation warranting ineligibility may be enforced (after three whereabouts failures/missed tests). This view was taken by the European Court of Human Rights (ECtHR) in the case of *Fédération Nationale des Syndicats Sportifs (FNASS) v France*.[49] Here, the FNASS, the Syndicat National des Joueurs de Rugby (Provale), the Union Nationale des Footballeurs Professionnels (UNFP), the Association des Joueurs Professionnels de Handball (AJPH), the Syndicat National des Basketteurs (SNB) and 99 other applicants from professional handball, football, rugby and basketball challenged a French Order (Order No 2010–379) that sought to bring the French Sports Code into line with the principles of the World Anti-Doping Code. Relying on Article 8 (the right to privacy) of the European Convention on Human Rights (ECHR), the applicants alleged that the mechanism requiring them to file complete quarterly information on their whereabouts and, for each day, to indicate a 60-minute time slot during which they would be available for testing, amounted to unjustified interference with their right to respect for their private and family life and their home. Relying on Article 2 of Protocol No 4, the applicants also argued that the whereabouts requirement was incompatible with their freedom of movement.

The ECtHR began its assessment of the merits of the case by explaining that the whereabouts requirement provided for by the code, which reduced the immediate personal autonomy of the athletes concerned, had, *prima facie*, interfered with the applicants' privacy. However, this did not automatically mean that a breach of Article 8 arose. Rather, if France could prove that the rule served a legitimate aim, was necessary and proportionate, and struck an appropriate balance between the competing rights and interests in issue, then it could be justified.

With respect to the legitimate aim(s) of the interference, the court observed that the 'protection of health' was enshrined in the relevant international and national instruments that presented the prevention of doping as a health concern. As a result, the whereabouts requirement was intended to address health issues, and not only the health of professionals, but also that of amateurs and, in particular, the youth. With regard to the other basis of anti-doping programmes, the fairness of sports competitions, the court preferred to consider that it was more closely related to the 'protection of the rights and freedoms of others'. Indeed, the use of prohibited substances unfairly eliminated competitors of the same level who did not have recourse to them, dangerously encouraging amateurs and especially young people to follow suit, and thus deprived spectators of the fair competition that they legitimately expected.

Regarding the necessity of such interference in a democratic society, the court found that it first had to look at the dangers of doping and ascertain whether there was common ground at the European and international levels. On the first point, the court observed that there was a broad consensus among medical, governmental and international authorities in favour of denouncing and combating the dangers caused by doping for the health of athletes. It referred, in this connection, to international instruments that all legitimized anti-doping programmes for the sake of health protection and relied, in particular, on the detailed reports of the Academy of Medicine and the French Senate. In addition, it noted that doping control concerned all those who practised sports, especially the youth. The court considered it important to attach weight to the repercussions of professional doping on young people, who identified with high-level

48 Oskar MacGregor, Richard Griffith, Daniele Ruggiu and Mike McNamee, 'Anti-doping, purported rights to privacy and WADA's whereabouts requirements: A legal analysis' (2013) 1(2) Revista de Filosofia, Ética y Derecho del Deporte 13.

49 Application no. 48151/11 and 77769/13.

sports professionals, seeing them as models whose examples were to be followed. On the second point, the court observed that the gradual construction of anti-doping programmes had resulted in an international legal framework, of which the World Anti-Doping Code was the main instrument. Furthermore, it noted that cooperation between the Council of Europe and the World Anti-Doping Agency continued to move towards greater harmonization of anti-doping rules within and outside the European Union. In these circumstances, the court was of the view that there were common European and international views on the need for unannounced testing. In accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to resolve in their legal order the concrete problems raised by doping control.

In relation to the whereabouts requirement imposed on sports professionals and unannounced testing, the court emphasized the very clear choice made by France to bring its domestic law into conformity with the principles of the World Anti-Doping Code. It also pointed out that the States Parties to the UNESCO Anti-Doping Convention had undertaken to adopt appropriate measures to comply with the principles set out in that code. As to the need for a balancing of interests, the court did not underestimate the impact of the whereabouts requirements on the individual applicants' private lives. It thus accepted their claim that they were subjected to obligations that were not imposed on the majority of the active population. That being so, it pointed out, first, that the whereabouts mechanism had the merit of establishing a legal framework for anti-doping that was not to be underestimated from the perspective of guaranteeing the rights of the sports professionals concerned. It took the view, secondly, that while the whereabouts requirement was only one aspect of doping control, those concerned had to accept their fair share of the constraints inherent in measures that were necessary in order to combat a scourge that was particularly prevalent in high-level competitions. It further found that, in view of the fact that the possible fixing of one's whereabouts at home would be at the request of the person concerned and within a fixed time slot, the anti-doping tests in question were different from those under the supervision of the judiciary, which were intended for the establishment of offences or for the possibility of carrying out seizures. It lastly observed that the applicants had not shown that testing confined to training venues and respecting private time would suffice to fulfil the aims set by the national authorities in view of the evolution of doping methods and the brief time frame within which prohibited substances could be detected. The court thus held that France had struck a fair balance between the various interests at stake and that there had been no violation of Article 8 of the ECHR. There was accordingly no breach of Article 8 of the ECHR.

In so far as Article 2 of Protocol No 4 on the question of free movement was concerned, the court noted that although the applicants were obliged to notify the National Anti-Doping Organisation of a daily time slot of 60 minutes in a precise location where they would be available for an unannounced test, the location was freely chosen by them and the obligation was more of an interference with their privacy than a surveillance measure. The court took note of the domestic courts' decisions not to characterize the whereabouts requirement as a restriction on freedom of movement and to distinguish between the ordinary and administrative courts in terms of the jurisdiction for such testing. The court thus took the view that the measures at issue could not be equated with the electronic tagging that was used as an alternative to imprisonment or to accompany a form of house arrest. Lastly, the court found that the applicants had not been prevented from leaving their country of residence but had merely been obliged to indicate their whereabouts in the destination country for the purposes of testing. The court held that Article 2 of Protocol No 4 was therefore inapplicable.

On another note, it is submitted that the current anti-doping regime has been wrongfully criticized for operating a 'moral crusade' against athletes, since the true concern of anti-doping

efforts has never been to police athletes' moral behaviour, but rather, and rightly so, to regulate the use of substances that have been universally known to give dopers an unfair advantage, incur unnecessary risks to their health and circumvent the values inherent in the practice of sport. The example often used by some scholars of cannabis being banned by the code only paints half of the picture, since marijuana is not per se totally banned, but rather banned in-competition only, which represents a reasonable compromise after decades of long debates. Indeed, the CAS has expressly indicated that:

> The issue of legality of the use of marijuana under another legal system is of no relevance to a dispute before CAS; even if such use had been illegal, there would have been no conflict with the WADA Code as long as the substance was not present in the athlete's body 'in competition'. The purpose of the rules of the WADC is not to facilitate doping-unrelated law enforcement but – among others – to protect the athletes' fundamental right to participate in doping-free sport.[50]

## 7.4 LEGISLATIVE FRAMEWORK

The effectiveness of the World Anti-Doping Code can be ascribed, in large part, to the fact that it has received broad-based support from not only sports administrators, but also governments the world over. In the Caribbean, several States, namely Bermuda,[51] Jamaica,[52] The Bahamas[53] and Trinidad and Tobago,[54] have gone the extra mile to incorporate some of the provisions of the WADC into their domestic law, through the passage of anti-doping legislation. This progressive approach is likely to be followed by Barbados, whose parliament has received a report detailing recommendations for the content of the new legislation.[55]

Even a cursory review of the existing regional anti-doping legislation reveals striking similarities, which reaffirm the unified approach both regionally and internationally to tackling the vexing issue of doping in sports. Among other things, these pieces of legislation give domestic effect to the WADC, so that athletes, athlete support personnel and national anti-doping organizations are all inherently bound by the provisions of the WADC, and therefore subject to the rules on testing, anti-doping rule violations and ineligibility.

These pieces of legislation establish national anti-doping organizations, namely, the Bermuda Sport Anti-Doping Authority (BSADA),[56] the Jamaica Anti-Doping Commission (JADCO),[57] The Bahamas Anti-Doping Commission (BADC)[58] and the Trinidad and Tobago Anti-Doping Organisation (TTADO),[59] whose duty it is to not only to undertake testing and facilitate doping control analysis, but also to prosecute anti-doping rule violations where the circumstances so demand. Under the Acts, anti-doping rule violations are, in the first instance, prosecuted before the Bermuda Anti-Doping Disciplinary Panel,[60] the Jamaica Independent

50 CAS 2008/A/1577 *USADA v Barney Reed*, award of 15 December 2008 [41]–[42].
51 Anti-Doping in Sport Act, 2011.
52 Anti-Doping in Sport Act, 2014.
53 Anti-Doping in Sport Act, 2009.
54 Anti-Doping in Sport Act, 2013.
55 Ria Goodman, 'Doping fight "a marathon"' (*Nation News*, 10 April 2017) www.nationnews.com/nationnews/news/95533/doping-fight-marathon.
56 Section 4(1) Bermuda Anti-Doping in Sport Act, 2011.
57 Section 5(1) Jamaica Anti-Doping in Sport Act, 2014.
58 Sections 4(1) and 5(1) The Bahamas Anti-Doping in Sport Act, 2009.
59 Section 7 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
60 Sections 31, 32 and 34 Bermuda Anti-Doping in Sport Act, 2011.

Anti-Doping Disciplinary Panel,[61] The Bahamas Anti-Doping Disciplinary Panel[62] and the Trinidad and Tobago Anti-Doping Disciplinary Panel,[63] respectively. These first instance tribunals are empowered to receive and consider written references and evidence alleging the commission of anti-doping rule violations; conduct disciplinary hearings relating to alleged anti-doping rule violations; determine whether an anti-doping rule violation has been committed; and impose sanctions for anti-doping rule violations.

Appeals from the respective disciplinary panels are heard by the Bermuda Anti-Doping Appeal Panel,[64] the Jamaica Anti-Doping Appeal Tribunal,[65] The Bahamas Anti-Doping Appeals Tribunal[66] and the Trinidad and Tobago Anti-Doping Appeal Panel,[67] respectively. These appeals tribunals are empowered to confirm, vary, amend or set aside the first instance decision or make any other appropriate decision, based on the circumstances of each case. Under the respective Acts and, indeed, under Article 13 WADC, an appeal from the decision of the respective appeal tribunals may be lodged before the CAS by a national level athlete,[68] although an international level athlete may appeal directly to the CAS without having to first bring his appeal before the respective domestic appeal tribunals.[69]

More generally, the respective pieces of legislation contain provisions establishing anti-doping therapeutic use exemption committees (TUEC),[70] which monitor existing TUEs; consider new requests for TUEs; and grant/reject TUEs, in appropriate cases. Other issues dealt with by the legislation include the establishment of a registered testing pool;[71] the establishment of a results management committee;[72] general guidelines for establishing anti-doping rule violations;[73] and confidentiality requirements.[74]

Although it is certainly a positive development that Bermuda, Jamaica, The Bahamas and Trinidad and Tobago have taken the lead in the passage of anti-doping legislation to advance the fight against doping, the absence of legislation in the other States does not mean that they are not bound by the WADC. On the contrary, the WADC inherently binds all national anti-doping organizations and, indeed, all sporting organizations that have control over national or international athletes, in addition, of course, to athletes being individually bound. This means that all relevant entities and persons in the sporting field are held to the same standard, irrespective of whether legislation has been passed.

At the international level, the World Anti-Doping Code has unparalleled primacy. The code's purposes are to protect athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide, and to ensure harmonized, coordinated

61 Sections 14 and 15 Jamaica Anti-Doping in Sport Act, 2014.
62 Sections 19, 20 and 21 The Bahamas Anti-Doping in Sport Act, 2009.
63 Sections 27 and 29 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
64 Sections 35, 36 and 38 Bermuda Anti-Doping in Sport Act, 2011.
65 Sections 17 and 18 Jamaica Anti-Doping in Sport Act, 2014.
66 Sections 22 and 23 The Bahamas Anti-Doping in Sport Act, 2009.
67 Sections 30, 31, 34 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
68 Article 13.2.2 WADC.
69 Article 13.2.1WADC; section 39 Bermuda Anti-Doping in Sport Act, 2011; section 24 The Bahamas Anti-Doping in Sport Act, 2009; section 30(2) Trinidad and Tobago Anti-Doping in Sport Act, 2013.
70 Sections 13, 23, 24 and 40 Bermuda Anti-Doping in Sport Act, 2011; sections 12 and 14 The Bahamas Anti-Doping in Sport Act, 2009; section 17 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
71 Section 26 Bermuda Anti-Doping in Sport Act, 2011; section 16 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
72 Sections 14 and 29 Bermuda Anti-Doping in Sport Act, 2011; section 19 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
73 Section 20 Bermuda Anti-Doping in Sport Act, 2011; sections 8, 9 and 10 The Bahamas Anti-Doping in Sport Act, 2014; section 21 Trinidad and Tobago Anti-Doping in Sport Act, 2013.
74 Section 41 Bermuda Anti-Doping in Sport Act, 2011; section 25 The Bahamas Anti-Doping in Sport Act, 2009; section 36 Trinidad and Tobago Anti-Doping in Sport Act, 2013.

and effective anti-doping programmes at the international and national level with regard to detection, deterrence and prevention of doping. National rules that operationalize the legislation described above, for example the Jamaican Anti-Doping Rules, largely mirror the provisions of the WADC.

In those countries[75] that do not have the requisite capacity because of their relatively small sizes and/or lack of human or technical resources, the Caribbean Regional Anti-Doping Organization (RADO), established in 2005, has played an important role, particularly in respect of doping control. Caribbean RADO's office is located in Barbados, and is supported by WADA. The jurisdiction of RADO stems from the WADC, which provides that, 'Comment to Article 20.5: For some smaller countries, a number of the responsibilities described in this Article may be delegated by their National Anti-Doping Organization to a Regional Anti-Doping Organization.' Apart from the Code, the World Anti-Doping Program encompasses international standards and models of best practice and guidelines, the former of which will from time to time be referred to in this chapter. The international standards contain much of the technical detail necessary for implementing the Code. The purpose of the international standards is harmonization among anti-doping organizations responsible for specific technical and operational parts of anti-doping programmes. Adherence to the international standards is mandatory for compliance with the Code. By contrast, models of best practice and guidelines provide alternatives from which stakeholders may select. Some stakeholders may choose to adopt the model rules and other models of best practices verbatim, while others may decide to adopt the models with modifications. Still, other stakeholders may choose to develop their own rules consistent with the general principles and specific requirements set out in the Code.

Although the Code applies with tremendous force across the multiple jurisdictions, including those in the Caribbean, it must be remembered that it is an evolving instrument, which necessarily battles its many shortcomings to achieve its lofty goals. For example, a strong argument can be made that, in empowering a National Olympic Committee (NOC) to perform the roles of a national anti-doping organization (NADO), in the absence of a NADO in a particular jurisdiction,[76] the Code creates a breeding ground for potential conflicts of interest. In light of the 2021 World Anti-Doping Code Review process,[77] a number of other key issues will need to be addressed, such as:

(1) whether the potential to enhance performance should be a mandatory criteria for placing a substance on the prohibited list;
(2) whether fraudulent conduct that does not involve 'doping control' should be addressed in Article 2 WADC, in light of the fact that athletes or athlete support personnel continue to lie or submit fraudulent documents during an investigation or during the results management process;
(3) the question of ownership of the retesting process under Article 6 WADC;
(4) the relevance and impact of various forms of environmental contamination under Article 10 WADC;
(5) whether athletes should have to establish the absence of fault or intent when there is no explanation of how the prohibited substance entered their bodies; as well as

75 This applies to Antigua and Barbuda, the Bahamas, Barbados, Cayman Islands, Dominica, Grenada, Guyana, St Kitts and Nevis, St Lucia, Montserrat, St Vincent and the Grenadines, Suriname, Trinidad and Tobago, and the Turks and Caicos Islands. Aruba and the British Virgin Islands (BVI) joined RADO in 2012; Curaçao in 2015 and Bonaire in 2016.

76 Article 20.4.6 WADC.

77 'WADA Launches First Phase of 2021 World Anti-Doping Code Review Process' (*WADA*, 12 December 2017) www.wada-ama.org/en/media/news/2017-12/wada-launches-first-phase-of-2021-world-anti-doping-code-review-process.

(6) the question of what 'timely admission' under Article 10 exactly entails;
(7) the adequacy of the protection afforded whistleblowers within the context of Article 10.6.1, which deals with substantial assistance.

These questions will presumably become all the more important in future, in light of the push by some countries, such as the United States under its proposed 2018 Rodchenkov Anti-Doping Act, to criminalize doping. Under this proposed Act, which, at the time of writing, was under consideration by the US Congress, the use of illegal performance-enhancing drugs ('doping fraud') in major international sporting competitions is acknowledged as damaging the integrity of sport. It notes, further, that doping fraud in major international competitions cheats clean athletes, including clean US athletes and sponsoring corporations, including US corporations, which often have anti-doping provisions in their sponsorship contracts. In recognition of the fact that the United States is the single largest sovereign contributor to WADA, as well as the fact that several other countries, including Germany, Australia, Belgium, Denmark, France, Italy, Sweden, Switzerland and Spain, have embraced criminal sanctions for doping fraud violations, the Act proposes to 'enhance the international community's fight to protect clean athletes [which] is fully consistent with international law'.

The proposed Act, which borrows its name from Dr Grigory Rodchenkov, the former director of Russia's National Anti-Doping Laboratory, who exposed state-sponsored doping in Russia, prescribes a sentence of up to five years' imprisonment and/or a fine of USD $100,000 or USD $250,000 for an individual who knowingly and intentionally administers, manufactures, distributes, dispenses or possesses any performance-enhancing drug with the intention to commit or attempt to commit doping fraud or in preparation for any major international competition. The proposed Act also seeks to protect whistleblowers from retaliation where he/she discloses doping fraud in the context of a major international competition.

## 7.5 THE INTERNATIONAL STANDARD FOR CODE COMPLIANCE BY SIGNATORIES

Against the backdrop of recent allegations of widespread and systemic state-sponsored doping practices levelled against countries like Russia, WADA recently promulgated the International Standard for Code Compliance by Signatories (ISCCS). The ISCCS is a mandatory international standard that forms an essential part of the World Anti-Doping Program. It was approved by WADA's Executive Committee on 15 November 2017, and came into effect on 1 April 2018. Notwithstanding calls for the ISCCS to be applied retroactively to address doping concerns on the part of States like Russia, WADA has decided that the ISCCS will not apply retroactively; rather, it will apply to all cases of Signatory (including a national anti-doping organization or a national Olympic committee, a major event organization or international federation) non-compliance arising after 1 April 2018. The objective of the ISCCS is to ensure that signatories deliver anti-doping programmes within their respective spheres of responsibility that meet the requirements of the code and the international standards, so that there is a level playing field wherever sport is played.

The ISCCS identifies three levels of non-compliance by Signatories: 'critical', 'high priority' and 'other'. Under Annex A of the ISCCS, requirements that are considered to be 'critical' in the fight against doping in sport include:

- Adoption of rules, regulations, and/or (where necessary) legislation that satisfy the Signatory's obligation under Article 23.4 of the WADC;

- The implementation of an anti-doping education programme for athletes and athlete support personnel in accordance with Articles 18.1 and 18.2 of the WADC;
- The development and implementation of an effective, intelligent and proportionate test distribution plan in accordance with Article 5.4 of the WADC, such as no advance notice testing;
- The development and implementation of an effective programme for the testing of athletes prior to their participation in the Olympic Games or Paralympic Games or other international event;
- The use of the anti-doping administration and management system (ADAMS) or another system approved by WADA (including for the timely entry of doping control forms and therapeutic use exemptions (TUE) decisions);
- The use of WADA-accredited laboratory/ies (or WADA-approved laboratory/ies) to analyse all samples, in accordance with Article 6.1 of the WADC;
- The establishment of a TUE committee, and a documented process for athletes to apply for the grant or the recognition of a TUE, in accordance with the requirements of the International Standard for TUEs;
- The timely notification to WADA of the opening of any investigation into a potential ADRV, in accordance with Article 12.3.2 of the International Standard for Testing and Investigations; and
- The proper and timely pursuit of all apparent anti-doping rule violations in accordance with Articles 7 and 8 of the WADC, including proper notification of the athlete or athlete support personnel in accordance with Article 7.3 of the WADC, and provision of a fair hearing within a reasonable time by a fair and impartial hearing panel in accordance with Article 8.1 of the WADC.

Should a signatory fail to comply with these requirements, a number of sanctions may be imposed under Annex B.3 of the ISCCS, including:

- the Signatory losing its WADA privileges;
- some or all of its anti-doping activities being subject to supervision or takeover by an approved third party, at the Signatory's expense;
- its representatives being ineligible to sit as members of the boards or committees or other bodies of any Signatory;
- in some cases, the Signatory's country being ineligible to host the Olympic Games and/or the Paralympic Games and/or to be awarded the right to host world championships until the Signatory is reinstated;
- in some cases (involving an international federation), the Signatory being ineligible to receive funding or other benefits of the recognition of the International Olympic Committee or the membership of the International Paralympic Committee or of recognition by or membership of any other Signatory; and
- in some cases, a fine (not exceeding the lower of (1) 10% of the signatory's annual income and (2) USD $100,000).

Under Annex A.2 of the ISCCS, a non-exhaustive list of requirements are considered to be 'high priority' requirements, which signatories must comply with, including:

- The development of intelligence and investigation capabilities in accordance with Article 5.8 of the WADC;

- The implementation of a documented procedure to ensure that athletes are notified that they are required to undergo sample collection in accordance with Articles 5.4.1–5.4.3 of the International Standard for Testing and Investigations;
- Implementation of the requirements set out in Articles 7.4.5 to 7.4.7 of the International Standard for Testing and Investigations for the documentation of the collection of a sample from an athlete;
- The implementation of training/accreditation/reaccreditation programmes for sample collection personnel in accordance with Annex H of the International Standard for Testing and Investigations;
- The implementation of a conflict of interest policy in relation to the activities of the sample collection personnel, in accordance with Article H.4.2 of the International Standard for Testing and Investigations;
- The collection and processing of samples in accordance with the requirements of Annexes A to G of the International Standard for Testing and Investigations;
- The implementation of a chain of custody process for samples in accordance with the requirements of Article 9 of the International Standard for Testing and Investigations;
- Review of all atypical findings in accordance with the requirements of Article 7.4 of the WADC;
- The timely notification to WADA and to the international federation(s) and national anti-doping organization(s) of the subject(s) of the investigation into a potential ADRV of the outcome of that investigation, in accordance with Article 12.4.3 of the International Standard for Testing and Investigations; and
- The prompt reporting of all TUE decisions into ADAMS in accordance with Article 5.4 of the International Standard for Therapeutic Use Exemptions.

Similar consequences to those described above in relation to breaches of 'critical' requirements are applicable under Annex B.2 of the ISCCS in the case of breaches of 'high priority' requirements.

Under Annex A.3, there is again a non-exhaustive list of requirements that are considered to be 'other' requirements in the fight against doping in sport, including;

- The establishment of a process to ensure that athletes do not breach the prohibition against participation while ineligible, in accordance with Article 10.12.3 of the WADC;
- In cases where it has been determined after a hearing or appeal that a person has not committed an ADRV, using reasonable efforts to obtain the consent of that person to the public disclosure of that decision, in accordance with Article 14.3.3 of the WADC;
- Informing athletes in writing that they are responsible for renewing their TUEs upon expiry, if necessary, in accordance with Article 6.9 of the International Standard for Therapeutic Use Exemptions;
- Establishing a process designed to ensure that a person is able to confirm in writing or verbally his/her understanding of the terms on which his/her personal data is processed, in accordance with Article 7.3 of the International Standard for the Protection of Privacy and Personal Information; and
- Designating a person within the anti-doping organization who is accountable for compliance with the International Standard for the Protection of Privacy and Personal Information and all locally applicable privacy and data protection laws, in accordance with Article 9.1 of that Standard.

Similar consequences to those described above in relation to breaches of 'critical' requirements are applicable under Annex B.1 of the ISCCS in the case of breaches of 'other' requirements.

The ISCCS outlines a robust procedure for dealing with what the standard describes as 'non-conformities'. A simplified version of the procedure is as follows:

- When non-conformities are identified, WADA's management will issue a corrective action report to the Signatory that sets out the nature of the non-conformities in issue, and which corrective actions are required to correct the non-compliance, and the timelines for their correction;[78]
    - Where the Signatory's rules or regulations (or applicable legislation) are not compliant with the WADC or other 'critical' requirements, WADA management will give the Signatory a three-month deadline to correct them without unnecessary delay;[79]
    - Meanwhile, non-conformities with requirements that are considered to be 'high priority' or 'other' must be corrected within no more than six months and nine months, respectively.
- If the Signatory disputes the non-conformities (and/or their classification) identified in the corrective action report, the Signatory may request that the dispute be referred to the Compliance Review Committee (CRC). If the CRC agrees with the view of WADA, the Signatory may continue to dispute the non-conformities and/or their classification in CAS proceedings;[80]
- If a Signatory does not correct all non-conformities within the timeline set in the corrective action report or if a Signatory fails to provide the required response in the time specified, WADA management will give the Signatory written notice of that failure and a new deadline (of up to three months) to correct it. That new deadline will not be extended again, save in exceptional cases;[81]
- If a Signatory continues to dispute the non-conformity or does not correct a non-conformity by the deadline or does not provide the required response, WADA management will refer the matter promptly to the CRC for consideration;[82]
- Where the CRC considers that the Signatory has failed without valid reason to correct the non-conformity/ies, the CRC will recommend to WADA's Executive Committee that the Signatory be sent a formal notice asserting that it is non-compliant with the requirements of the code and/or the international standards, categorizing the requirements in question as 'critical', 'high priority', or 'other', identifying any aggravating factors, specifying the consequences that are proposed for such non-compliance and specifying the conditions that it is proposed the Signatory should have to satisfy in order to be reinstated;[83]
- At its next meeting, WADA's Executive Committee will decide whether to accept the CRC's recommendation;
- Where WADA's Executive Committee decides to accept the CRC's recommendations, WADA shall issue such formal notice to the Signatory;[84]

78 Article 7.2.5 ISCCS.
79 Ibid Article 9.2.1.
80 Ibid Article 9.2.4.
81 Ibid Article 9.3.1.
82 Ibid Article 9.4.1.
83 Ibid Article 9.4.4.
84 Ibid Article 10.2.3.

- The Signatory will have 21 days from the date of receipt of the formal notice to dispute WADA's assertion of non-compliance and/or the consequences proposed or reinstatement conditions proposed. If the Signatory does not communicate such dispute in writing to WADA within 21 days, the assertion will be deemed admitted;[85]
- If the Signatory wishes to dispute the asserted non-compliance and/or the proposed consequences and/or the proposed reinstatement conditions, it must notify WADA in writing within 21 days of its receipt of the notice from WADA. WADA will then file a formal notice of dispute with CAS, and the dispute will be resolved by the CAS Ordinary Arbitration Division. Where necessary to preserve the integrity of an event, the CAS may issue interim measures;[86]
- Once a decision as to a Signatory's non-compliance is final, that decision shall be applicable worldwide and shall be recognized, respected and given effect by all other Signatories in accordance with their authority and within their respective spheres of responsibility.[87]

It is important to note that the timelines specified above are merely indicative, and may be considerably shortened through a 'fast-track procedure' in the case of non-compliance with 'critical' requirements where urgent intervention is needed to preserve the integrity of the sport or particular event.[88]

Notwithstanding what appears to be a robust procedure and apparently high expectations by WADA of compliance with the code on the part of Signatories, it is arguable that these are objectively justified on the ground of protecting the integrity of sport. Indeed, long before the new standard came into effect, the CAS had already ruled in *RPC v IPC*[89] that a Signatory that has an obligation to enforce the code within its sphere of authority remains fully liable for any violations even if they are due to the actions of other bodies that it relies on but that it does not control, and just as an athlete cannot escape the consequences of an anti-doping rule violation by delegating his or her responsibility to comply with his or her anti-doping obligations to others, so too a Signatory has an absolute and non-delegable obligation to comply with the requirements of the code and the international standards. The CAS in *ROC v IAAF*[90] had also ruled that if a Signatory fails to deliver an anti-doping programme that is compliant with the code, then in order to restore a level playing field, to provide a meaningful sanction that will provoke behavioural change within the Signatory's sphere of influence, and to maintain public confidence in the integrity of international events, it may be necessary (and therefore legitimate and proportionate) to go so far as to exclude the Signatory's affiliated athletes and athlete support personnel and/or its representatives from participation in those international events.

That said, the new standard appears to strike an appropriate balance between the need to protect the integrity of sport and protecting the rights and interests of athletes who are not engaged in doping, in keeping with the CAS decision of *ROC v IAAF*, which created the possibility for athletes affiliated to a suspended member national federation to apply for special eligibility to compete in international competitions as 'neutral' athletes, where they could show that the suspended member's failure to enforce the anti-doping rules did not affect the athlete in any way, because he or she was subject to other, fully adequate anti-doping systems for a sufficiently long period to provide substantial objective assurance of integrity. Under the new

85 Ibid Article 10.3.1.
86 Ibid Article 10.4.1.
87 Ibid Article 10.5.1.
88 Ibid Article 9.5.1.
89 CAS 2016/A/4745.
90 CAS 2016/O/4684.

standard, the consequences discussed above do not go further than is necessary to achieve the objectives underlying the code. In particular, where a consequence imposed is exclusion of athletes and/or athlete support personnel from participation in one or more events, consideration will be given to whether it is feasible (logistically, practically, and otherwise) for other relevant Signatories to create and implement a mechanism that enables the non-compliant Signatory's athletes and/or athlete support personnel to demonstrate that they are not affected in any way by the Signatory's non-compliance. If so, and if it is clear that allowing them to compete in the event(s) in a neutral capacity (i.e., not as representatives of any country) will not make the consequences that have been imposed less effective, or be unfair to their competitors or undermine public confidence in the integrity of the event(s) (e.g., because the athletes have been subject to an adequate testing regime for a sufficient period) or in the commitment of WADA and its stakeholders to do what is necessary to defend the integrity of sport against the scourge of doping, then such a mechanism may be permitted, under the control of and/or subject to the approval of WADA (to ensure adequacy and consistency of treatment across different cases).[91] In other words, although the consequences applied should include cessation of the Signatory's non-compliant anti-doping activities in order to maintain confidence in the integrity of sport, there are mechanisms inherent in the rules designed to ensure, as far as practicable, that there is no gap in the protection offered to clean athletes while the Signatory is working to satisfy the reinstatement conditions.[92]

On the question of reinstatement, in order to be reinstated, it is important to note that the Signatory must have demonstrated that it is ready, willing and able to comply with all of its obligations under the code and the international standards, including carrying out all of its anti-doping activities independently and without improper outside interference.[93] In other words, the Signatory must have respected and observed in full all of the consequences applied to it;[94] and must have paid in full the following costs and expenses upon demand by WADA.[95] Once the WADA management considers that the Signatory has met all of the reinstatement conditions, it will inform the CRC accordingly.[96] If the CRC agrees with the WADA management that the Signatory has met all of the reinstatement conditions, it will recommend that WADA's Executive Committee confirm the reinstatement of the Signatory.[97] Only WADA's Executive Committee has the authority to reinstate a Signatory that has been declared non-compliant.[98]

## 7.6 THE PROHIBITED LIST

Every year, WADA publishes a 'prohibited list'.[99] This list is provided to all Signatories, governments and WADA-accredited or approved laboratories, and published on WADA's website. Signatories, pursuant thereto, take all appropriate steps to distribute the prohibited list to their members and constituents. In principle, the prohibited list goes into effect three months after its publication, which usually takes place on or around 1 October each year. The result is that the prohibited list comes into force on 1 January of the following year.

91 Ibid Article 11.2.6.
92 Ibid Article 11.2.7.
93 Ibid Article 12.2.1.2.
94 Ibid Article 12.2.1.3.
95 Ibid Article 12.2.1.4.
96 Ibid Article 12.3.3.
97 Ibid Article 12.3.4.
98 Ibid Article 12.3.6.
99 Article 4.3 WADC.

The prohibited list identifies those prohibited substances and methods which are prohibited as doping at all times (both in-competition and out-of-competition). These include anabolic agents, such as steroids and growth factors and diuretics and masking agents, as well as methods such as manipulation of blood and blood components and gene doping. The list also identifies and prohibits various substances and methods in-competition only, such as cocaine and marijuana. Further, the list is expanded from time to time by WADA in respect of particular sports, such as beta-blockers being prohibited in automobile, golfing and skiing.

A substance or method is considered for inclusion on the prohibited list if WADA, in its sole discretion, determines that the substance or method meets any *two* of the following three criteria:

(1) the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance;
(2) use of the substance or method represents an actual or potential health risk to the athlete;
(3) it violates the spirit of sport.

WADA's determination of the prohibited substances and methods that are included on the prohibited list, the classification of substances into categories on the prohibited list, and the classification of a substance as prohibited at all times or in-competition only is *final* and, accordingly, cannot be challenged by an athlete or other person based on an argument that the substance or method was not a masking agent or did not have the potential to enhance performance, represent a health risk or violate the spirit of sport. This position has been repeatedly reaffirmed in a number of cases decided upon by the CAS to date,[100] which have held that if persons are unhappy with the contents of the prohibited list, they must persuade WADA to change the list, since 'it is not within the jurisdiction of the CAS to make that decision'.[101]

While the inclusion of a substance on the prohibited list is final and thus cannot be challenged, the same cannot be said in relation to the classification of a substance as 'similar' to one of the listed substances. CAS jurisprudence has pointed to the fact that the latter issue is, indeed, open to challenge. By way of example, in *Maria Luisa Calle Williams v International Olympic Committee*,[102] the athlete had ingested neo-saldina, which contained isometheptene. Interestingly, isometheptene was not expressly listed as a prohibited substance on the 2004 prohibited list, though the IOC argued that isometheptene had a similar chemical structure or similar pharmacological effect(s) as heptaminol, a substance that was expressly listed. The athlete challenged a finding of an anti-doping rule violation on the ground that the IOC had failed to establish that isometheptene was 'similar' to heptaminol. The CAS agreed, finding that while the substances included on the prohibited list were immune from challenge because they were so included after a thorough evaluation by a so-called 'list committee', a group of specialists in the field of doping substances representing all stakeholders in the fight against doping, the same could not be said of substances that were alleged to be 'similar' to substances expressly listed, since the classification of a substance as 'similar' was made by the WADA administration (at least in the case at hand) without the benefit of the input from experts from all interested groups. For this reason, the CAS concluded that 'to exclude any challenge of such a decision would give too much responsibility to WADA alone'.[103]

100 CAS 2013/A/3437 *ISSF v WADA*, award of 18 December 2014 (operative part of 4 August 2014).
101 CAS ad hoc Division OG 06/001 *WADA v USADA, USBSF and Zachery Lund*, award of 10 February 2006 [17].
102 CAS 2004/A/726, award of 19 October 2005.
103 Ibid [11].

In concluding that the athlete could challenge WADA's determination to treat a substance as 'similar' to a listed substance, the CAS considered the aforementioned criteria for the inclusion of prohibited substances, and found that,

> the classification of a substance as having 'a similar chemical structure or similar pharmacological effect(s)' requires a similarity to one or several of the particular substances on the list. It is not sufficient for WADA or the IOC, or any other anti-doping agency, simply to assert that a substance, such as Isometheptene, is 'a stimulant' and thus a prohibited substance (when that assertion is disputed by an athlete) without specifying the particular substance on the List with which similarity is supposed to exist.[104]

Against this backdrop, the CAS rejected WADA's argument according to which 'every stimulant' was prohibited no matter whether it was expressly listed. In other words, it was not conclusive to state that isometheptene was a stimulant; even if it was, this was not sufficient for it to be classified as a prohibited substance. What was required was similarity with one or several of the listed substances. In this connection, the CAS was not comfortably satisfied that isometheptene was a prohibited substance under the applicable rules.

In the interest of completeness, the CAS went on to note that even if 'similarity' existed, the IOC and WADA would still have had to 'consider' the criteria listed in Article 4.3 of the WADA Code before deciding to treat a substance as similar and thus prohibited, namely the potential performance enhancement, health risk and violation of the spirit of sport. Only if two of these three were met could a substance be treated as similar and thus prohibited.

The question of 'similarity' arose in *JADCO v Yohan Blake, Marvin Anderson, Allodin Forthergill and Lansford Spence*.[105] Here, the athletes had taken a product called 'Muscle Speed', which contained 1, 3 dimethylamlamine, another name for 4-methyl-2-hexanamine. The athletes were tested positive for 4-methyl-2-hexanamine. It was argued that methylhexanamine was a stimulant that had a chemical structure similar to tuaminoheptane, the latter of which was on WADA's 2009 prohibited list. The appeal tribunal rejected the panel's ruling that although the two substances could have the same molecular structure, they were not the same in terms of their chemical structure. It found, instead, that because 4-methyl-2-hexanamine had a similar chemical or biological effect to tuaminoheptane, a prohibited substance, the athletes had committed an anti-doping rule violation. However, their period of ineligibility was reduced to only three months because of certain mitigating factors, including the fact that the prohibited substance was not expressly stated on WADA's prohibited list; the athletes consulted their management team to avoid taking a banned substance, but the advice provided was flawed; and this was their first violation.

Issues surrounding the prohibited list recently arose in a case involving Jamaican sprinter, Nesta Carter, (and, by implication, triple world record holder Usain Bolt) who was stripped of his 4x100-metres gold medal won at the 2008 Beijing Olympic Games after the 2016 retesting of his 2008 samples by the Lausanne laboratory, which revealed the presence of methylhexaneamine (MHA), a banned stimulant.[106] Interestingly, although MHA was not specifically mentioned on the 2008 list of prohibited substances, the IOC argued that it nonetheless fell within the scope of the general prohibition of stimulants having a similar chemical structure or similar biological effect as a listed stimulant, namely tuaminoheptane.[107] In *Nesta Carter v International*

104 Ibid [24].

105 *Jamaica Anti-Doping Appeals Tribunal* (14 September 2009).

106 'Nesta Carter appeals doping penalty to CAS' (*ESPN*, 17 February 2017) www.espn.com/olympics/trackandfield/story/_/id/18696423/nesta-carter-appeals-doping-penalty-cost-jamaican-relay-team-usain-bolt-gold-medal.

107 On 22 September 2009, a year after the Beijing Olympics, MHA was found by a CAS panel to be a substance similar to a prohibited substance and therefore prohibited as being a substance 'with a very similar chemical structure' and with 'similar biological effects to it'.

*Olympic Committee*,[108] the CAS held that although, admittedly, MHA was not specifically listed in section S6 of the 2008 prohibited list,

> MHA was nevertheless already covered under class S6 Stimulants, as a substance with a similar chemical structure or similar biological effects to an expressly listed stimulant (tuaminoheptane), and it was therefore already prohibited as a stimulant.[109]
>
> Stimulants are numerous in number and new stimulants can easily be developed. For this reason, for this particular class of substances, the WADA Prohibited List is not a closed list and does not provide an exhaustive enumeration, but establishes the principle that all stimulants are prohibited.[110]
>
> ...
>
> The Athlete was required to ensure that no stimulants were present in his bodily systems, named or unnamed. This is the legal framework which was set in order to ensure a more equal playing field to sporting competitors. It was a legal framework of which he was aware.[111]

In short, although the CAS made 'no finding that the Athlete took the substance intentionally or was negligent to any degree', and it was 'possible that the substance found its way to the Athlete's systems through contamination, which could or could not have been avoided with the exercise of utmost care',[112] the conclusion that, as a matter of principle, MHA was already prohibited under the WADA 2008 prohibited list as a stimulant having a similar structure and effects as one listed, that is tuaminoheptane, was a necessary one in view of the 'regime which has been determined to be necessary for an effective fight against doping in sport'.[113]

## 7.7 STRICT LIABILITY

Each athlete is under a personal duty to ensure that no prohibited substance enters his or her body and that no prohibited method is used by or administered to him or her. It is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation.[114] This is because the WADC adopts the civil law concept of 'responsabilité objective', otherwise referred to in common law countries as 'strict liability'. This essentially means that there is an irrebuttable presumption of guilt once it is demonstrated that a prohibited substance or method has been used, though the question of guilt, fault or negligence on the part of the athlete may affect the sanction ultimately imposed.

It is instructive to note, from the very outset, however, that the principle of strict liability does not exempt sports federations from the need to prove the existence of a doping offence.[115] Rather, the principle merely renders obsolete proof of guilt on the part of the person subjected to the strict liability regime; it does not eliminate the need to establish the wrongful act itself and the causal link between the wrongful act and its consequences.

108 CAS 2017/A/49984.
109 Ibid [68].
110 Ibid [67].
111 Ibid [153].
112 Ibid [155].
113 Ibid.
114 CAS 2006/A/1067 *IRB v Jason Keyter*, award of 13 October 2006 [5].
115 CAS 95/142 *L. / Fédération Internationale de Natation Amateur (FINA)*, award of 14 February 1996.

Although a rather compelling argument has been advanced that the strict liability regime is contrary to natural justice and arguably amounts to an unreasonable restraint on trade, a number of CAS awards have repeatedly reaffirmed that the strict liability regime is not only lawful, but justifiably designed to ensure 'overall fairness' in sport. Indeed, once the rules attempting to impose strict liability are 'absolutely crystal clear and unambiguous', the principle of strict liability has been held to be defensible on the grounds of the 'high objectives and practical necessities of the fight against doping'.[116] More specifically, according to the CAS in *B./ITU*,[117] the 'rule on strict liability is essential and, indeed, indispensable for an efficient fight against doping in sport and for the protection of fairness towards all competitors and of their health and well-being'.[118] Indeed, if successful proof by an athlete that he or she had no intention to absorb the substance was sufficient to discharge him or her from liability, this would open the floodgates for exoneration in all cases where substances have been absorbed unknowingly, for example due to the intervention of a trainer, friend or similar person; these might very well be cases that should clearly be caught by sanctions if the fight against doping is to be made efficient. Furthermore, 'if, for each case, the sport federations had to prove the intentional nature of the act, the fight against doping would become practically impossible'.[119]

Although it is true that the principle of strict liability is likely, in some sense, to be unfair in an individual case, such as where the athlete may have taken medication as a result of mislabelling or faulty advice for which he or she is not responsible, particularly in the circumstances of sudden illness in a foreign country, overall fairness in sport appears to justify the application of the principle.[120] As bluntly explained by the CAS in *USA Shooting & Q./UIT*,[121] 'the vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair'.[122] By way of illustration, the CAS pointed to the fact that although somewhat 'unfair', a competition will not generally be postponed to await an athlete's recovery from food poisoning. By parity of reasoning, the CAS explained that,

> it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.[123]

At least one other CAS tribunal has also considered that 'it would indeed be shocking to include in a ranking competition an athlete who has not competed using the same means as his opponents, for whatever reasons'.[124]

In short, although the strict liability approach may appear, on first glance, to be unreasonable, according to the CAS in *Veronica Campbell-Brown v Jamaica Athletics Administrative Association (JAAA) & International Association of Athletics Federations (IAAF)*,[125]

116 Ibid [12].
117 CAS 98/222, award of 9 August 1999.
118 Ibid [16].
119 Ibid [18].
120 CAS 2007/A/1312 *Jeffrey Adams v CCES*, award of 16 May 2008 [29].
121 CAS 94/129, award of 23 May 1995.
122 Ibid [14].
123 Ibid [15].
124 CAS ad hoc Division OG 00/011 *Andreea Raducan / IOC*, award of 28 September 2000 [16].
125 CAS 2014/A/3487, award of April 10, 2014 (operative part of 24 February 2014).

> [it] is an essential cornerstone of anti-doping enforcement ... it is a necessary means for ensuring that athletes assume the highest degree of personal responsibility for all substances that enter their bodies. Only by cultivating a culture of responsibility, diligence and absolute intolerance of doping can fairness in professional sport be achieved and maintained, in a manner that protects all athletes.[126]

## 7.8 THE TESTING PROCESS

The testing of athletes or 'doping control' is conducted in accordance with the International Standard for Testing and Investigations (ISTI). The purpose of the ISTI is to assist anti-doping organizations to plan for intelligent and effective testing, both in-competition and out-of-competition, and to maintain the integrity and identity of the samples collected from the point where the athlete is notified of the test to the point where the samples are delivered to the laboratory for analysis.

### 7.8.1 Urine sample collection

In principle, anti-doping organizations may, at any time, test any athlete over whom they have testing authority who has not retired, including athletes serving a period of ineligibility. Typically, tests are conducted by doping control officers (DCO) who may be accompanied by other support staff, including chaperones. In a typical case, the DCO would inform the athlete that he has been selected for testing, and direct the athlete to the appropriate testing area.[127] At the very outset, the DCO will offer the athlete the choice of appropriate equipment for collecting the sample.[128] The DCO will then instruct the athlete to select a collection vessel.[129] Once the athlete selects a collection vessel, the DCO will instruct the athlete to check that all seals on the selected equipment are intact and the equipment has not been tampered with.[130] If the athlete is not satisfied with the selected equipment, he/she may select another. If the athlete is not satisfied with any of the equipment available for selection, this must be recorded by the DCO. If the DCO does not agree with the athlete that all the equipment available for the selection is unsatisfactory, he must instruct the athlete to proceed with the sample collection session. Meanwhile, if the DCO agrees with the athlete that all the equipment available for the selection is unsatisfactory, the DCO must terminate the sample collection session and this must be recorded.

The DCO/chaperone, who must be of the same gender as the athlete, should, where practicable, ensure that the athlete thoroughly washes his/her hands prior to the provision of the sample or wears suitable (e.g. latex) gloves during provision of the sample.[131] The DCO/chaperone will then proceed to an area of privacy in order to witness the athlete's passing of urine.[132] Interestingly, the DCO/chaperone must have an unobstructed view of the sample leaving the athlete's body and must continue to observe the sample after provision until the

126 Ibid [181].
127 The consent of a parent/guardian of a minor athlete is required under Annex C before a test is conducted in respect of that athlete.
128 Annex D.4.2 ISTI.
129 Annex D.4.3 ISTI.
130 Annex.4.4 ISTI.
131 Annex D.4.7 ISTI.
132 Annex DCO. D.4.6 ISTI. Cf Direct witnessing of a minor athlete passing urine by the DCO is not permitted under Annex C ISTI.

sample is securely sealed.[133] The DCO/chaperone has to ensure that all urine passed by the athlete at the time of provision of the sample is collected in the collection vessel, and must verify, in full view of the athlete, that the suitable volume of urine for analysis has been provided.[134]

Once the volume of urine provided by the athlete is sufficient, the DCO would then instruct the athlete to select a sample collection kit containing A and B bottles.[135] Once a sample collection kit has been selected, the DCO and the athlete would then check that all code numbers match and that these code numbers are recorded accurately on the doping control form.[136] If the athlete or DCO finds that the numbers are not the same, the DCO must instruct the athlete to choose another kit, in relation to which the DCO must keep a record.

Thereafter, the athlete would pour the minimum suitable volume of urine for analysis into the B bottle (to a minimum of 30 ml), and then pour the remainder of the urine into the A bottle (to a minimum of 60 ml).[137] The suitable volume of urine for analysis is to be viewed as an absolute minimum, so that if more than the minimum has been provided, the DCO must ensure that the athlete fills the A bottle to capacity. Should there still be urine remaining, the DCO must ensure that the athlete fills the B bottle to capacity. The DCO must also instruct the athlete to ensure that a small amount of urine is left in the collection vessel, explaining that this is to enable the DCO to test that residual urine. The athlete must then seal the A and B bottles as directed by the DCO.[138] The DCO is obliged to check, in full view of the athlete, that the bottles have been properly sealed,[139] and will, thereafter, test the residual urine in the collection vessel to determine if the sample has a suitable specific gravity for analysis. The rules provide that urine should only be discarded when both the A and B bottles have been filled to capacity and the residual urine has been tested.[140]

### 7.8.2 Partial urine samples

While the process described above appears to be quite straightforward, the same cannot be said for those instances in which a partial sample has been provided by the athlete; that is, where a suitable volume of urine for analysis has not been provided. In such a case, the rules require that the DCO inform the athlete that a further sample must be collected to meet the suitable volume of urine for analysis requirements.[141] Thereafter, the DCO must instruct the athlete to select partial sample collection equipment.[142] In principle, the DCO must then instruct the athlete to open the relevant equipment, pour the insufficient sample into the new container and seal it. The DCO must check, in full view of the athlete, that the container (or original collection vessel, if applicable) has been properly sealed.[143] The DCO and the athlete are also obliged to check that the equipment code number and the volume and identity of the insufficient sample are recorded accurately by the DCO on the doping control form, and either the athlete or the DCO must retain control of the sealed partial sample.[144] Importantly, while waiting to

133 Annex D.4.9 ISTI.
134 Annex D.4.10 ISTI.
135 Annex D.4.12 ISTI.
136 Annex D.4.13 ISTI.
137 Annex D.4.14 ISTI.
138 Annex D.4.15 ISTI.
139 Annex D.4.16 ISTI.
140 Annex D.4.17 ISTI.
141 Annex F.4.1 ISTI.
142 Annex F.4.2 ISTI.
143 Annex F.4.3 ISTI.
144 Annex F.4.4 ISTI.

provide an additional sample, the athlete must remain under continuous observation and be given the opportunity to hydrate.[145]

When the athlete is able to provide an additional sample, the procedures for collection of the sample described above must be repeated until a sufficient volume of urine is provided by combining the initial and additional sample(s).[146] In this context, once the DCO is satisfied that the requirements for suitable volume of urine for analysis have been met, the DCO and the athlete must check the integrity of the seal(s) on the container(s) containing the previously provided partial sample(s),[147] and any irregularity with the integrity of the seal(s) must be recorded by the DCO. The DCO must then direct the athlete to break the seal(s) and combine the samples, ensuring that additional samples are added in the order they were collected to the original partial sample until, as a minimum, the requirement for suitable volume of urine for analysis is met.[148]

Once the volume of urine provided by the athlete is now sufficient, the DCO must then instruct the athlete to select a sample collection kit containing A and B bottles. Once a sample collection kit has been selected, the DCO and the athlete would then check that all code numbers match and that code numbers are recorded accurately by the DCO on the doping control form. If the athlete or DCO finds that the numbers are not the same, the DCO must instruct the athlete to choose another kit. In this context, the DCO must record the matter. Thereafter, the athlete would pour the minimum suitable volume of urine for analysis into the B bottle (to a minimum of 30 ml), and then pour the remainder of the urine into the A bottle (to a minimum of 60 ml). The DCO must then check the residual urine in order to ensure that it meets the requirement for suitable specific gravity for analysis.[149]

### 7.8.3 Collection of blood samples

In similar vein to the process described above, the DCO, when collecting blood samples, must begin by properly notifying the athlete of the requirements associated with the sample collection.[150] The DCO/chaperone and athlete would then proceed to the area where the sample would be provided.[151] At this point, the DCO must instruct the athlete to select the sample collection kit(s) required for collecting the sample and to check that the selected equipment has not been tampered with and the seals are intact.[152] When a suitable sample collection kit has been selected, the DCO and the athlete would then check that all code numbers match and that the code numbers are recorded accurately by the DCO on the doping control form. If the athlete or DCO finds that the numbers are not the same, the DCO must instruct the athlete to choose another kit, which must be recorded by the DCO.[153]

The blood collection officer (BCO) is obliged to clean the skin with a sterile disinfectant wipe or swab in a location unlikely to adversely affect the athlete or his/her performance and, if required, apply a tourniquet.[154] The BCO would then take the blood sample from a superficial vein into the tube. The tourniquet, if applied, would be immediately removed after the

145 Annex F.4.5 ISTI.
146 Annex F.4.6 ISTI.
147 Annex F.4.7 ISTI.
148 Annex F.4.8 ISTI.
149 Annex F.4.10 ISTI.
150 Annex E.4.3 ISTI.
151 Annex E.4.4 ISTI.
152 Annex E.4.6 ISTI.
153 Annex E.4.7 ISTI.
154 Annex E.4.8 ISTI.

venipuncture has been made. The amount of blood removed must be adequate enough to satisfy the relevant analytical requirements for the sample analysis to be performed.[155] If the amount of blood that can be removed from the athlete at the first attempt is insufficient, the BCO must repeat the procedure up to a maximum of three attempts in total. Should all three attempts fail to produce a sufficient amount of blood, then the BCO must inform the DCO, who would then terminate the sample collection session and record this and the reasons for terminating the collection.[156]

After applying a dressing to the puncture site(s),[157] the athlete would seal his/her sample into the sample collection kit as directed by the DCO.[158] In full view of the athlete, the DCO is required to check that the sealing is satisfactory. The athlete and the BCO/DCO must thereafter sign the doping control form.

## 7.9 DEPARTURE FROM THE INTERNATIONAL STANDARD FOR TESTING AND INVESTIGATIONS

Although the foregoing processes have long been standardized and national anti-doping organizations are fully aware of the importance of abiding by the standards identified above, the CAS has had to repeatedly chastise these organizations, including the Jamaican Anti-Doping Commission (JADCO), for falling afoul of these requirements. For instance, in *Veronica Campbell-Brown v JAAA & IAAF*,[159] the athlete, a Jamaican track and field sprinter, an eight-time Olympic medallist who specializes in the 100 and 200 metres, was tested by JADCO after she won the women's 100-metre race at the Jamaica Invitational Meet. Apart from being informed about the mandatory nature of the test and escorted to the doping control area in the stadium, none of the relevant procedures outlined above in relation to the collection of partial samples were followed by the DCO. After the athlete provided a partial sample, under the supervision and direction of the DCO, she took that sample with her in a covered (but unsealed) collection vessel and went to the waiting room where several other athletes and doping control officer assistants (DCOAs) were present. The athlete placed the sample on the floor while she went to collect more water and Powerade and did various exercises in an effort to induce more urine. At one point, the athlete returned to the sink where she ran her hands under the tap water in an effort to induce urine. When the athlete felt able to produce further urine – which may have taken up to an hour – she was accompanied to the bathroom by the DCOA, where she attempted to pass further urine into the collection vessel. On this occasion, she was able to produce enough urine which, when combined with her prior effort, exceeded the minimum specimen volume requirements. Having produced a total of 160 ml of urine, the athlete was instructed to select a storage kit, remove the two containers inside (one for the A sample and one for the B sample) and pour her urine into both bottles. On the doping control form, the DCO did not indicate that the athlete had provided an initial partial sample, as that box was left empty when the form was completed. Subsequently, the laboratory issued a certificate stating that it had identified the presence of hydrochlorothiazide ('HCT') and the metabolite chloramino-phenamide in the athlete's A sample. This was confirmed by the B sample, and the athlete was provisionally suspended.

155 Annex E.4.9 ISTI.
156 Annex E.4.10 ISTI.
157 Annex E.4.11 ISTI.
158 Annex E.4.14 ISTI.
159 CAS 2014/A/3487, award of April 10, 2014 (operative part of 24 February 2014).

On appeal to the CAS, the athlete argued that there was a fundamental departure from the requirements prescribed by the ISTI, thereby warranting the nullification of the results obtained by the laboratory. The CAS held that the DCOs who obtained the urine sample from the athlete knowingly violated the mandatory partial collection procedures by failing to store the partial sample in a sealed, special-purpose partial collection vessel after collecting the initial partial urine sample; by leaving the partial sample in an unsealed collection vessel with a lid containing a small aperture while the athlete was waiting to produce further urine; by allowing the partial sample to remain in the possession of the athlete, and not the DCO, while the athlete was waiting to provide a further sample; by instructing the athlete to use the collection vessel containing the initial partial sample, rather than a fresh collection vessel, when she was ready to pass further urine; and by failing to record any information about the partial sample when completing the mandatory doping control form.

Although the CAS accepted that it was, in principle, relatively rare for an IST departure itself to directly cause an adverse analytical finding, the facts of this case were unique in that the IST departures created an opportunity for an intervening act (namely, environmental contamination) to compromise the integrity of the athlete's sample. Pointing to the fact that, 'in order to justify imposing a regime of strict liability against athletes for breaches of anti-doping regulations, testing bodies should be held to an equivalent standard of strict compliance with mandatory international standards of testing',[160] the CAS considered that the IST departures in this case were so fundamental to the fairness of the doping control regime and so central to ensuring the integrity of the sample collection and testing process that there should be automatic invalidation of the outcome of the testing procedure.

As a matter of principle, the CAS felt that, although this was an exceptional case, Athletes, in order to succeed, would have to establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. This causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible. According to the CAS, this does not set the bar for a shift in the burden of proof to an unduly high threshold, and strikes an appropriate balance between the rights of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST.

On the facts, the athlete was able to establish a credible and non-negligible possibility that the adverse analytical finding could have been caused by a serious departure from an international standard and not by ingestion (deliberate or inadvertent) of HCT. In this regard, the CAS considered that the departures from the IST increased the possibility (or were capable of increasing the possibility) of contamination occurring, since they created more opportunities, for example, of contaminated water or sweat to enter the unsealed collection vessel. Given that the athlete had succeeded in establishing that possibility, JADCO was found to have been unable to discharge its burden of proof in that it failed to provide 'particularly cogent and persuasive evidence for the Panel to be comfortably satisfied that the Adverse Analytical Finding was not, in fact, caused by the deviation from the IST'.[161] In particular, the IAAF could not (1) provide convincing evidence positively demonstrating that the athlete ingested HCT, nor (2) provide convincing evidence demonstrating why the fundamental and dramatic IST departure could not realistically have been the cause of the HCT presence in the athlete's sample,

160 Ibid [147].
161 Ibid [180].

for example by excluding to the panel's comfortable satisfaction the possibility that the sample could have been contaminated. In the CAS's estimation, there was compelling expert and statistical evidence showing widespread therapeutic use of HCT in Jamaica and a significant disparity between the proportion of positive HCT test results worldwide, and the proportion of positive HCT results amongst athletes competing at the Jamaica National Stadium.

With regard to JADCO's repeated failure to comply with mandatory IST, the CAS emphatically lamented,

> That systematic and knowing failure, for which no reasonable explanation has been advanced, is deplorable and gives rise to the most serious concerns about the overall integrity of the JAAA's anti-doping processes, as exemplified in this case by the flaws in JADCO's sample collection and its documentation.[162]

It further considered that,

> the burden of satisfying the Panel that a doping violation has occurred is substantially higher where the anti-doping body has engaged in a knowing, systematic and persistent failure to comply with a mandatory IST that is directed at the integrity of the sample collection and testing process.
>
> Strict liability for doping violations is an essential cornerstone of anti-doping enforcement. Although capable of operating harshly against athletes who inadvertently consume prohibited substances, strict liability is a necessary means for ensuring that athletes assume the highest degree of personal responsibility for all substances that enter their bodies. Only by cultivating a culture of responsibility, diligence and absolute intolerance of doping can fairness in professional sport be achieved and maintained, in a manner that protects all athletes. Anti-doping agencies play a critical role in that endeavor. However, their ability to hold athletes to that strict standard of accountability is necessarily attenuated in circumstances where those agencies manifestly and willfully fail to uphold their side of the bargain. This is particularly so where, as here, the failure creates a possibility of sample contamination and unreliable testing results. In such cases, the IST departure strikes at the very heart and purpose of the anti-doping regime. To adopt a different approach might be said to encourage noncompliance with international standards and could render such standards a nullity.[163]

Although a different outcome was arrived at in the subsequent case of *Traves Smikle v JADCO*,[164] it is clear that the CAS continues to be frustrated that the mandatory IST has not in practice been fully adhered to, at least in the Jamaican context. In that case, the Jamaican athlete was tested immediately after he participated in the Jamaica Athletics Administrative Association (JAAA) National Senior Championships. His urine subsequently revealed the presence of hydrochlorothiazide (HCTZ), a prohibited substance. The athlete, however, argued that there was a departure from the IST, which had the effect of invalidating the outcome of the testing procedure. In this regard, the athlete argued that he was taken to the doping control station located at the stadium, but that his initial sample was insufficient to meet the minimum of 90 ml which was required, even after he had drunk two bottles of Powerade. A second sample was combined with the first, he alleged, but when the sample volume was still not enough to meet the required amount, he was again asked, a third time, to pass urine for the sample, using the same container. On the third occasion, he was able to produce enough urine to bring the sample to the required amount.

162 Ibid [182].
163 Ibid [181].
164 CAS 2015/A/3925, award of 10 August 2015 (operative part of 22 June 2015).

Although the CAS accepted that the process of collecting the urine sample was irregular, in that there was a departure from the IST because there were no partial sample kits on the date of testing, the panel declined to establish a per se rule that non-compliance with IST partial sample collection procedures automatically invalidates the sample's test results. In particular, it rejected the athlete's assertion that JADCO's breaches of the IST partial sample collection procedures constituted a fundamental breach so serious that it necessarily cannot be comfortably satisfied he committed a doping violation. More specifically, the CAS noted that the athlete had not discharged his burden of proof in providing sufficient evidence to enable it to reasonably conclude that JADCO's breach of the IST partial sample collection procedures plausibly caused his positive test for HCTZ. In other words, the CAS could not rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample, since the suggested causative link was not more than merely hypothetical; in other words, not plausible.

Commenting on the distinguishing features between the facts of this case and the *Veronica Campbell-Brown* case described above, the CAS found that it could not be reasonably concluded that the JADCO's breach of the IST partial sample collection procedures plausibly caused his positive test for HCTZ by environmental contamination of his urine sample from water or sweat containing HCTZ. Even if it were possible that a single drop of water or sweat containing HCTZ could have a concentration level of HCTZ high enough to result in the amount of HCTZ present in the athlete's urine, the CAS did not find it plausible that the athlete's urine sample was contaminated based on the evidence. Indeed, there was no evidence that the ice or melted water in the doping control waiting room cooler containing the Powerade and Wata brand water that the athlete drank or that which his hands came into contact with was contaminated with HCTZ. Nor was there any evidence that anyone taking blood pressure medication came into contact with the cooler or its contents. The doping control waiting room was air conditioned, and there was no evidence that anyone therein was sweating and came into contact with the cooler. Moreover, after washing his hands, the athlete uncapped and capped his urine sample container in a bathroom stall in the doping control area before and after each of the three times he urinated in order to provide a full sample. Additionally, the JADCO chaperone, who observed the athlete urinate, stood approximately two feet away from him each time and did not touch him or cough or sneeze during any of the three times he urinated. While washing his hands, he placed the container on the counter top of the sink approximately five inches from the faucet that he used to wash his hands. Further, the container's spout was sealed with an adhesive film strip, which was found by the CAS to negate the possibility that it was contaminated with bathroom tap water containing HCTZ.

Although the athlete's two expert witnesses testified that HCTZ was an ingredient of blood pressure medication commonly prescribed in Jamaica and that Jamaica had a history of ground water contamination from sewage and improperly disposed of pharmaceuticals that may have contaminated its potable water supply, the CAS found that there was no evidence that the bathroom tap water that the athlete used to wash his hands before or after urinating three times was contaminated with HCTZ. Indeed, there was no expert testimony that water vapour or humidity in the air of the doping control area may have contained HCTZ that could possibly have contaminated the athlete's urine sample during one or more of the three times he opened it in the bathroom stall in which he urinated. The CAS thus concluded that the presence of HCT in the athlete's body indicated he ingested HCTZ rather than that his urine sample was contaminated by water or sweat containing it. In short, the athlete provided no plausible causative link between the breach of the IST and the presence of HCTZ in his sample.

Although the outcome of the *Veronica Campbell-Brown* case and the *Traves Smikle* case very much depended on the cogency of the evidence respectively adduced by the athletes, it is clear

that the CAS will not adopt a per se rule to the effect that any departure from the IST justifies invalidation of the results of the testing procedure, which has been confirmed in a number of other cases. For example, Bahamian athlete, Trevorano Mackey, was reprimanded after an adverse analytical finding was recorded against him in circumstances where he was tested after he participated in the Bahamas Association of Athletic Associations Nationals, though he argued that there was a departure from the IST that could have caused an adverse analytical finding.[165] Though a mere reprimand, in this context, was arguably not justified in light of the fact that the athlete had failed to establish that the departure plausibly caused the adverse analytical finding, it remains clear that regional anti-doping organizations have increasingly come under the microscope for their half-hearted compliance with IST.

Further afield, in *IAAF v CBAT & Simone Alves da Silva*,[166] the athlete provided a partial urine sample following an anti-doping test. The anti-doping officials who conducted the test permitted the athlete to leave the doping control station carrying her unsealed sample bottle. The athlete then took part in a media interview. During the interview, she placed the sample on the floor and covered it with a cloth. She then returned to the doping control station and provided the remaining portion of her sample. The sole arbitrator did not find that any departure from the IST had occurred. However, he held that, even if a departure had occurred, 'it [was] doubtful whether such departure led or would reasonably have led to the adverse analytical finding'.[167] In the same vein, in *World Anti-Doping Agency (WADA) v Coetzee Wium*,[168] a DCO accidentally left the athlete's urine sample at the athlete's premises at the conclusion of the collection procedure. The sample was left unattended for 45 minutes in a sealed and tamper-proof 'Berlinger test kit'.[169] The CAS held that the departures from IST 'did not cast any doubt on the reliability of the test results',[170] since it could not

> imagine any hypothesis under the given circumstances that would indicate that any other person, whether identified or not, might have used the period during which the samples were unattended, for any act of sabotage with a possible impact on the result of the laboratory analysis.[171]

The CAS has also, in a number of cases, rejected arguments alleging that an inordinate delay between the time the athlete's sample is collected and when it is tested warrants a nullification of the results of the testing procedure. This was so held in *Tai Cheau Xuen v Olympic Council of Asia (OCA)*,[172] a 16-hour delay, and in *Vroemen v Koninklijke Nederlandse Athletiek Unie & Anti-Doping Autoreit Nederland*,[173] a period of three and a half days, were respectively challenged. In both cases, the CAS held that although the WADA rules require that samples be transported to the WADA-accredited laboratory *as soon as practicable* after the completion of the sample collection session, this is only indicative and that, in the absence of any evidence to prove that the sample was tampered with during this period of time, the CAS will almost invariably find that the time period taken

165 'BADC releases statement on doping violation by Mackey' (*The Nassau Guardian*, 10 April 2014).
166 CAS 2012/A/2779, award of 3 October 2012.
167 Ibid [210].
168 CAS 2005/A/908, award of 25 November 2005.
169 Peter Rutherford, 'WADA sourcing new doping control kits after Swiss firm pulls out' (*Reuters*, 9 March 2018) www.reuters.com/article/us-sport-doping-bottles/wada-sourcing-new-doping-control-kits-after-swiss-firm-pulls-out-idUSKCN1GM01R. Note that recently, WADA has said it is looking into a potential integrity issue with Berlinger's sample collection bottles after the accredited laboratory in Cologne discovered they might potentially be susceptible to manual opening 'upon freezing'. WADA said it was gathering information from the company and its customers to come up with solutions that would maintain the integrity of the doping control process.
170 *WADA v Coetzee Wium* (n 168) [10].
171 Ibid.
172 CAS ad hoc Division (AG Incheon) 14/003, award of 3 October 2014 (operative part of 2 October 2014).
173 CAS 2010/A/2296, 12 September 2011.

'cannot constitute a reason on which to make a finding that there has been a violation of the IST', since 'this time frame is arguably not ideal but it is in line with common testing practice, especially when sample collection occurs far away from a WADA-accredited laboratory'.[174]

More generally, the CAS has also indicated that where mere clerical errors are made in the labelling of athletes' samples, and they do not question the reliability or integrity of the sample nor the fact that the relevant data is indeed to be attributed to the athlete in question, such errors would be regarded merely as 'unfortunate', but not so fundamental as to call into question the laboratory's compliance with the IST thereby nullifying the athlete's positive sample.[175] However, the CAS is likely to take a more pragmatic and athlete-friendly approach where the anti-doping organization fails to invite an athlete to attend the opening of his B sample. For example, in *T./International Gymnastics Federation (FIG)*,[176] where the anti-doping organization failed to invite the athlete to attend the opening of her B sample, the CAS held that this deprived her of her right to be present or represented during the testing of the B sample and, therefore, the testing procedure could not be regarded as valid. The CAS, in particular, observed that the athlete's right to verify the integrity of the seal on the sample bottle, and to inspect the sample for any apparent variations or irregularities,

> is completely taken away from the athlete when the analysis of the B-sample is conducted without the athlete or his/her federation being given due notification of the relevant date and time. The athlete is then simply treated as the object of the doping test procedure and not its subject.[177]

This IST departure, according to the CAS, is of a nature that is incapable of being remedied in the course of the arbitral process. In *Kaisa Varis v International Biathlon Union (IBU)*,[178] the CAS endorsed this approach, explaining that,

> an athlete's right to be given a reasonable opportunity to observe the opening and testing of a 'B' sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping rule violation.[179]

While in *Wen Tong v International Judo Federation*[180] the CAS stated that, 'it is now established CAS jurisprudence that the athlete's right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B-sample results must be disregarded'.[181] That said, it must be noted that

> nothing contained within Article 7.1.3 WADC requires that any national federation or national anti-doping organization appoint an independent observer in the event an athlete is unable to attend the opening of his B Sample. All that is required is that an athlete be given an opportunity to attend such opening, or have his representative attend on his behalf.[182]

A similar approach was adopted in the Caribbean case of *IAAF v The National Association of Athletics Administration of Trinidad and Tobago and Semoy Hackett*,[183] which concerned a Trinidadian

174 Ibid [125].
175 CAS 2014/A/3639 *Amar Muralidharan v Indian National Anti-Doping Agency (NADA), Indian National Dope Testing Laboratory, Ministry of Youth Affairs & Sports*, award of 8 April 2015.
176 CAS 2002/A/385, award of 23 January 2003.
177 Ibid [29].
178 CAS 2008/A/1607, award of 13 March 2009.
179 Ibid [32].
180 CAS 2010/A/2161, award of 23 February 2011.
181 Ibid [16].
182 CAS 2014/A/3639 *Amar Muralidharan v National Anti-Doping Agency, National Dope Testing Laboratory, Ministry of Youth Affairs & Sports* [79].
183 CAS 2013/A/3277.

athlete alleging that, in respect of her second anti-doping rule violation in one year, she was not allowed to be present at the analysis of her B sample nor provided with her laboratory package. The Disciplinary Committee of the National Association of Athletics Administrations of Trinidad and Tobago, which first heard the matter, agreed with Hackett, finding that the failure to allow her to be present to witness the analysis of her 'B' sample was a fundamental departure from procedure, leading to the invalidation of her B sample result. The IAAF appealed the decision of the NAAATT's Disciplinary Committee to the CAS, but there was no final ruling since the parties settled the matter in advance of the CAS hearing. Ultimately, however, Hackett's period of ineligibility lasted for two years and four months.[184]

## 7.10 ANTI-DOPING RULE VIOLATIONS

Under the WADC, 'doping' occurs where an anti-doping rule violation occurs in connection with Articles 2.1–2.10 of the Code.

Anti-doping organizations bear the burden of establishing that an anti-doping rule violation has occurred.[185] The standard of proof is whether the anti-doping organization in question has established an anti-doping rule violation to the *comfortable satisfaction* of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt.[186]

In light of the importance of Articles 2.1–2.10 WADC to the success of the anti-doping regime, and the controversies that repeatedly arise in this context, we will hereafter consider the specific anti-doping rule violations covered by these provisions. It is noteworthy that two new anti-doping rule violations have been included in the 2015 version of the code, which were not included in the 2009 version of the code, namely, complicity and prohibited association.

### 7.10.1 Presence of a prohibited substance or its metabolites or markers in an athlete's sample

Under Article 2.1 WADC, each athlete is under a personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers present in their samples. Typically, the prohibited substance or its metabolites or markers would be indicated in the athlete's A sample, and this will generally be confirmed in the athlete's B sample.[187] Once the anti-doping organization establishes, to the comfortable satisfaction of the panel, the presence of a prohibited substance in the athlete's sample, it is not necessary for it to then go on to prove that the athlete acted with intent, fault, negligence or knowingly used the prohibited substance. This provision, in effect, adopts the 'strict liability' approach to establishing an anti-doping rule violation without cognizance of the athlete's *mens rea*, though this might be important in the determination of the sanction ultimately imposed.

As discussed in the foregoing section, only an appreciable departure from the IST may nullify the existence of an anti-doping rule violation under Article 2.1, as in the *Veronica*

184 Ibid. See also Mark Fraser, 'Hackett banned again' (*Trinidad Express*, 30 May 2014) www.trinidadexpress.com/sports/Hackett–banned-again-261192871.html.
185 Article 3.1 WADC.
186 Ibid. CAS 2000/A/310 L. / IOC, award of 22 October 2002.
187 Article 2.1.2 WADC.

*Campbell-Brown* case, where the athlete was able to establish a causative link between the IST departure and the presence of the prohibited substance in her sample. Barring such a finding, however, as the *Traves Smikle* case demonstrates, the presence of a prohibited substance in an athlete's sample will almost invariably result in an anti-doping rule violation having been committed. This has recently been confirmed in a number of cases, including the sanctioning of Javaughn Dill,[188] a Bermudan bodybuilder, who tested positive for the presence of methandienone metabolites, methylhexeanamine and oxilofrine in his samples, as well as Guyanese cyclist, Alanzo Greaves, who was recently banned for four years after his sample returned an adverse analytical finding (AAF) for the prohibited substance, testosterone.[189] Barbadian Levi Codougan, an Olympic sprinter, was also recently found to have committed an anti-doping rule violation after a banned diuretic and masking agent, furosemide, was present in his sample, while Darren Matthews, a celebrated Barbadian cyclist, was banned for four years for having also committed an anti-doping rule violation. Interestingly, in light of anti-doping rule violations being recorded against a worrying number of other Barbadian athletes for the presence of prohibited substances in their samples, including Barry Forde, a cyclist, Ivorn McKnee, a weightlifter, and Hoskin Worrell, Roderick Waterman, Martinus Durrant and Roger Boyce, all bodybuilders,[190] the Chairman of the Barbados National Anti-Doping Commission, Dr Adrian Lorde, has indicated that he was 'very concerned about the apparent upsurge in doping in various sports in Barbados', and was worried by the fact that the tests also revealed positive samples for multiple banned substances.[191] These concerns reflect the never-ending need for ongoing education and training for all sporting stakeholders, not only in Barbados but throughout the wider Caribbean.

### 7.10.2 Use or attempted use by an athlete of a prohibited substance or a prohibited method

Under Article 2.2 WADC, each athlete is under a personal obligation to ensure that no prohibited substance or method is used or attempted to be used by him. Where an athlete is found to have used a prohibited substance or method, it is not necessary for the anti-doping organization to establish intent, fault, negligence or knowing use on the part of the athlete. Importantly, whether the athlete succeeds or fails in his use or attempted use of the prohibited substance or method is immaterial, so long as it can be proved that the prohibited substance or method was used or attempted to be used.[192] The use of a prohibited substance or method may be established by any reliable means, such as admissions by the athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the athlete's biological passport, or other analytical information, This includes reliable analytical data from the analysis of an A sample (without confirmation from an analysis of a B sample) or from the analysis of a B sample alone where the anti-doping organization provides a satisfactory explanation for the lack of confirmation in the other sample.

While it is relatively straightforward in practice to establish that an athlete has used a prohibited substance or method, the same cannot be said in relation to an allegation that an athlete has

188 'Bodybuilder Javaughn Dill Banned Until 2020' (*Bernews*, 2 February 2017) http://bernews.com/2017/02/former-mr-bermuda-banned-2020/.
189 CAS 2016/A/4662 *WADA v Caribbean Regional Anti-Doping Organization (RADO) & Alanzo Greaves*.
190 Justin Marville, 'Drug problem' (*Barbados Nation*, 17 December 2017) www.nationnews.com/nationnews/news/111120/drug.
191 Justin Marville, 'Second Sprint Tests Positive' (*Daily Nation Barbados*, 14 December 2017) www.nationnews.com/nationnews/news/110178/sprinter-tests-positive.
192 Article 2.2.2 WADC.

*attempted* to use a prohibited substance or method. This is because to satisfy its burden of proof that an athlete has attempted to use a banned substance or method, the anti-doping organization has to adduce evidence to prove intent on the athlete's part. This contentious requirement arose in the case of *Giuseppe Gibilisco v CONI.*[193] Here, the athlete, a professional pole vaulter, submitted to a doping test, in relation to which no prohibited substances were detected. However, the Italian military police force recorded, by wire-tapping, a conversation between a doctor, who was suspected of providing prohibited substances to athletes, and Gibilisco, at the doctor's office. In that conversation, the doctor and Gibilisco spoke, among other things, about diets, medicines and supplements and about Testovis, which is a product that contains testosterone, and about IG, a growth hormone. The anti-doping organization relied upon a number of factors, which it argued amounted to proof that the athlete attempted to use prohibited substances, including the fact that the athlete kept on calling the doctor even after having become aware that he was involved in doping matters; the fact that the athlete confessed that the doctor had advised him to take growth hormones; the fact that he had not communicated his visits at the doctor to his military superiors; and the terms of the conversation held between him and the doctor recorded at the doctor's office.

The athlete appealed the decision to render him ineligible for two years before the CAS. The CAS began by referring to the concept of 'attempt' as defined in Appendix 1 of the WADC, noting that it refers to purposely engaging in conduct that constitutes a *substantial step* in a course of conduct planned to culminate in the commission of an anti-doping rule violation, though there will be no actionable attempt if he renunciates the attempt prior to it being discovered by a third party not involved in the attempt. On the facts, the CAS found that although it was undisputed that the athlete visited the doctor on several occasions and did not disclose these visits to the military doctors, it was not proven, to its comfortable satisfaction, that the doctor prescribed to the athlete prohibited substances in any way. In addition, regarding the content of the conversation held in the doctor's office, the CAS felt that this did not provide conclusive evidence of an 'attempt' to use prohibited substances. Further, no medical prescription or other kind of document referring to prohibited substances and made out either by the doctor or by the athlete was ever found in the course of the investigations, and no other evidence showed conclusively the prescription of prohibited substances. Moreover, even though the athlete failed to provide a convincing explanation about the letters that appeared in his agenda, there was no conclusive evidence that could link such letters to doping substances or to doping programmes followed by him. The mere fact that similar (but not the same) letters had been found in the agendas of other athletes who admitted that these letters were related to doping practices could not by itself, in the CAS' opinion, be deemed sufficient to hold that the athlete was also following or intending to follow such doping practices. In short, according to the CAS, although some of the athlete's conduct raised doubts about the truthfulness of his statements (especially his calling on the doctor fully conscious of the fact that the doctor was involved in doping practices), there were not sufficient elements to determine that he attempted to use prohibited substances. The facts deemed as proven (individually or combined) could not be considered as conduct constituting a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation.

### 7.10.3 Evading, refusing or failing to submit to sample collection

Where an athlete evades sample collection or, without compelling justification, refuses or fails to submit to sample collection after notification, that person commits an anti-doping rule

193 CAS 2007/A/1426, award of 9 May 2008.

violation.[194] It is important to note that a violation for 'failing to submit to sample collection' may be based on either intentional or negligent conduct of the athlete, while 'evading' or 'refusing' sample collection contemplates intentional conduct by the athlete.

The CAS's jurisprudence to date demonstrates a zero-tolerance approach to countenancing the actions of athletes who unjustifiably evade or refuse or fail to submit to sample collection. In fact, the CAS has noted that the defence of a compelling justification is to be interpreted restrictively, so 'that, whenever physically, hygienically and morally possible, the sample must be provided despite objections by the athlete'.[195]

For example, in *WADA v Ivan Mauricio Casas Buitrago & Colombian Olympic Committee (COC)*[196] the athlete, a Columbian cyclist, never submitted to a urine test, notwithstanding the fact that his name was placed on a billboard at the finish line of a national race informing him that he was to provide a doping control urine sample. At the relevant time, the athlete had gone back to his hotel room, showered and urinated, and refused to submit to a urine sample collection even after the doping control officer went to the hotel and informed him that he should submit to a sample, though he signed the doping control form. The CAS held that because he was aware that he was selected for testing and had been advised to hydrate by the doping control officer, but still refused to provide a sample, apparently on the advice of his doctor, it was clear that there was no compelling justification present on the facts. He was accordingly subject to a two-year period of ineligibility.

Similarly, in *F v IOC*[197] an Hungarian discus thrower was requested, at 10:15pm, to report to the doping control station in order to provide a urine sample. The athlete arrived at the doping control station at 10:19 pm but, despite a plurality of attempts, lasting until 2:37 am the following day, the athlete could provide only a (partial) sample of 25 ml of urine. Although the athlete was given the opportunity to continue the sample collection at the village polyclinic, he refused to do so. Upon disciplinary proceedings being brought against the athlete, the athlete argued that he did not feel well at the time, that the DCO had behaved aggressively towards him, and that he experienced psychological trauma because two witnesses were present, while the applicable rules allow for only one witness. The CAS rejected the athlete's explanations, holding that he had deliberately refused to submit to a sample collection for subjective reasons that were totally irrelevant. More specifically, the CAS held that once the athlete was physically present at the doping control station, he could not invoke subjective reasons personal to himself to justify a refusal or inability to provide a urine sample, barring a compelling justification. On the facts, however, the CAS found that there was no such compelling justification. More specifically, the presence of two witnesses (instead of one) could not be invoked as a circumstance invalidating the entire doping sample collection procedure, and, in any event, 'aggressive' conduct on the part of the doping control staff during the doping control procedure was not established on the facts, though, in any case, such events were completely irrelevant. The CAS went even further to note that even if the circumstances at the time caused the athlete to experience 'urinary retention', this could not be invoked as an excuse not to continue the sample collection procedure at the village polyclinic, an arguably more comfortable environment. In short, there was no compelling justification for failing to submit to doping control at the village polyclinic, and therefore the athlete committed an anti-doping rule infringement, pursuant to Article 2.3 WADC.

On the question of evasion, as opposed to failing to submit to a test, the CAS has similarly adopted a robust approach, making it exceptionally hard for athletes to establish a 'compelling

194 Article 2.3 WADC.
195 CAS 2005/A/925 [75].
196 CAS 2013/A/3077, award of 4 December 2013.
197 CAS 2004/A/714, award of 31 March 2005.

justification' in their plight to be exonerated. This was aptly illustrated in the case of *Niksa Dobud v Fédération Internationale de Natation* (FINA).[198] Here, the DCO arrived at the athlete's address with a view to test the athlete and rang at the door at 6:44 am. The first person to open the door was the athlete's wife. After the DCO explained the purpose of his visit, she went back indoors. Shortly thereafter, a male individual came to the door; it was questionable whether that individual was the athlete or his brother-in-law, which was the issue central to the determination of the case. Around 8:00 am, the athlete's wife went again to the door and told the DCO that her husband was not at home and that the only other persons inside the flat were her brother and his wife. She did not allow the DCO to enter the apartment. Around 9:00 am, the athlete's wife opened the door again and told the DCO that unless they left she would call the police and her lawyer. Because of this threat, the DCO ceased trying to carry out a test collection.

The key issue in this case concerned whether the male person that the DCO saw at the athlete's flat was the athlete or his brother-in-law. If it was the athlete, then it would follow from what transpired thereafter that he evaded a test. However, if it was his brother-in-law, then – at the highest – the athlete had missed a test. On the evidence before it, the CAS held that the athlete had sought to evade the consequences of his test in a deceitful way. More specifically, the CAS considered that the athlete's wife waited a considerable amount of time, measurable in hours, not minutes, before going out for a last time to tell the DCO that her husband was not at home and threatening to call the police if the DCO did not leave. According to the CAS, the argument that this behaviour was prompted by her husband's actual absence lacked credibility, as it would have been much easier, in order to make the DCO leave, to have brought her brother to the door much earlier and pointed out that the latter was not the athlete. Further, no cogent explanation was given for the failure of the male individual, when told by the DCO that he had to undergo a doping test, to respond immediately and instinctively that he was not the athlete. The explanation actually proffered by the athlete's brother-in-law that he was afraid of the DCO and stayed hidden for about three hours while the DCO was ringing and knocking was considered by the CAS to be 'utterly unpersuasive'. In short, the CAS concluded that the family's motive to cover up test evasion by the athlete was obvious, since the athlete's reputation, his career and his ability to support his wife and child were all in jeopardy if he was found to have committed an anti-doping rule violation. In other words, the family's evidence was 'false, self-serving and coordinated'.[199] In any event, the regulations governing test evasion, according to the CAS, do not require the governing body to establish why an athlete may have evaded a test; only that he had in fact done so. For this reason, the athlete was held to have committed an anti-doping rule violation.

One of the rare instances in which the CAS was prepared to accept a 'compelling justification' for evading, refusing or failing to submit to a sample collection arose in the case of *WADA & IAAF v United States Anti-Doping Agency (USADA) & Lindsey Scherf*.[200] Here, the athlete, a then 21-year-old collegiate distance runner, was first diagnosed with exercise-induced asthma in 2003. She had applied for, and received, an abbreviated therapeutic use exemption ('ATUE') for her flovent asthma medication from the IAAF in 2005 and from USADA in 2006 and 2007. In January 2007, she travelled to Australia for a semester of study abroad. She decided to enter the Gold Coast Marathon. She was of the belief that if she ever entered an international competition she would require an ATUE from her international federation, so her father, on her behalf, contacted USADA and was advised that a separate IAAF ATUE would be needed, and that USADA would forward the athlete's application to the IAAF. More than nine weeks

198 CAS 2015/A/4163, award of 15 March 2016 (operative part of 15 January 2016).
199 Ibid [93].
200 CAS 2007/A/1416, award of 11 August 2007.

prior to the Gold Coast Marathon, the athlete applied for an ATUE from the IAAF for flovent. By late June 2007 the athlete had still not received word from the IAAF concerning the status of her applications. She diligently followed up with USADA since she understood that this agency had submitted the applications on her behalf. No information was provided to her or to USADA concerning the status of her TUE applications prior to the start of the Gold Coast Marathon. Unfortunately, she had contracted a serious throat and lung infection three weeks prior to the marathon race, which necessitated her using flovent.

On the advice of USADA's TUE coordinator, the athlete decided to check with officials responsible for the Gold Coast Marathon to determine if there would be drug testing. She had decided to continue taking her asthma medication due to her respiratory difficulties and had determined that she would not compete in the marathon if there was to be drug testing, unless her TUE was granted prior to the commencement of the race. She continued to communicate with race officials until the day of the marathon. She was advised that there had been no drug testing in the three previous years, and that it was highly unlikely that there would be a last-minute decision by the Australian Sports Anti-Doping Authority to carry out drug tests at this competition. She had decided that she would not run the race if so notified. After not receiving any further notification, the athlete ran the marathon and was the second female finisher. Shortly after finishing the race, she was advised that she had been selected for drug testing. She believed that the drug test would be positive for flovent and consulted her father in the United States as to what to do, who advised her that she would most likely face a two-year ban if she tested positive for flovent without an IAAF TUE. He thought that the penalty for refusing to provide a drug test might be less, and that the potential to straighten things out after the fact would be better for a refusal than it would be for a failed test. The athlete therefore decided that she would not submit to a drug test.

The Australian Sports Anti-Doping Authority (ASADA) subsequently notified the International Association of Athletes Federation (IAAF) of the athlete's refusal to submit to doping control. At the conclusion of the investigation, the relevant written documents, as well as a written report concerning the investigation were submitted to USADA's Anti-Doping Review Board (ADRB), and she was charged by USADA with a doping violation and notified that she could receive a period of ineligibility of up to two years. The athlete argued that she was at all times open, frank and honest in her dealings with USADA, and with the Gold Coast Marathon officials. She stated that, with the help of her father, she was doing her best to comply with the complicated and confusing TUE process, and contended that the criticism by the IAAF of her decision to submit her TUE applications through USADA was unfair in that this was a procedure encouraged by USADA and a procedure that she had followed when making previous applications. She also pointed out that USADA was in the business of anti-doping and yet it did not appreciate that she did not need a further TUE in order to compete in the Gold Coast Marathon. She submitted that it should not be expected that a 21-year-old athlete of limited international experience would completely understand rules that national anti-doping agencies have difficulty understanding.

The CAS heard evidence that the USADA did not email the supporting documents for the athlete's TUE application until just a few days prior to the 1 July 2007 marathon race, and accepted that the athlete had previously submitted her applications for a TUE to USADA and saw no reason to depart from that practice on the occasion in question. It also considered that the IAAF rules and procedures regarding the TUE application process were confusing even for those who have responsibility for those issues on a daily basis, and that the athlete naively believed that a race official would inform her of the certainty that drug testing would take place at the Gold Coast Marathon, and that her good faith in seeking such assurance would be respected. The CAS found that the errors made by the IAAF and by USADA placed the athlete

in somewhat of a quandary, and that her subsequent error in judgement was as a direct result of the errors made by agencies that should have provided better service to the athlete. For this reason, the CAS concluded that, given the exceptional circumstances of the case, the athlete's fault or negligence, when viewed in light of all the circumstances, was not significant in relation to her anti-doping rule violation. That said, the CAS strongly cautioned that,

> this is a rare case in which an athlete who has failed or refused to provide a sample will be able to satisfy a CAS Panel that the sanction is to be reduced on the ground of no significant fault or negligence. Such cases will not often occur.[201]

### 7.10.4 Whereabouts failures

Pursuant to Article 2.4 WADC, any combination of three missed tests and/or filing failures within a 12-month period by an athlete in a registered testing pool[202] constitutes an anti-doping rule violation. The specific modalities of such a violation are expressly dealt with by the International Standard for Testing and Investigations (ISTI).

Under the ISTI, an athlete who is in a registered testing pool is required:

(1) to make quarterly whereabouts filings that provide accurate and complete information about his or her whereabouts during the forthcoming quarter, including identifying where he/she will be living, training and competing during that quarter, and to update those whereabouts filings, where necessary, so that he/she can be located for testing during that quarter at the times and locations specified in the relevant whereabouts filing. It is the athlete's responsibility to ensure that he/she provides all the information required in a whereabouts filing accurately and in sufficient detail. Where an athlete does not know precisely what his/her whereabouts will be at all times during the forthcoming quarter, he/she must provide his/her best information, based on where he/she expects to be at the relevant times, and then update that information as necessary. The athlete must file the update as soon as possible after the circumstances change, and in any event prior to the 60-minute time slot specified in his/her filing for the day in question. A failure to do so may be pursued as a filing failure. An athlete cannot avail himself from this obligation by arguing that a third party in respect of whom he gave authorization to complete his whereabouts information failed to do so nor would an apparent emergency change in circumstances not reflected in an update to one's whereabouts information suffice.

This issue was considered in *JADCO v Andre Russell*.[203] Here, the Independent Anti-Doping Disciplinary Panel rejected an argument raised by Jamaican and West Indies cricketer, Andre Russell, that the reason for recording three filing failures in a 12-month period was because he had relied upon his agent to 'take over and deal with JADCO on a matter he did not fully understand'. The panel found that Russell had not fulfilled his personal responsibility under Article 2.4 WADC, and that 'the assignment of a delegate does not remove from the Respondent the responsibility' to comply with his obligations, and accordingly imposed a one-year period of

201 Ibid [53].

202 'Registered testing pool' means the pool of highest-priority athletes established separately at the international level by international federations and at the national level by national anti-doping organizations, who are subject to focused in-competition testing and out-of-competition testing as part of each international federation's or national anti-doping organization's test distribution plan and therefore are required to provide whereabouts information as provided in the code and the International Standard for Testing and Investigations.

203 *Independent Anti-Doping Disciplinary Panel* (decision of 31 January 2017).

ineligibility. Meanwhile, in *WADA v Comitato Olimpico Nazionale Italiano (CONI) & Alice Fiorio*,[204] the athlete, an Italian professional softball player, had failed to file her whereabouts information on two occasions thereby resulting in two filing failures being recorded against her. Subsequently, contrary to her whereabouts information, which stated that she would have been present at the campus of her softball club, she was not there. The CAS rejected the argument that an anti-doping rule violation should not have been recorded against her because she had gone to another area to see her doctor and had forgotten to update her whereabouts information as she was preoccupied with her physical state. Similarly, in *Karam Gaber v United World Wrestling (FILA)*,[205] the athlete, an Egyptian elite wrestler, had left his whereabouts filings incomplete on two separate occasions, thereby resulting in two separate filing failures being recorded against him. On the third occasion, the athlete provided inaccurate whereabouts information that did not allow the doping control officer to properly locate him. Although he had stated that he would have been in Cairo, he was actually in Alexandria. The CAS considered as insufficient the explanation advanced by the athlete that he had travelled to Alexandria in order to assist his wife who had been hospitalized. The CAS felt that this was not a 'justifiable and exceptional circumstance', and that, in any event, the failure of a third party, whom the athlete had asked to update his whereabouts information, to do as directed, was equally an insufficient explanation.

(2) to specify in his/her whereabouts filings, for each day in the forthcoming quarter, one specific 60-minute time slot where he/she will be available at a specific location for testing. This does not limit in any way the athlete's obligation to submit to testing at any time and place upon request by an anti-doping organization with testing authority over him/her, nor does it limit his/her obligation to provide the information as to his/her whereabouts outside that 60-minute time slot. However, if the athlete is not available for testing at such location during the 60-minute time slot specified for that day in his/her whereabouts filing, that failure may be declared a missed test. The purpose of the 60-minute time slot is to strike a balance between the need to locate the athlete for testing and the impracticality and unfairness of making athletes potentially accountable for a missed test every time they depart from their previously declared routine. That said, declarations such as 'running in the Black Forest' are insufficient and are likely to result in a filing failure. Similarly, specifying a location that the DCO cannot access (e.g. a 'restricted-access' building or area) is likely to result in a filing failure.

Procedurally, an athlete may only be declared to have committed a filing failure where the results management authority establishes each of the following:

(1) that the athlete was duly notified
   (a) that he/she had been designated for inclusion in a registered testing pool;
   (b) of the consequent requirement to make whereabouts filings; and
   (c) of the consequences of any failure to comply with that requirement;
(2) that the athlete failed to comply with that requirement by the applicable deadline; that is, where, the athlete does not make the necessary filing, or where he/she fails to update the filing or where he/she makes the filing or update, but does not include all of the required information in that filing or update; for example, if he/she does not include the place where he/she will be staying overnight for each day in the following quarter, or for each day covered by the update, or omits to declare a regular activity that he/she will be pursuing during the quarter, or during the period covered by the update or where he/she

204 CAS 2013/A/3241, award of 22 January 2014.
205 CAS 2015/A/4210, award of 28 December 2015.

includes information in the original filing or the update that is inaccurate (for example, an address that does not exist) or insufficient to enable the anti-doping organization to locate him/her for testing (e.g., 'running in the Black Forest');

(3) while a single whereabouts failure does not amount to an anti-doping rule violation under Article 2.4 WADC, in the case of a second or third filing failure (in the same quarter) that he/she must have been given notice of the previous filing failure, and (if that filing failure revealed deficiencies in the whereabouts filing that would lead to further filing failures if not rectified) was advised in the notice that in order to avoid a further filing failure, he/she must file the required whereabouts filing (or update) by the deadline specified in the notice (which must be no less than 24 hours after receipt of the notice and no later than the end of the month in which the notice is received) and yet failed to rectify that filing failure by the deadline specified in the notice. The objective of this requirement is to give the athlete notice of the first filing failure in the quarter and an opportunity to avoid a subsequent one, before a subsequent filing failure may be pursued against him/her for that quarter. But that is all that is required. In particular, it is not necessary to complete the results management process with respect to the first filing failure before pursuing a second filing failure against the athlete.

The importance of the results management organization giving adequate notice to an athlete of a whereabouts violation was considered in *Albert Subirats v Fédération Internationale de Natation* (FINA).[206] Here, the Venezuelan Swimming Federation had always forwarded the athlete's whereabouts forms to FINA on time, but on this occasion, it had not forwarded this information for three quarters, thereby resulting in three filing failures. FINA, in turn, had notified the Venezuelan Swimming Federation, but not the athlete, of the athlete's filing failures on three separate occasions. It appears that the Venezuelan Swimming Federation never forwarded these notices to the athlete, until after the third violation had already occurred. The CAS held that while it was the responsibility of the athlete to report the required whereabouts information to the FINA office and that delegating this duty to the Venezuelan Swimming Federation did not absolve him from his obligation,[207] the reality was that FINA never notified a filing failure communication to the athlete. In particular, FINA never sent the letters concerning the filing failures directly to the athlete, but only to the Venezuelan Swimming Federation. Accordingly, because the athlete did not receive any such communications before his third failure, he was left unaware of all filing failures until the third filing failure occurred and was not in a position to correct his actions. This meant that he had not, in reality, committed an anti-doping rule violation. Finally,

(4) that the athlete's failure to comply was at least negligent. The athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirements yet failed to comply with them. That presumption may only be rebutted by the athlete establishing that no negligent behaviour on his/her part caused or contributed to the failure.

It is instructive to note that three whereabouts failures by an athlete within any 12-month period[208] amount to an anti-doping rule violation of Article 2.4 WADC. More specifically, it

206 CAS 2011/A/2499, award of 24 August 2011.

207 Ibid. The CAS (at paragraph 10) pointed out that, 'an athlete who delegates such assignments to a third party must make sure that such third party effectively forwards the whereabouts information to the anti-doping organization on time. The rationale of such rule is quite obvious: no athlete shall be in position to somehow "hide" behind a third party, chosen by the athlete himself as a kind of personal "courier" (...) it shall not be a defense to an allegation of a filing failure under Clause 2.4 that the athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirement.'

208 The 12-month period starts to run on the date that an athlete commits the first whereabouts failure being relied upon in support of the allegation of a violation of Article 2.4 WADC. If two or more whereabouts

should be noted that the whereabouts failures may be any combination of filing failures and/or missed tests, adding up to three in total. This issue arose in *JADCO v Odean Brown*.[209] Here, two missed tests were recorded against the Jamaican cricketer in circumstances where he could not be found at the address indicated in his whereabouts information by the doping control officers on two separate occasions. Subsequently, he failed to submit his whereabouts information, resulting in a combination of two missed tests and one filing failure. Against this backdrop, the Jamaica Anti-Doping Disciplinary Panel rejected the athlete's reasons for missing the tests, namely that he had left for training to beat the traffic into Kingston, that it was difficult for him to update his whereabouts as cricketers often did not have precise details of where they would be staying when they travelled overseas and that his address had changed, imposing a 15-month period of ineligibility in the process.

With regard to a missed test, Article I.4.3 ISTI states that an athlete may only be declared to have committed a missed test violation where the authority can establish each of the following:

(1) that when the athlete was given notice that he had been designated for inclusion in the registered testing pool, he was advised that he would be liable for a missed test if he was unavailable for testing during the 60-minute time slot specified in his whereabouts filing at the location specified for that time slot;
(2) that a DCO attempted to test the athlete on a given day in the quarter, during the 60-minute time slot specified in the athlete's whereabouts filing for that day, by visiting the location specified for that time slot;
(3) that during that specified 60-minute time slot, the DCO did what was reasonable in the circumstances (i.e. given the nature of the specified location) to try to locate the athlete, short of giving the athlete advance notice of the test, but could not locate the athlete;
(4) that notice was given to the athlete after his or her first missed test before a subsequent (second) missed test may be pursued against him/her. But that is all that is required. In particular, it is not necessary to complete the results management process with respect to the first missed test before pursuing a second missed test against the athlete; and
(5) that the athlete's failure to be available for testing at the specified location during the 60-minute time slot was at least negligent. The athlete will be presumed to have been negligent upon proof of the above conditions. That presumption may only be rebutted by the athlete establishing that no negligent behaviour on his part caused or contributed to his failure to be available for testing at such location during such time slot, and to update his most recent whereabouts filing to give notice of a different location where he would instead be available for testing during a specified 60-minute time slot on the relevant day.

These conditions were held to have been satisfied in the case of *Christine Ohuruogu v UK Athletics Ltd (UKA) & International Association of Athletics Federations (IAAF)*.[210] Here, Ohuruogu, a professional athlete who specialized in the 400-metre track event, had missed three tests. On the first occasion, when the DCO went to the particular stadium at which she had indicated that she would have been, she was not there, as she had forgotten to update her schedule.

failures occur during the ensuing 12-month period, then an Article 2.4 WADC anti-doping rule violation is committed, irrespective of any samples successfully collected from the athlete during that 12-month period. However, if an athlete who has committed one whereabouts failure does not go on to commit a further two whereabouts failures within 12 months of the first, at the end of that 12-month period the first whereabouts failure 'expires' for the purposes of Article 2.4, and a new 12-month period begins to run from the date of his/her next whereabouts failure.

209 *Jamaica Anti-Doping Disciplinary Panel* (decision of 10 May 2016).

210 CAS 2006/A/1165, award of 3 April 2007.

On the second occasion when the DCO visited another location indicated by her, she was similarly not there, apparently because she could not get from where she was at the time to the testing area in time before the DCO had left. A third missed test was recorded after the DCO, on another occasion, visited the location indicated by the athlete, waited for an hour, but the athlete did not show up, apparently because her coach had instructed her to train elsewhere and she had forgotten to change her schedule. The CAS felt that this was a straightforward case in which the athlete had committed an anti-doping rule violation by virtue of missing three tests. She was accordingly declared ineligible for competition for one year. Quite instructively, the CAS pointed out that,

> the burden on an athlete to provide accurate and up-to-date whereabouts information is no doubt onerous. However, the anti-doping rules are necessarily strict in order to catch athletes that do cheat by using drugs and the rules therefore can sometimes produce outcomes that many may consider unfair. This case should serve as a warning to all athletes that the relevant authorities take the provision of whereabouts information extremely seriously as they are a vital part in the ongoing fight against drugs in the sport.[211]

### 7.10.5 Tampering or attempted tampering with any part of doping control

It is an anti-doping rule violation for an athlete to tamper or attempt to tamper with any part of the conduct of doping control in circumstances where this has the effect of subverting the doping control process.[212] Among other things, tampering includes intentionally interfering or attempting to interfere with a doping control official, providing fraudulent information to an anti-doping organization or intimidating or attempting to intimidate a potential witness. Additionally, it may also include a situation in which the athlete alters the identification numbers on a doping control form during testing, breaking the B bottle at the time of B sample analysis, or altering a sample by the addition of a foreign substance.

To establish that the athlete has tampered or attempted to tamper with any of the steps or processes that make up the doping control process, the anti-doping organization has the burden of establishing, to the comfortable satisfaction of the panel, that the athlete engaged in one or more of the actions specified in the definition of tampering. According to the CAS, all of the actions specified in the definition of tampering require *intent* and certain actions also require fraudulent conduct, or the intent to deceive, on the part of the person involved.[213] By way of example, the CAS imposed a lifetime ban on the athlete in *Rebecca Gusmao v Fédération Internationale de Natation (FINA)*,[214] in circumstances where the athlete colluded with a doctor to substitute her sample with that of a different person. The CAS held that tampering was particularly serious in this case because the athlete knew about the presence of testosterone, which she tried to hide by manipulation. In any event, it was not only the intake of testosterone that posed an issue, but also the additional effort to manipulate the doping control process either individually or in collusion with a doctor by substituting the samples. Unfortunately, the athlete did not assist the CAS in her defence by refusing to elucidate her doping offences, failing to explain how the testosterone entered her body and by failing to contribute to, in general, the fight against doping.

211 Ibid [21].
212 Article 2.5 WADC.
213 CAS 2013/A/3341 *WADA v Daniel Pineda Contreras & COC,* award of 28 May 2014.
214 CAS 2008/A/1572, 1632 & 1659, award of 13 November 2009.

### 7.10.6 Possession of a prohibited substance or a prohibited method

Under Article 2.6 WADC, where an athlete possesses, in-competition, any prohibited substance or method, that person commits an anti-doping rule violation. Similarly, where an athlete possesses, out-of-competition, any prohibited substance or any method that is prohibited out-of-competition, that person commits an anti-doping rule violation. An athlete will only be excused from committing an anti-doping rule violation under this provision where he has obtained a therapeutic use exemption ('TUE') or provides another acceptable justification.[215] However, 'acceptable justification' would not include, for example, buying or possessing a prohibited substance for the purposes of giving it to a friend or relative, except under justifiable medical circumstances where that person had a physician's prescription, e.g., buying insulin for a diabetic child.[216]

In order to establish a violation of Article 2.6 WADA, the anti-doping organization has the onus of proving, to the comfortable satisfaction of the panel, bearing in mind the seriousness of the allegations:

(1) the athlete had actual, physical possession of a prohibited substance or method; or
(2) the athlete had constructive possession of a prohibited substance or method, which means either:
    (a) the athlete had exclusive control over the premises in which a prohibited substance or method exists; or
    (b) the athlete knew about the presence of a prohibited substance or method and intended to exercise control over it.[217]

An interesting case, which illustrates the application of these principles, is that of *Johannes Eder, Martin Tauber and Jürgen Pinter v IOC*.[218] Here, three Austrian cross-country skiers had shared a private house, instead of the team's shared accommodation, during their participation in the 2006 Torino Winter Olympic Games. Tauber brought with him a device for measuring hemoglobin levels ('hemoglobinmeter') in relation to which the other athletes had both knowledge and access. As a result of an announcement that athletes could be subject to a protective ban, barring them from participating in the Games because of elevated levels of hemoglobin, Eder self-administered a saline infusion in order to reduce his hemoglobin values. Subsequently, the police raided the private house and found a number of implements, including the hemoglobinmeter, which Eder threw under his bed; an intravenous saline drip with needle used by Eder; Tauber had a hemoglobinmeter, microcuvettes for hemoglobin value testing, a significant quantity of single use and butterfly needles and an infusion pack; and Pinter had four used single-use syringes with tubing, showing traces of blood and a further five boxes of single-use syringes. The athletes' trainer was also found to have similar implements, among other things. Interestingly, other than the hemoglobinmeter, the athletes each claimed to have no knowledge of the items possessed by their fellow athletes or of the items found with their trainer.

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215 Similar rules apply under Article 2.6.2 WADC in the case of possession of a prohibited substance or method by an athlete support person.
216 Comment to Article 2.6 WADC.
217 CAS 2007/A/1290 *Roland Diethart v International Olympic Committee (IOC)*, award of 4 January 2008, [38]. Exclusive control of the prohibited substance or method, or the premises, in which it is found, is therefore not necessary to establish constructive possession.
218 CAS 2007/A/1286 *Johannes Eder v IOC*, CAS 2007/A/1288 *Martin Tauber v IOC*, CAS 2007/A/1289 *Jürgen Pinter v IOC*, award of 4 January 2008.

The Austrian Olympic Committee (AOC) declared each of the Appellants to be ineligible for all future Olympic Games, which resulted in an appeal before the CAS. The CAS rejected the athletes' view that it was a mere coincidence that they, living together in cramped accommodation, each arrived at the Games with different parts of a complete kit for the manipulation of hemoglobin levels. Further, there was evidence that Tauber's hemoglobinmeter was freely used by his fellow athletes in his bedroom. According to the CAS, each of the athletes constructively possessed those items found in the physical possession of their fellow athletes and of the trainer. In other words, each of them knew about those items and intended to exercise control over or use them if and when they wished to do so. While the CAS accepted that it would not be sufficient to justify a charge under Article 2.6.1 WADC if an athlete were merely in possession of, for example, one single syringe – even though such an item would be viewed suspiciously in the absence of a reasonable explanation or a recognized therapeutic use exemption ('TUE'), possession of a prohibited method, as in this case, was proved to its comfortable satisfaction, having regard to all the circumstances of the case, which collectively illustrated that the athletes were in possession, either physically or constructively, of items that would enable them to engage in a prohibited method, namely, intravenous infusions. Importantly, the CAS rejected the argument that, in addition to establishing actual or constructive possession, it was also necessary to establish the intent to use the prohibited method, since this anti-doping violation is proved simply by possession. The CAS also found it particularly telling that the athletes were unable to explain satisfactorily why the Austrian cross-country team chose to stay in a private shared house, rather than in the athletes' village, where they would have been subject to bag searches and a controlled environment that would have made infusions or transfusions virtually impossible.

Apart from the prohibited method, namely intravenous infusions, the CAS also found that it was likely that the athletes were in possession of an additional prohibited method, namely 'blood doping'. On the facts, a number of factors suggested that the athletes had engaged in blood doping, including the saline infusions administered by Eder; the traces of blood found both in the syringes and tubing of Pinter and also amongst the items found with the trainer; the significant usage of Tauber's hemoglobinmeter; the fact that the trainer knew about Eder's hemoglobin values; instructions given to the athletes' chalet to not let the doping control officers into their accommodations in the event of a doping control; and the blood-testing device found with the trainer, which suggested that blood from multiple sources had either been collected or stored.

With regard to the question of justification, the CAS indicated that only a TUE and 'other acceptable justification' would have been sufficient. It held that any items related to a prohibited method that are prescribed on the advice of a medical doctor should be the subject of a TUE and that 'other acceptable justification' is intended to cover situations in which emergency medical treatment is required, so that there is no opportunity to apply for a TUE. On the facts, however, none of the athletes had applied for a TUE in relation to the medical equipment that was found in their possession, and the explanations provided by them were overall unsatisfactory. More specifically, the CAS rejected Eder's self-assessment of diarrhoea in the absence of a physical examination by a medical practitioner, as well as the argument that the equipment was necessary because there had been insufficient medical personnel that were dedicated to the Austrian team at the Games. It also rejected the argument that they had feared that their high hemoglobin levels would put them at risk of a protective ban from competition during the Games, since none of them had previously received a protective ban. The athletes, against this backdrop, received a lifetime ban from participating in the Olympic Games.

### 7.10.7 Trafficking or attempted trafficking in any prohibited substance or prohibited method

Where an athlete traffics or attempts to traffic in any prohibited substance or method, that person commits an anti-doping rule violation under Article 2.7 WADC. Trafficking entails selling, giving, transporting, sending, delivering or distributing (or possessing for any such purpose) a prohibited substance or method (either physically or by any electronic or other means) by an athlete, athlete support person or any other person subject to the jurisdiction of an Anti-Doping Organization to any third party. However, this definition excludes the actions of *bona fide* medical personnel involving a prohibited substance used for genuine and legal therapeutic purposes or other acceptable justification, and does not include actions involving prohibited substances that are not prohibited in out-of-competition testing, unless the circumstances as a whole demonstrate such prohibited substances are not intended for genuine and legal therapeutic purposes or are intended to enhance sport performance.[219]

### 7.10.8 Administration or attempted administration

Where a person administers or attempts to administer to any athlete, in-competition, any prohibited substance or prohibited method, or administers or attempts to administer to any athlete, out-of-competition, any prohibited substance or any prohibited method that is prohibited out-of-competition, that person commits an anti-doping rule violation, in accordance with Article 2.8 WADC. The requirements of this provision would likely be satisfied where, for example, an athlete physically assists a fellow athlete or support staff member by providing equipment to him or her that is necessary for the administration of that prohibited method. In the absence of proof of physical assistance, a violation of this provision can also be established by what might be termed 'psychological assistance'. Psychological assistance, according to the CAS, covers any assistance that was not physical assistance, such as, for example, any action that had the effect of encouraging the violation.[220]

This provision not only covers situations where an athlete administers or attempts to administer a prohibited substance or method to another athlete, but also where a coach or trainer does so. Indeed, a coach of a team, registered with a national federation (NF), is deemed to have agreed, by his act of registering, to abide by the statutes and regulations (including the anti-doping regulations) of the NF. In addition, by virtue of being subject to the statutes and regulations of the NF, he is also bound by the rules of the international federation (IF). This was aptly illustrated in *FIFA v CFA & E. Eranosian*.[221] Here, Eranosian, a professional football coach of a Cypriot football club, had, at about one hour before the start of each game, given his football players two white round pills, which some of them took, while others did not. The coach, who had the pills in his jacket in a cylindrical box, told them that these pills were caffeine. A doping control was performed in respect of several of the club's athletes, and the samples of two players indicated the presence of oxymesterone, a prohibited substance.

The CAS held that the coach had administered pills that he had obtained from a source unrelated to the producer, and did not ask questions or conduct further investigations with a doctor or another reliable specialist, and, indeed, did not have the pills tested by an official laboratory. Those circumstances showed that he was extremely negligent, despite the fact that he

219 Appendix I WADC.
220 CAS 2007/A/1286 *Johannes Eder v IOC,* CAS 2007/A/1288*; Martin Tauber v IOC;* CAS 2007/A/1289 *Jürgen Pinter v IOC,* award of 4 January 2008, [65]–[66].
221 CAS 2009/A/1844 *FIFA v CFA & E. Eranosian,* award of 26 October 2010.

did not administer the pills secretly, but in full view of all the players and other coaching staff in the dressing room before the games, and even though he did not force anyone to take the pills. The CAS accordingly declared the coach ineligible for a period of four years.

### 7.10.9 Complicity

Under Article 2.9 WADC, it is an anti-doping rule violation to assist, encourage, aid, abet, conspire, cover up or do any other type of *intentional* complicity involving an anti-doping rule violation by another person. An anti-doping rule violation will be established where there is active, physical assistance, as is suggested by 'assisting', 'aiding', 'abetting' and 'covering up' or psychological assistance, as is suggested by 'encouraging'. The assistance rendered by the accessory must contribute to the anti-doping rule violation.

Article 2.9 WADC is very broad, and thus covers any anti-doping rule violation by various persons, including a coach or a support staff member, and is not limited to anti-doping rule violations committed by fellow athletes. Indeed, it captures situations where an athlete specifically conspires with other athletes who are engaged in an anti-doping rule violation, even if that athlete was unaware that other athletes were also involved in the network, which is referred to as 'horizontal complicity', as well as 'vertical complicity'. Vertical complicity arises where an athlete engages in an anti-doping rule violation that is facilitated by a coach or support staff, in circumstances where that coach or support staff also similarly facilitated the ADR violations of other athletes. In such a situation, an athlete may not positively know which other athletes are also engaging in anti-doping rule violations, but by his or her common utilization of the coach or support staff for improper means, that athlete is complicit in the anti-doping rule violations of those other athletes and also of the coach or support staff. Although 'complicity' is likely to involve some degree of knowledge on the part of the person alleged to be complicit, it is not necessary that that person knew all the people involved or all of the prohibited methods being used or possessed.

These sentiments were expressed in a case already referred to above, namely, *Johannes Eder, Martin Tauber and Jürgen Pinter v IOC*.[222] Here, the issue was whether or not each of the appellants assisted, encouraged, aided, abetted or covered up the possession violations of his fellow appellants in such a way as to contribute to causing his fellow appellants' possession violations. The CAS held that the IOC had proven to its comfortable satisfaction that each appellant met these standards, since there was a broad pattern of cooperation and common activity with the other athletes and with the coaches in the possession of the prohibited method of blood doping. More specifically, Tauber's provision of the hemoglobinmeter was key in the administration of the prohibited method; without that equipment, it would have been highly unlikely that the appellants could have engaged in this activity. Indeed, Tauber freely offered it to them for their use, and given the cramped nature of the appellants' accommodations, it was highly unlikely that Tauber could have been unaware of the use of his hemoglobinmeter by his fellow appellants or of the related equipment possessed by his fellow appellants. Regarding both Eder and Pinter, they too violated Article 2.9 WADC by engaging in the possession of a prohibited method and through this conduct encouraging and providing mental support to their fellow appellants in their possession of a prohibited method. The possession by each athlete of various equipment necessary to engage in blood doping and the pattern of cooperation in, for example, using the hemoglobinmeter, showed that each athlete did not engage in this activity alone, but rather did

222 CAS 2007/A/1286 *Johannes Eder v IOC,* CAS 2007/A/1288 *Martin Tauber v IOC,* CAS 2007/A/1289 *Jürgen Pinter v IOC,* award of 4 January 2008.

so as part of a common scheme to engage in the prohibited method. Even if the coach may have been the instigator of potential blood-doping practices, these practices would not have been possible had each appellant himself not engaged in the prohibited method or at least possessed the items that enabled him to do so. This involvement had the effect of making routine the practice within the team, so that the appellants were far more comfortable with, and less likely to reject, the practice. In short, the appellants were aware of the items that all of them collectively possessed, thereby rendering all the appellants in violation of Article 2.9 WADC through their participation in these activities and the resulting encouragement of the possession violations of their fellow appellants.

### 7.10.10 Prohibited association

Under Article 2.10 WADC, an athlete commits an anti-doping rule violation where he associates, in a professional or sporting capacity, with an athlete support person who is serving a period of ineligibility or who has been convicted or found in criminal, disciplinary or professional proceedings[223] to have engaged in conduct that would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such a person.

That said, in order for this provision to apply, it is necessary that the athlete has previously been advised in writing by an anti-doping organization with jurisdiction over the athlete, or by WADA, of the athlete support person's disqualifying status and the potential consequence of prohibited association and that the athlete can reasonably avoid the association. Where an association between an athlete and an athlete support personnel is found to exist, the burden rests on the athlete to establish that the association was not in a professional or sport-related capacity.

The rationale behind this provision is to ensure that athletes do not work with coaches, trainers, physicians or other athlete support personnel who are ineligible on account of an anti-doping rule violation or who have been criminally convicted or professionally disciplined in relation to doping. According to the WADC commentary on the provision, some examples of the types of association that are prohibited include obtaining training, strategy, technique, nutrition or medical advice; obtaining therapy, treatment or prescriptions; providing any bodily products for analysis; or allowing the athlete support person to serve as an agent or representative. In this context, it is important to note that a prohibited association can exist even where it does not involve any form of compensation having been provided by one party to the other.

## 7.11 THERAPEUTIC USE EXEMPTIONS (TUE)

Where a prohibited substance or its metabolites or markers are found in the sample of an athlete or he uses or attempts to use, possesses or administers or attempts to administer a prohibited substance or method, he can nonetheless be exempted from being considered to have committed an anti-doping rule violation if he has in his possession a therapeutic use exemption ('TUE'), granted in accordance with the International Standard for Therapeutic Use Exemptions (ISTUE).[224]

In practice, three different application routes exist for athletes wishing to obtain a TUE. The first involves a national-level athlete applying to his national anti-doping organization for

223 The disqualifying status of such a person shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed.

224 Article 4.4 WADC.

a TUE. If the national anti-doping organization denies the application, the athlete may appeal exclusively to the national-level appeal tribunal.[225] Second, an international-level athlete must apply to his international federation for a TUE.[226] If the athlete has already been granted a TUE by his national anti-doping organization for the substance or method in question, and that TUE meets the criteria discussed below in accordance with the ISTUE, the international federation *must* recognize it. It is only if the TUE granted by the national anti-doping organization does not meet the ISTUE criteria that the international anti-doping organization can refuse to recognize it, though it must do so promptly, stating reasons. Should this be the case, the athlete or national anti-doping organization has 21 days from the notification of such refusal to refer the matter to WADA for review. During this time, the TUE granted by the NADO remains valid for national-level competitions, but not for international competitions. If the matter is not referred to WADA for review, the TUE granted by the NADO becomes invalid after the 21-day review deadline expires.[227] It is, however, important to note that if the international federation refuses to recognize a TUE granted by a NADO only because medical records or other information are missing that are needed to demonstrate satisfaction with the criteria in the ISTUE, the matter should not be referred to WADA. Instead, the file should be completed and resubmitted to the international federation.[228]

Third, a major event organization may require athletes to apply to it for a TUE if they wish to use a prohibited substance or method in connection with the event. If the TUE is granted, it is effective for the event only.[229] However, where the athlete already has a TUE granted by his NADO or international federation, if that TUE meets the criteria set out in the ISTUE, the major event organization must recognize it. If the major event organization decides the TUE does not meet those criteria and so refuses to recognize it, it must notify the athlete promptly, explaining its reasons.[230] This decision may be appealed by the athlete exclusively to an independent body established or appointed by the major event organization for that purpose. If the athlete does not appeal (or the appeal is unsuccessful), he or she may not use the substance or method in question in connection with the event, but any TUE granted by his NADO or international federation for that substance or method remains valid outside of that event.

As a procedural matter, a decision by WADA to reverse a TUE decision may be appealed by the athlete, the national anti-doping organization and/or the international federation affected, exclusively to CAS.[231]

With regard to the criteria[232] that must be satisfied for the granting of a TUE, the athlete must show, on a balance of probability,[233] that each of the following conditions is met:[234]

(1) The prohibited substance or prohibited method in question is needed to treat an *acute or chronic medical condition*, such that the athlete would experience a *significant impairment to health* if the prohibited substance or method were to be withheld;

225 Article 4.4.2 WADC.
226 Article 4.4.3 WADC.
227 Article 4.4.3.2 WADC.
228 Note that if an International Federation chooses to test an athlete who is not an international-level athlete, it must recognize a tue granted to that athlete by his or her national anti-doping organization.
229 Article 4.4.4 WADC.
230 Article 4.4.4.2 WADC.
231 Article 4.4.8 WADC.
232 CAS 2013/A/3437 *ISSF v WADA*, award of 18 December 2014 (operative part of 4 August 2014). The CAS held that 'satisfaction of all the four criteria is a necessary ground precondition for the grant of a TUE. Nothing else will suffice for such a grant'.
233 CAS 2015/A/4355 *J. & ADD v IPC*, award of 26 May 2016.
234 Article 4.1 ISTUE.

(2) The therapeutic use of the prohibited substance or method is *highly unlikely to produce any additional enhancement of performance* beyond what might be anticipated by a return to the athlete's normal state of health following the treatment of the acute or chronic medical condition;

(3) There is *no reasonable therapeutic alternative* to the use of the prohibited substance or method; and

(4) The necessity for the use of the prohibited substance or method is not a consequence, wholly or in part, of the prior use (without a TUE) of a substance or method that was prohibited at the time of such use.

There are, however, circumstances where an athlete may apply for, and may be granted, a TUE *retroactively*, namely if:[235]

(1) Emergency treatment or treatment of an acute medical condition was necessary; or

(2) Due to other exceptional circumstances, there was insufficient time or opportunity for the athlete to submit, or for the therapeutic use exemption committee (TUEC) to consider, an application for the TUE prior to sample collection; or

(c) The national anti-doping organization has chosen to collect a sample from a person who is not an international-level or national-level athlete, and that person is using a prohibited substance or prohibited method for therapeutic reasons; or

(d) It is agreed by WADA and by the anti-doping organization to which the application for a retroactive TUE is or would be made that *fairness* requires the grant of a retroactive TUE.

Where a national anti-doping organization grants a TUE to an athlete, it must warn him/her in writing that that TUE is valid at the national level only, and that if the athlete becomes an international-level athlete or competes in an international event, that TUE will not be valid for those purposes, unless it is recognized by the relevant international federation or major event organization.[236] Thereafter, the national anti-doping organization should help the athlete to determine when he/she needs to submit the TUE to an international federation or major event organization for recognition, and should guide and support the athlete through the recognition process.

With regard to the TUE application process, it should be noted that, in principle, an athlete who needs a TUE should apply as soon as possible. For substances prohibited in-competition only, the athlete should apply for a TUE at least 30 days before his/her next competition, unless it is an emergency or exceptional situation. The athlete should apply to his/her national anti-doping organization, international federation and/or a major event organization (as applicable), using the TUE application form provided.[237]

The athlete should submit the TUE application form to the relevant anti-doping organization via the anti-doping administration and management system (ADAMS) or as otherwise specified by the anti-doping organization. The form must be accompanied by a statement by an appropriately qualified physician, attesting to the need for the athlete to use the prohibited substance or method in question for therapeutic reasons; and a comprehensive medical history, including documentation from the original diagnosing physician(s) (where possible) and the results of all examinations, laboratory investigations and imaging studies relevant to the application.[238] Any costs incurred by the athlete in making the TUE application and in supplementing it as required by the TUEC are the responsibility of the athlete.[239]

235 Article 4.3 ISTUE.
236 Article 5.5 ISTUE.
237 Article 6.1 ISTUE.
238 Article 6.2 ISTUE.
239 Article 6.6 ISTUE.

The TUEC would then decide whether or not to grant the application as soon as possible, and usually, unless exceptional circumstances apply, within not more than 21 days of receipt of a complete application.[240] Where a TUE application is made a reasonable time prior to an event, the TUEC must use its best endeavours to issue its decision before the start of the event. The TUEC's decision must be communicated in writing to the athlete and must be made available to WADA and to other anti-doping organizations via ADAMS or any other system approved by WADA.[241] Typically, a decision to grant a TUE must specify the dosage(s), frequency, route and duration of administration of the prohibited substance or prohibited method in question that the TUEC is permitting, reflecting the clinical circumstances, as well as any conditions imposed in connection with the TUE, while a decision to deny a TUE application must include an explanation of the reason(s) for the denial. In the event that, after his/her TUE is granted, the athlete requires a materially different dosage, frequency, route or duration of administration of the prohibited substance or prohibited method to that specified in the TUE, he/she must apply for a new TUE.[242]

Each TUE will have a specified duration, as decided by the TUEC, at the end of which the TUE will expire automatically. If the athlete needs to continue to use the prohibited substance or prohibited method after the expiry date, he/she must submit an application for a new TUE well in advance of that expiry date, so that there is sufficient time for a decision to be made on the application before the expiry date.[243]

Where an adverse analytical finding is issued shortly after a TUE for the prohibited substance in question has expired or has been withdrawn or reversed, the anti-doping organization conducting the initial review of the adverse analytical finding must consider whether the finding is consistent with the use of the prohibited substance prior to the expiry, withdrawal or reversal of the TUE. If so, such use (and any resulting presence of the prohibited substance in the athlete's sample) would not constitute an anti-doping rule violation.[244]

As a matter of practice, the CAS had repeatedly held that an athlete should not leave it to others to determine if he has a TUE, and must accordingly make personal inquiries himself.[245] It has also held that an athlete's failure to obtain the correct information on the requirements for exemption and the procedures to be followed in applying for a TUE is inexcusable.[246]

From a Caribbean perspective, it appears that while national anti-doping organizations have increased public education so as to raise awareness among athletes as to the requirements for applying for a TUE, a great deal of work still remains to be done, as evident by existing regional jurisprudence. For example, in *JADCO v Jason Livermore*,[247] the Jamaican athlete admitted using medications prescribed by his doctor, namely clomiphene-citrate and proviron, to treat a medical condition, but without first having obtained a TUE certificate. The athlete argued that he was unaware of the TUE process at the time of the doping tests and that he was of the view that as long as he disclosed to JADCO at the time of the sample testing the medication he was taking he would be absolved from liability, in particular since the drug was prescribed by a doctor. The independent anti-doping panel, however, rejected this argument, finding that although the athlete did not intend to cheat, he was negligent in not satisfying himself that the drugs were not prohibited substances and should have applied for a TUE certificate.

240 Article 6.7 ISTUE.
241 Article 6.8 ISTUE.
242 Article 6.12 ISTUE.
243 Article 6.9 ISTUE.
244 Article 6.11 ISTUE.
245 CAS 2015/A/4127 *Ian Chan v CWSA and CCES*, award of 11 December 2015.
246 CAS 2005/A/918 *K. v FIS*, award of 8 December 2005.
247 *Independent Anti-Doping Disciplinary Panel Jamaica* (decision no. 04 of 2017).

Although seemingly harsh, a similar decision was arrived at in *Simone Forbes v JADCO*,[248] a case in which the athlete, a seasoned Jamaican netballer, tested positive for clomiphene metabolites, a prohibited substance, in circumstances where she took a fertility drug to treat a medical condition that was incapacitating on a monthly basis. The Jamaica Anti-Doping Appeal Tribunal, while acknowledging the lack of intention to enhance performance on the athlete's part, nonetheless found that she had been negligent in not informing her team physician and in not asking her doctor about the drug's suitability for use as a national athlete. More fundamentally, for an elite athlete like her who was tested several times in the past, it was felt that she had a responsibility to apply for a TUE certificate before using the drug in question.

Although, on the face of it, it would appear from the decisions above that regional disciplinary tribunals such as the Jamaica Anti-Doping Disciplinary Panel and Appeals Tribunal have adopted a robust approach to cases in which athletes were negligent in not applying for TUE certificates, this has not arguably been the approach taken in every TUE-related case to date. Indeed, there has been some degree of inconsistency in a few cases. For example, in *JADCO v Ricardo Cunningham*,[249] the Jamaican athlete was tested positive for pseudoephedrine, a prohibited substance, in circumstances where he had taken panadol, cetamol cold and flu and DPH cough and cold to treat a persistent cold. The athlete wrongly believed that TUEs were associated with athletes who suffered from asthma. It was held that because the athlete did not intend to enhance performance, and given that it was his first violation, a reprimand and no period of ineligibility was appropriate. The independent anti-doping disciplinary panel, however, went on to caution that 'educational opportunities should be provided to ensure that athletes are properly informed of the Anti-Doping Rules, and, in particular, the use of the TUE facility, in situations where medication may be required for illnesses'.[250] Having regard to the glaring similarities between the *Simone Forbes* case and the *Cunningham* case, it is hard to rationalize how the panel could have arrived at the decision that Forbes should be subject to a three-month period of ineligibility while Cunningham was only subject to a reprimand. In both cases, both athletes had taken prescribed drugs that contained prohibited substances; both had been negligent to some degree in not ascertaining whether the prescribed drugs in fact contained prohibited substances; it was both athletes' first violation; and, fundamentally, both misunderstood the true nature of the TUE. For this reason, it would appear that the *Forbes* case, but not the *Cunningham* case, was correctly decided, since the circumstances in both cases warranted the imposition of a period of ineligibility, as opposed to a mere reprimand. Given the inconsistency between the two cases, however, one is left to wonder whether Forbes' monthly incapacitating pains, inherent to her femininity, was viewed as less worthy of being countenanced for sanctioning purposes than a man's temporary struggle with the cold.

## 7.12 THE RESULTS MANAGEMENT PROCESS

- Upon receipt of an adverse analytical finding,[251] the anti-doping organization responsible for results management will typically conduct a review to determine whether an applicable

248 *The Jamaica Anti-Doping Appeals Tribunal* (decision of 16 June 2011).
249 *Jamaica Anti-Doping Disciplinary Panel* (decision of 30 January 2013).
250 Ibid [26].
251 Different rules apply to atypical findings, which arise because of the presence of prohibited substances, which may be produced endogenously. here, upon receipt of an atypical finding, the anti-doping organization responsible for results management shall conduct a review to determine whether an applicable TUE has been granted or will be granted or there is any apparent departure from the International Standard for Testing and Investigations or International Standard for Laboratories that caused the atypical finding. If that review does not reveal an applicable TUE or departure that caused the atypical finding, the anti-doping

TUE has been granted or will be granted or there was an apparent departure from the International Standard for Testing and Investigations or International Standard for Laboratories that caused the adverse analytical finding;

- The anti-doping organization must also refer to ADAMS or another system approved by WADA and contact WADA and other relevant anti-doping organizations to determine whether any prior anti-doping rule violation in respect of the athlete exists;
- If no applicable TUE or entitlement to a TUE or departure that caused the adverse analytical finding is found, the anti-doping organization must promptly notify the athlete of the adverse analytical finding; the anti-doping rule violated; and the athlete's right to promptly request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived; the scheduled date, time and place for the B sample analysis if the athlete or anti-doping organization chooses to request an analysis of the B sample; the opportunity for the athlete and/or the athlete's representative to attend the B sample opening and analysis within the time period specified in the International Standard for Laboratories, if such analysis is requested; and the athlete's right to request copies of the A and B samples laboratory documentation package which includes information as required by the International Standard for Laboratories;
- Where there is an adverse analytical finding for *specified substances*, contaminated products, or other anti-doping rule violations, the athlete must be offered the opportunity to accept a provisional suspension pending the resolution of the matter;
- Whether it is before the imposition of the provisional suspension or on a timely basis after imposition of the provisional suspension, the athlete must be given the opportunity for a provisional hearing or an expedited hearing;
- At the provisional/expedited hearing, the athlete who is subject to a mandatory provisional suspension (that is, one in relation to which there is an anti-doping rule violation in respect of a *substance other than a specified substance*) may request that such mandatory provisional suspension be eliminated, which may be granted if the athlete demonstrates to the hearing panel that the violation is likely to have involved a contaminated product;
- The anti-doping organization must then provide a fair hearing within a reasonable time by a fair and impartial hearing panel. The right to a hearing may, however, be waived either expressly or by the athlete's or other person's failure to challenge an anti-doping organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the anti-doping organization's rules;
- The panel must issue, in a timely manner, a reasoned decision specifically including an explanation of the reason(s) for any period of ineligibility, which is typically publicly disclosed;
- anti-doping organizations may, upon receipt of the reasoned hearing decision, appeal this decision under appropriate circumstances;
- The appeal tribunal or, in some cases, the CAS would hear the matter and make a determination.

It is important to note that any period of provisional suspension imposed on, or voluntarily accepted by, the athlete until the date of the final award will be credited against the total period

organization must conduct the required investigation. After the investigation is completed, the athlete and other anti-doping organizations must be notified whether or not the atypical finding will be brought forward as an adverse analytical finding. The anti-doping organization may conduct the B sample analysis after notifying the athlete, with such notice to include a description of the atypical finding.

of ineligibility to be served.[252] However, this only arises where the athlete actually respected the provisional suspension imposed. If, for example, as in *WADA v Damar Robinson & JADCO*,[253] the athlete participates in competitions organized by a national-level event organization, this amounts to a failure to respect the provisional suspension, and thus no credit will be given. In *Robinson's* case, although he had respected approximately half of the provisional suspension, he did not respect it in its entirety and the CAS accordingly found that he could not receive credit for the provisional suspension.

## 7.13 CONSEQUENCES OF ANTI-DOPING RULE VIOLATIONS

If an individual obtains any medals, points or prizes in consequence of winning in an individual sport, but it is later revealed that he has committed an anti-doping rule violation after an in-competition test, the results (and any medals, points or prizes) obtained in that competition will be subject to automatic disqualification.[254] In principle, where such an athlete had participated in a team sport, any medals, points or prizes received by the individual players comprising the team will also be disqualified upon the recording of an adverse analytical finding, as recently transpired when Usain Bolt and other 4x100 metre team members had their gold medals, won at the 2008 Beijing Olympics, taken from them as a result of Nesta Carter's adverse analytical finding.

Additionally, an athlete who produces a positive sample for a prohibited substance or method may be subject to the automatic disqualification of results obtained in the competition[255] as well as in all other competitive results obtained from the date of the positive sample through the commencement of the provisional suspension or ineligibility period.[256] Disqualification of competition results invariably also means forfeiture of any medals, points and prizes won in said competitions. On a wider scale, another sanction which could be imposed is that of disqualification of results obtained in an event[257] in relation to which an anti-doping rule violation had occurred. In such a case, the athlete's individual results obtained in the event, as well as all medals, points and prizes will be forfeited, unless it is demonstrated by the athlete that he bears no significant fault or negligence for the violation.[258] In that event, the athlete's results and associated medals, points and prizes may not be subject to disqualification both in respect of the event in question as well as events completed in other competitions.

Where a prohibited substance or method is found in an athlete's sample (Article 2.1 WADC), or where he has used or attempted to use (Article 2.2 WADC) or possesses (Article 2.6 WADC) such a substance or method, that person is subject to a period of ineligibility of four years, depending on the circumstances of the case. More specifically, if a non-specified

252 Article 10.11.3 WADC.
253 CAS 2014/A/3820, award of 14 July 2015.
254 Article 9 WADC.
255 Note the definition of 'competition' in Appendix 1 WADC. 'Competition' means a single race, match, game or singular sport contest. For example, a basketball game or the finals of the Olympic 100-metre race in athletics. For stage races and other sport contests where prizes are awarded on a daily or other interim basis the distinction between a competition and an event will be as provided in the rules of the applicable international federation.
256 Article 10.8 WADC.
257 Note definition of 'event' in Appendix 1 WADC. 'Event' means a series of individual competitions conducted together under one ruling body (e.g., the Olympic Games, FINA World Championships, or Pan American Games).
258 Article 10.1 WADC. Factors to be included in considering whether to disqualify other results in an event might include, for example, the seriousness of the athlete's anti-doping rule violation and whether the athlete tested negative in the other competitions.

substance is in issue, the four-year period of ineligibility will inevitably be imposed, unless the athlete establishes that the anti-doping rule violation which he has committed was not intentional.[259] While the burden of proof is on the athlete in the case of a non-specified substance to prove that the anti-doping rule violation is not intentional, the burden is on the anti-doping organization to prove that an athlete who has committed an anti-doping rule violation in relation to a specified substance acted intentionally, should it wish to impose a four-year period of ineligibility.[260] If the athlete, whether in respect of a specified or non-specified substance, has not acted intentionally, the ordinary period of ineligibility ought to be two years, though this can be eliminated or reduced in appropriate circumstances, as discussed below.[261]

To avoid misunderstanding between sportspersons and organizations as to the appropriate sanction to be imposed, the WADC has provided a definition of the term 'intentional'. According to Article 10.2.3 WADC, this term seeks to identify those athletes who cheat. The term, therefore, requires that the athlete or other person engaged in conduct that he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. Under the WADC, it is presumed, unless rebutted, that if an athlete tests positive for a specified substance that is prohibited in-competition only, such as marijuana, that he had not acted intentionally, providing that he can establish that he had used the substance out-of-competition. The same principle applies in respect of non-specified substances, where the athlete can establish that the prohibited substance was used out-of-competition in a context unrelated to sport performance.[262]

Where an athlete evades, refuses or fails to submit to a sample collection (Article 2.3) or tampers or attempts to tamper with any part of doping control (Article 2.5), that person will be subject to a four-year period of ineligibility, unless, in so far as he fails to submit to a sample collection, he can establish that this was not intentional, in which case he may be subject to a two-year period of ineligibility.[263]

By contrast, where an athlete commits a whereabouts violation (that is, a combination of three missed tests and/or filing failures within a 12-month period under Article 2.4 WADC), that person will be subject to a two-year period of ineligibility, subject to a reduction to a minimum of one year, depending on the athlete's degree of fault.[264] That said, the flexibility between two years and one year of ineligibility under Article 10.3.2 WADC is not available to athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the athlete was trying to avoid being available for testing.

With respect to trafficking or attempted trafficking in any prohibited substance or method (Article 2.7) or the administration or attempted administration to any athlete of any prohibited substance or method (both in and out of competition, respectively under Article 2.8 WADC), the period of ineligibility is, at a minimum, four years up to lifetime ineligibility, depending on the seriousness of the violation. Thus, where such a violation involves a minor, this is considered to be a particularly serious violation and, if committed by athlete support personnel in respect of violations other than for specified substances, this will result in lifetime ineligibility for the athlete support personnel.[265] This is, of course, in addition to the sanctions associated with the

259 Article 10.2.1.1 WADC.
260 Article 10.2.1.2 WADC.
261 Article 10.2.2 WADC.
262 Article 10.2.3 WADC.
263 Article 10.3.1 WADC.
264 Article 10.3.2 WADC.
265 Article 10.3.3 WADC.

*Table 7.1* Table on sanctions for various anti-doping rule violations

| *Anti-doping rule violation provision* | *Nature of anti-doping rule violation* | *Sanction* | *Sanctioning provision* |
|---|---|---|---|
| Article 2.1 WADC | Presence of a prohibited substance or its metabolites or markers in an athlete's sample | • If non-specified substance, four years ineligibility, unless the athlete establishes that the anti-doping rule violation which he has committed was not intentional, in which case it is a two-year period of ineligibility, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6.<br>• If specified substances, four years ineligibility unless the anti-doping organization can prove that the athlete acted intentionally. In the absence of proof of intention, it is a two-year period of ineligibility, subject to potential elimination, reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6. | Art. 10.2.1.1 WADC<br>Art. 10.2.2 WADC<br>Art. 10.2.1.2 WADC |
| Article 2.2 WADC | Use or attempted use by an athlete of a prohibited substance or a prohibited method | • If non-specified substance, four years ineligibility unless the athlete establishes that the anti-doping rule violation which he has committed was not intentional in which case it is a two-year period of ineligibility, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6.<br>• If specified substance, four years ineligibility, unless the anti-doping organization can prove that the athlete acted intentionally. In the absence of proof of intention, it is a two-year period of ineligibility, subject to potential elimination, reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6. | Art. 10.2.1.1 WADC<br>Art. 10.2.2 WADC<br>Art. 10.2.1.2 WADC |
| Article 2.3 WADC | Evading, refusing or failing to submit to sample collection | • Four-year period of ineligibility unless, in so far as he fails to submit to a sample collection, the athlete can establish that this was not intentional, in which case, he may be subject to a two-year period of ineligibility.<br>NB: Article 10.5 may be applicable to reduce the sanction if there is no significant fault/negligence, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable. | Art. 10.3.1 WADC |
| Article 2.4 WADC | Whereabouts failures | • Two-year period of ineligibility, subject to reduction to a minimum of one year, depending on the athlete's degree of fault.<br>NB: the flexibility between two years and one year of ineligibility under Article 10.3.2 WADC is not available to athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the athlete was trying to avoid being available for testing. | Art. 10.3.2 WADC |

| | | | |
|---|---|---|---|
| | | NB: Article 10.5 may be applicable to reduce the sanction if there is no significant fault/negligence, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable.<br>NB: Article 10.6 may be applicable in respect of a further reduction of sanction. | |
| Article 2.5 WADC | Tampering or attempted tampering with any part of doping | • Four-year period of ineligibility.<br>• NB: Article 10.6 may be applicable in respect of the reduction of sanction. | Art 10.3.1 WADC |
| Art. 2.6 WADC | Possession of a prohibited substance or a prohibited method | • If non-specified substances, four years ineligibility, unless the athlete establishes that the anti-doping rule violation that he has committed was not intentional, in which case it is a two-year period of ineligibility, subject to potential reduction or suspension pursuant to Articles 10.4,10.5 or 10.6.<br>• If specified substances, four years ineligibility, unless the anti-doping organization can prove that the athlete acted intentionally. In the absence of proof of intention, it is a two-year period of ineligibility, subject to potential elimination, reduction or suspension pursuant to Articles 10.4,10.5 or 10.6. | Art. 10.2.1.1 WADC<br>Art 10.2.2 WADC<br>Art. 10.2.1.2 WADC |
| Art. 2.7 WADC | Trafficking or attempted trafficking in any prohibited substance or prohibited method | • At a minimum four years up to lifetime ineligibility, depending on the seriousness of the violation.<br>NB: where such a violation involves a minor, this is considered to be a particularly serious violation and, if committed by athlete support personnel for violations other than for specified substances, will result in lifetime ineligibility for athlete support personnel.<br>NB: Sanction imposed here is in addition to the sanctions associated with the violation of non-sporting laws and regulations, as imposed by competent administrative, professional or judicial authorities.<br>• NB: Article 10.6 may be applicable in respect of the reduction of sanction. | Art. 10.3.3 WADC |

(*Continued*)

*Table 7.1* (Continued)

| *Anti-doping rule violation provision* | *Nature of anti-doping rule violation* | *Sanction* | *Sanctioning provision* |
|---|---|---|---|
| Art. 2.8 WADC | Administration or attempted administration to any athlete in-competition of any prohibited substance or prohibited method, or administration or attempted administration to any athlete out-of-competition of any prohibited substance or any prohibited method that is prohibited out-of-competition | • At a minimum, four years up to lifetime ineligibility, depending on the seriousness of the violation.<br>NB: where such a violation involves a minor, this is considered to be a particularly serious violation and, if committed by athlete support personnel for violations other than for specified substances, will result in lifetime ineligibility for athlete support personnel.<br>NB: Sanction imposed here is in addition to the sanctions associated with the violation of non-sporting laws and regulations, as imposed by competent administrative, professional or judicial authorities.<br>NB: Article 10.6 may be applicable in respect of the reduction of sanction. | Art. 10.3.3 WADC |
| Article 2.9 WADC | Complicity | • A minimum of two years, up to four years, depending on the seriousness of the violation.<br>NB: Article 10.6 may be applicable in respect of the reduction of sanction. | Art. 10.3.4 WADC |
| Article 2.10 WADC | Prohibited association | • Two years, subject to reduction to a minimum of one year, depending on the athlete or other person's degree of fault and other circumstances of the case.<br>NB: Article 10.5 may be applicable to reduce the sanction if there is no significant fault/negligence, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable.<br>NB: Article 10.6 may be applicable in respect of a further reduction of sanction. | Art. 10.3.5 WADC |

violation of non-sporting laws and regulations, as imposed by competent administrative, professional or judicial authorities.

Finally, where an athlete is complicit in the commission of an anti-doping rule violation (Article 2.9 WADC), the period of ineligibility imposed is a minimum of two years, up to four years, depending on the seriousness of the violation.[266] Meanwhile, if an athlete is found to have had a prohibited association (Article 2.10 WADC), that person will be subject to a period of ineligibility of two years, subject to reduction to a minimum of one year, depending on the athlete or other person's degree of fault and other circumstances of the case.[267]

## 7.14 THE FLEXIBLE SANCTIONS REGIME

In an effort to militate against the harshness of the strict liability regime described earlier, the WADC provides for a flexible sanctions regime in respect of which an athlete may benefit from either an elimination or reduction of the otherwise applicable period of ineligibility where the circumstances so warrant.

### 7.14.1 Elimination of sanctions

If an athlete or other person establishes that there is no fault or negligence in respect of an alleged anti-doping rule violation, that person could benefit from the elimination of the otherwise applicable period of ineligibility under Article 10.4 WADC. Although the CAS has indicated that the threshold for satisfying 'no fault or negligence' ought not to be placed too high or too low,[268] the athlete or other person must nonetheless establish that he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he had used or been administered the prohibited substance.[269]

The CAS jurisprudence to date confirms that, in order to succeed in proving no fault or negligence, the athlete or other person must first establish, on a balance of probability,[270] how the prohibited substance entered his body and, second, that he did not intend to enhance his sporting performance, to the comfortable satisfaction of the panel.[271] Naturally, these requirements work in tandem with the degree of fault or negligence (or lack thereof) that could be attributed to the athlete or other person; if no such fault or negligence could be attributed to him, then he could benefit from an elimination of the otherwise applicable period of ineligibility.

The requirement to prove how the prohibited substance entered the person's body is an essential first step in this analysis; failure to satisfy this condition is fatal to a tribunal countenancing a request for the elimination of, or indeed, a reduction of, an otherwise applicable period of ineligibility. For example, in *Allison Randall v JADCO*,[272] the Jamaican athlete proffered three explanations as to how the prohibited substance, hydrochlorothiazide (HCTZ), entered her body, namely 'I have no idea how I could have ingested the banned substance'; 'through contamination', that is, the company from which she obtained her regular supply of Animal

266 Article 10.3.4 WADC.
267 Article 10.3.5 WADC.
268 CAS 2005/A/847 *Hans Knauss v FIS*, award of 20 July 2005 [16].
269 CAS 2014/A/3559 *Alexandra Georgiana Radu v RNADA*, award of 3 December 2014.
270 CAS 2006/A/1067 *IRB v Jason Keyter*, award of 13 October 2006 [7]; CAS 2016/A/4662 *WADA v Caribbean Regional Anti-Doping Organization (RADO) & Alanzo Greaves* [36].
271 CAS 2016/A/4416 *FIFA v CONMEBOL & Brian Fernández*, award of 7 November 2016 (operative part of 8 July 2016).
272 *Jamaica Anti-Doping Appeal Tribunal* (decision of 1–2 October 2014).

Pak and Animal Omega also produced Animal Cut, which contained a diuretic complex, so she assumed that it was possible that her supplement may have been contaminated given that all three products were made by the same company; and 'mislabeling of her usual supplements'. The Jamaica Anti-Doping Appeals Tribunal, however, rejected her argument that she was entitled to an elimination of sanction under Article 10.4 of the JADCO Anti-Doping Rules on the basis that her endeavour to establish how HCTZ entered her body could be categorized as 'no higher than mere speculation'. In other words, her contention of contamination was an assumption because she had not put forward factual circumstances in which the prohibited substance entered her body, and, in any event, none of her three explanations had any probative value.

Similarly, in *WADA v Caribbean Regional Anti-Doping Organisation & Alanzo Greaves*,[273] leading Guyanese cyclist, Alanzo Greaves, was charged with the presence in his sample of testosterone, a prohibited substance. Throughout the proceedings, he did not challenge this finding, or the presence of testosterone of exiguous origin in his body, and in fact accepted that it was there, but advanced the argument that he was informed by one of his friends who was present at a local bar that another of his friends had put the drug proviron in his glass when he visited the gents, without his knowledge, which allegedly accounted for the banned substance. The CAS, however, considered that the athlete's attempted explanation that the prohibited substance was ingested by him in ignorance in a drink spiked with proviron by an unidentified 'friend' on a social occasion was 'unparticularised' and unsupported by actual evidence. More specifically, it held that the athlete had failed to discharge his burden of proof by failing to identify the place, time or witnesses to the alleged spiking of his drink; the 'friend' who allegedly did it, why, how and when he obtained the alleged proviron that he used; or the 'friends' who told him; and when and how he was told this happened. If the CAS were to have accepted his argument, it was felt that this would 'drive a coach-and-horses through the WADC and similar anti-doping measures and amount to a license to cheat and an abject surrender in the battle against doping'.[274] In imposing a four-year period of ineligibility, the CAS opined that,

> to establish the origin of the prohibited substance, it is not sufficient for an athlete merely to protest their innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which the athlete was taking at the relevant time. Rather, an athlete must adduce actual evidence to demonstrate that a particular supplement, medication or other product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.[275]

Even a cursory review of the relevant CAS jurisprudence on Article 10.4 WADC reveals that it is only in the most exceptional circumstances that an athlete or other person would be able to establish no fault or negligence, even where quite reasonable explanations are proffered. For example, in *FIFA v CONMEBOL & Brian Fernández*,[276] a professional Argentinian football player had tested positive for the prohibited substance cocaine and its metabolites, which were prohibited in-competition only. He did not suggest an accidental or involuntary ingestion of the drug, but rather, that he took cocaine voluntarily because he had a difficult childhood and, in particular, went through a very difficult phase in his life at the time of sample collection. While the CAS ultimately reduced his sanction under Article 10.5 WADC, it refused to countenance his arguments that he was entitled to an elimination of the otherwise applicable sanction under

273 CAS 2016/A/4662.
274 Ibid [40].
275 Ibid [37].
276 CAS 2016/A/4416, award of 7 November 2016 (operative part of 8 July 2016).

Article 10.4 WADC, on the basis that he had not exercised utmost caution in the circumstances, since he had deliberately ingested a banned substance. Though sympathetic to the fact that his father, who had a drug problem himself, exercised a bad influence on him when he reappeared with his entourage in the athlete's life, thereby resulting in the athlete's wife and child leaving, the CAS reiterated that it is only exceptional circumstances that could justify an elimination of sanction, which did not arise on the facts.

Similarly, in *Ian Chan v CWSA and CCES*,[277] a four-time Canadian Paralympian was a paraplegic who suffered from numerous medical issues, including depression, and experienced severe pains, spasticity, abscesses and pressure sores, for which he took a variety of medications. Upon his return from a Japanese event, he learned that he had lost his entire life savings on a bad investment. Facing the loss of this money, as well as suffering from some lows in competition, the athlete felt his prescription for oxycodone was insufficient, or too weak, which resulted in him obtaining 'street oxys' from a friend whom he trusted. Such friend was not licensed to dispense the product, and the athlete was unaware as to the source of the pills. The pills came in a prescription bottle and, while he was aware that the bottle bore his friend's name, he did not read the label or determine what the prescription dosage was for the pills. The athlete tested positive for the banned substances, fentanyl and oxycodone, both narcotic substances, and sought to rely on Article 10.4 WADC for an elimination of the otherwise applicable sanction. While the CAS acknowledged that there are circumstances when the elimination of the otherwise applicable period of ineligibility might be possible, for example, where addiction or substance abuse or depression made the athlete not responsible for his actions and such a finding is supported by persuasive evidence and likely expert opinion, this was not the case on the facts of the instant case. In short, because of the total lack of evidence presented by the athlete to support his contention that because of his condition he was not at fault in respect of the commission of the anti-doping rule violation, the CAS refused to grant an elimination of sanction, and, even further, refused to grant a reduction of sanction under Article 10.5 WADC, on the basis that the athlete had deliberately exceeded the prescribed dosage and engaged in acquiring more oxycodone than his prescription provided for.

In similar vein, in *Ryan Napoleon v FINA*,[278] the CAS refused to grant an elimination or reduction of sanction in circumstances where the athlete, a 20-year-old Australian professional male swimmer who had a history of asthma attacks, was found to have committed an anti-doping rule violation after taking his father's mislabelled inhaler,[279] which contained a prohibited substance, instead of his, as both inhalers were stored in the same cupboard. The CAS, while recognizing the unfortunate circumstances of the case, nonetheless refused to grant an elimination or, indeed, reduction of the otherwise applicable period of ineligibility on the ground that the athlete had not exercised 'utmost caution'. Indeed, the CAS went further by noting that the involvement of a third party, the pharmacist, who had wrongly labelled the inhaler dispensed to his father, which he subsequently used, was immaterial and not considered as qualifying under 'exceptional circumstances' to warrant the elimination of the otherwise applicable period of ineligibility. In any event, the CAS felt that the different colours of the bases of the inhalers provided a means of differentiating the inhalers, and this supported the finding of negligence on the part of the athlete.

Another interesting illustration of the high threshold that must be satisfied in order to benefit from an elimination of sanction under Article 10.4 WADC is the case of *James Armstrong*

277 CAS 2015/A/4127, award of 11 December 2015.
278 CAS 2010/A/2216, award of 22 December 2010.
279 Ibid. The father's inhaler had been incorrectly labelled by the dispensing pharmacist and was in fact another type of asthma medication, Symbicort 400, which contained Formoterol.

*v WCF*.[280] Here, the athlete's sample revealed the presence of tamoxifen, a banned substance. The athlete argued that he should benefit from an elimination of sanction on the basis of the circumstances of his case. More specifically, the athlete noted that his wife of 30 years was diagnosed with stage 4 breast cancer, and that one of the many medications that his deceased wife was prescribed to treat her cancer was tamoxifen. He pointed out that, after his wife's death, he sold the family home and moved from British Columbia to Ontario. To prepare for the move, he placed many household items in storage, including a box of many of his own medications as well as many of the prescription medications belonging to his late wife. As the appellant became short on medications, he looked to his older medications in the storage box, which had been unwittingly contaminated by an old medication of his deceased wife. It was uncontested that the tamoxifen and ASA 81 mg (a substance prescribed to him for the last six years) were virtually identical in size, shape, colour and texture, such that he could have easily mistaken one pill for the other. Notwithstanding this, however, the CAS found that storing his own medicine together with the medicine of his wife in a box and also in reusing containers of tamoxifen did not constitute an exercise of 'utmost caution'. It noted that it should have been more than obvious to the athlete that the medicine could have been easily mistaken, which should have necessitated him taking caution. Added to this, the appellant was a health professional and an elite athlete for many years, which meant that he should have exercised much more caution in handling medicine which was prohibited in his sport. That said, although the athlete could not benefit from an elimination of sanction, he nonetheless qualified for a reduction of sanction on the basis of the fact that his wife had only recently died and he had to deal with the complications of his move on his own, as well as the fact that he became the victim of his own mistake in putting pills of size, shape and colour identical to his own medication into the same box/container, which appeared to have been caused by his state of emotional stress.

Notwithstanding the seemingly high, if not impossible, threshold that must be satisfied in order for an athlete to successfully rely on Article 10.4 WADC, there have been a few cases in which elimination of sanction has been granted. By way of example, in *International Tennis Federation v Richard Gasquet*,[281] a tennis player who had tested positive in-competition for cocaine was able to successfully establish that the contamination with cocaine resulted from kissing a girl he had met the night before the doping control. The CAS came to the conclusion that 'by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence'.[282] Similarly, in *P v IIHF*[283] the CAS granted an elimination of sanction in circumstances where the athlete, a Ukrainian professional ice hockey player, was body checked by a player of the opposite team during a championship game resulting in him hitting the boards so hard that he had to be taken off the ice. In the changing room, he was helped out of his hockey gear and then taken to the hospital, where he was treated on account of acute heart failure. In the emergency room, he was given intravenous and intramuscular injections. In this connection, the athlete contended that, unbeknownst to him, one of these injections was 1 ml of retabolil 5%, a steroid also known as nandrolone. According to the athlete, the team doctor failed to accompany him to the hospital, a fact that caused the team to terminate the doctor's engagement. The athlete further submitted that, when he arrived at the hospital, he was in a very bad physical and mental condition, which made it impossible for him to monitor or even ask questions about the treatment that was going to be applied. He was in severe pain and all he cared about was saving his life.

280 CAS 2012/A/2756, award of 21 September 2012.
281 CAS 2009/A/1926 & 1930.
282 Ibid [55].
283 CAS 2005/A/990, award of 24 August 2006.

However, his physical condition improved rapidly after his treatment, and the hospital allowed him not only to leave the hospital the next day, but also to resume training approximately two weeks later. According to him, after leaving the hospital, he did not pay much attention to the incident and was merely looking forward to being a part of the Ukrainian national team during the then forthcoming World Championship. On the facts, the CAS held that there was sufficient evidence that the athlete, under the unique circumstances of this case, was unable to influence or control the treatment applied to him in the emergency situation. Because he was unable to prevent the doctor from administering a prohibited substance, the CAS felt satisfied that the athlete had demonstrated that he was without fault or negligence for the anti-doping rule violation. The otherwise applicable period of ineligibility was accordingly eliminated.[284]

From a Caribbean perspective, there have been very few cases in which an elimination of sanction was deemed to be appropriate. For example, in *JADCO v Kenneth Edwards*[285] the athlete's sample returned an adverse analytical finding for hydrochlorothiazide (HCTZ), a banned substance, in circumstances where the athlete had been prescribed antibiotics and anti-inflammatory medication, which were contaminated at the pharmacy at which he purchased them, as opposed to other pharmacies where they remained free from contamination. The panel considered that the athlete had taken the antibiotics and anti-inflammatory medication to treat a severe sprain to his hand after it showed poor signs of healing, and that the medication was shown to be contaminated at the pharmacy in question, thereby justifying a reprimand without any period of ineligibility.

A similar decision regarding elimination of the otherwise applicable sanction was arrived at in the Jamaican case of *JADCO v Ricardo Cunningham*,[286] although it is submitted that the circumstances of this case did not warrant an elimination of sanction, but rather a reduction. In this case, the athlete had taken panadol, cetamol cold and flu and DPH cough and cold to treat a persistent cold without first obtaining a TUE. These products contained a prohibited substance. It was held that the athlete qualified for a reprimand and no period of ineligibility, both because the athlete did not intend to enhance his sporting performance, as well as the fact that it was his first violation and there were apparently few educational opportunities to learn about TUE applications in Jamaica. This outcome is no doubt questionable in light of the foregoing discussion, which demonstrates the truly exceptional circumstances in which an athlete should qualify for an elimination of sanction. Indeed, it is submitted that rather than assuming that a TUE was only relevant to athletes with asthma, the athlete should have exercised utmost caution before using the cold medications, by, for example, consulting a physician or researching the ingredients contained in the medications before taking them.

### 7.14.2 Reduction of sanction

A reduction in the otherwise applicable period of ineligibility is possible under Article 10.5 WADC. This would arise in circumstances where the athlete or other person is able to establish, on a *balance of probability*,[287] how the prohibited substance entered his or her body; that, based

284 On the question of whether the athlete should have applied retroactively for a TUE certificate, the CAS (at paragraph 12) concluded that 'under these circumstances, the Player had no reason to suspect that he was treated with a substance which – contrary to practice in Western Europe – was being applied for a heart condition. Therefore, the Player was without fault or negligence in connection with his failure to disclose his treatment and to apply for a retroactive TUE'.

285 *Jamaica Anti-Doping Disciplinary Panel* (decision no. 6 of 2013).

286 *Jamaica Anti-Doping Disciplinary Panel* (decision of 30 January 2013).

287 CAS 2009/A/2012 *Doping Authority Netherlands v N.,* award of 11 June 2010 [25]. The CAS stated that 'the balance of probability standard means that the indicted athlete bears the burden of persuading the judging

on corroborating evidence, in addition to his or her word, he did not act with intent to enhance sport performance or mask the use of a performance enhancing substance, to the comfortable satisfaction of the panel; and that his or her fault or negligence, when viewed in the totality of the circumstances, was not significant in relationship to the anti-doping rule violation, on a balance of probability.[288] The anti-doping rule violation must have, however, been the presence of a specified substance (Article 2.1 WADC), use of or attempted use of said substance (Article 2.2 WADC) or the possession of that substance (Article 2.6 WADC). Once the aforementioned criteria are satisfied, the athlete may be entitled to a reduction in sanction to, at a minimum, a reprimand and no period of ineligibility and, at a maximum, two years of ineligibility.[289]

Although this provision affords athletes a stronger chance of succeeding in their defence than reliance on Article 10.4 WADC, it must be noted that the CAS has consistently reiterated that the athlete's behaviour must, at all times, be compared to the standard of care that can be expected from a 'reasonable person' in the athlete's situation, so that the threshold of no significant fault or negligence is only met if the athlete observes the 'clear and obvious precautions which any human being would take' in the specific set of circumstances.[290] The CAS has also indicated that, in principle, it is possible to distinguish between different categories of negligence, namely light, normal and significant negligence, and that it is only the first two categories that allow for a reduction of the otherwise applicable period of ineligibility. In this connection, in order to determine which category of negligence is applicable in a particular case, it is helpful to consider both the objective and the subjective elements of the case, the former relating to the standard of care that could be expected from a reasonable person in the athlete's situation, while the latter relates to what is expected from that particular athlete, with regard to his personal capacities.[291]

The age of an athlete and the question of whether the violation in question is his or her first do not automatically result in a finding of no significant negligence or fault, though it appears that this may be considered when assessing the athlete's degree of fault. For example, in *Alexandra Georgiana Radu v RNADA*[292] the CAS refused to reduce the otherwise applicable period of ineligibility that was imposed on a 15-year-old swimmer in circumstances where she displayed significant negligence or fault. On the facts, the athlete ingested pills of various shapes and colours that were stored in different containers and that were placed somewhere in the kitchen and given to her by her mother for about a year, though she was aware that her mother had no particular medical knowledge. She ignored the origins of the pills and their real effect, and had never taken the time to read their label. Although she had some suspicions about the prohibited nature of the pills, she did not question her mother about them, though when she found out about the adverse analytical findings, she asked her mother, who at that point indicated that the pills were meant to ease her menstrual pains. The CAS held that the

body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence. This means also that the evidence considered must be specific and decisive to explain the athlete's departure from the expected standard of behaviour.'

288 CAS 2013/A/3050 *WADA v Andrey Krylov & FIG*, award of 10 June 2013.

289 Article 10.5.1.1 WADC. Note that a similar principle applies to contaminated products under Article 10.5.1.2 WADC. Note also that, under Article 10.5.2 WADC, for violations other than presence (Article 2.1), use or attempted use (Article 2.2) or possession (Article 2.6), but which do not involve an intent to cheat, an athlete may benefit from a reduction of the period of ineligibility to not be less than one-half of the period of ineligibility of the otherwise applicable or eight years if the otherwise applicable period of ineligibility is lifetime, in circumstances where the athlete establishes no significant fault or negligence.

290 CAS 2016/A/4416 *FIFA v CONMEBOL & Brian Fernández*, award of 7 November 2016 (operative part of 8 July 2016).

291 Ibid.

292 CAS 2014/A/3559, award of 3 December 2014.

athlete was obviously aware that her mother could not be blindly trusted as she had suspicions, and that her environment (her sport academy and competitions at national and international events) offered ample opportunities to seek information or advice as regards the real nature of the pills she was being administered. It was thus concluded that the simple fact that the athlete was a minor at the time she was tested did not constitute a circumstance relevant to reducing her fault or negligence, since 'the anti-doping rules must apply in equal fashion to all participants in competitions they govern, irrespective of the participant's age'.[293]

Similarly, in *Tomáš Enge v FIA*,[294] an elderly athlete, who had suffered from nasal problems, could not find his 'UK Vicks stick' on the Czech market, so he resorted to using a similar nasal stick handed to him by his mother, which she stored in her medicine cabinet. The CAS held that as the athlete's mother was not a doctor and did not have any particular knowledge in anti-doping matters, he should not have blindly trusted her when she handed him the medication, and that he should have been all the more careful to ensure that the stick was 'safe' as he had not used it for several months, and the research that he undertook in respect of 'UK Vicks' took place when he was living in another country, two years earlier. On the question of age, the CAS considered that the athlete's old age did not justify treating him any differently from all the other competitors, thereby rejecting his request for a reduction of sanction.

In similar vein, the CAS has held that an argument that an athlete is not experienced or is not exposed to anti-doping education does not automatically warrant a reduction in the otherwise applicable period of ineligibility, although this may be taken into account when assessing the athlete's degree of fault. For example, in *FIFA v KFA & Kang Soo Il*,[295] the athlete was a professional football player who was mixed race; his mother was Korean and his father was African American. As a result, the athlete lacked the ability to naturally grow facial hair (for example, his left eyebrow was two-thirds shorter than his right). Because this allegedly made him subject to ridicule and discrimination among the South Korean people, he sought advice from his long-term and trusted friend, who recommended a product called microgen. His friend already had a microgen tube open (which he was using) and gave it to the athlete, who then proceeded to apply small portions of the product on his body. The tube carrying the microgen contained product information in the Japanese language regarding its ingredients, including methyltestosterone and testosterone propionate, both banned substances. The CAS refused to reduce the otherwise applicable period of ineligibility on the ground that the athlete had shown significant negligence or fault by applying cream stored in a tube that had already been opened; using the cream that had not been prescribed by a doctor, but had merely been recommended to him by a friend; not closely researching the ingredients of the cream, which were inscribed in Korean, a language with which he was unfamiliar; failing to seek the opinion of his personal or team doctor before using the substance; and by not confirming its contents from someone who spoke Japanese. These factors, coupled with the fact that he had benefited from Korea's fairly developed and relatively sophisticated anti-doping education structures for several years, meant that the period of ineligibility could not be reduced.[296]

293 Ibid [93].
294 CAS 2012/A/2895, award of 15 April 2013.
295 CAS 2015/A/4215, award of 29 June 2016.
296 In CAS 2005/A/847 *Hans Knauss v FIS*, award of 20 July 2005, where the label did not specify that it contained a prohibited substance, 18 months of ineligibility was imposed. Similarly, in CAS 2010/A/2107. *Flavia Oliveira v USADA*, award of 6 December 2010, where the athlete fell victim to mislabelling and/or was not willfully negligent regarding the risks that a nutritional supplement might have been mislabelled because she took some steps to ensure the substance did not contain a banned substance, 18 months of suspension was imposed. Where there is a failure to check the components of a supplement, an 18-month period of ineligibility was imposed in CAS 2011/A/2615 *Thibaut Fauconnet v International Skating Union (ISU)* and CAS 2011/A/2618 *International Skating Union (ISU) v Thibaut Fauconnet*, order of 28 November 2011. Meanwhile,

Notwithstanding the foregoing, a reduction of sanction was granted in two Caribbean cases that raised similar facts. In *Sherone Simpson v JADCO*[297] and *Asafa Powell v JADCO*,[298] the respective world-renowned Jamaican athletes tested positive for oxilofrine, a prohibited substance. The circumstances of each case were that both athletes had taken a supplement, epiphany D1, from their trainer, Chris Xuereb, after being assured that they were 'clean' supplements. On the facts, the athletes were able to establish how the specified substance entered their respective bodies, namely through ingesting the epiphany D1 capsules, which they had taken as a nutritional supplement following the recommendation of Xuereb. The athletes were also able to establish that the substance was not intended to enhance their sport performance, evidenced by the fact that they did not know that the substance they were ingesting contained oxilofrine and did not even know what oxilofrine was. While Simpson, in particular, should have listed epiphany D1 on her doping control form, her failure to do so was held to be but one factor to be considered in determining whether she intended to enhance her performance. In any event, the nature of the specified substance was such that it would not have been beneficial to the athlete, since it was a low grade, mild stimulant.

On the question of the athletes' degree of fault, the CAS considered that their prior clean record was irrelevant to the issue of degree of fault, and that it was incumbent upon the international-level athletes to, at the very least, be aware of the risk associated with supplement use. Interestingly, the CAS found that neither athlete made necessary checks into the credentials of Xuereb nor made direct inquiries with the manufacturer of the supplement nor sought the advice of professionally qualified doctors. That said, the respective athletes' degree of fault, on a whole, was not considered significant, in light of the fact that they had taken steps to research the ingredients of the supplement. Importantly, the CAS felt that there was no way, short of a laboratory test, through which the oxilofrine could have been identified as one of the ingredients of epiphany D1, and that

> requiring an athlete to secure a laboratory analysis before taking a supplement as the only means of fully satisfying an athlete's duty of care would be prohibitively expensive, hugely wasteful of time, and, in the end, might possibly be entirely inconclusive given that the ingredients of supplements can vary from batch to batch.[299]

Although the athletes ultimately benefited from a reduction in sentence from the initially imposed 18 months to six months in light of these mitigating circumstances, the CAS was at pains to note that:

> Powell in this case put far too much trust in the recommendation of someone who lacked any professional qualifications. Powell did not question whether Mr Xuereb had any experience, let alone qualifications as a nutritionist as distinct from a physiotherapist. While the Panel accepts that it would be unreasonable to expect an athlete to go to the lengths of having each batch of a supplement tested before use, there are other less onerous steps that could be taken, such as making a direct inquiry to the manufacturer and seeking a written guarantee that the product is free of any substances on the WADA Prohibited List or asking if the manufacturer makes any products that do contain prohibited substances at the plant where the supplement is produced.[300]

in CAS 2010/A/2229, *WADA v FIBV & Berrios*, award of 28 April 2011, a one-year period of ineligibility was imposed where the athlete had only a cursory check on the internet for the banned substance.

297 CAS 2014/A/357, award of 7 July 2015.

298 CAS 2014/A/3571, award of 7 July 2015.

299 Ibid.

300 Ibid [10.38].

### 7.14.3 Substantial assistance

Where an athlete has provided substantial assistance to an anti-doping organization or criminal authority or disciplinary body resulting in either the organization discovering or bringing forward an anti-doping rule violation committed by another person or a criminal or disciplinary body discovering or bringing forward a criminal offence or breach of professional rules against another person, then that person could benefit from a suspension of part of the otherwise applicable period of ineligibility.[301]

The importance of the athlete providing proof that the assistance he has provided actually resulted in the discovery or bringing forward of an anti-doping rule violation against another person has been highlighted in several regional cases to date.[302] In *WADA v Damar Robinson & JADCO*,[303] for example, the athlete, a talented Jamaican high jumper who, in 2013, was captain of the track and field team at Calabar High School in Kingston, Jamaica, was advised by his coach to stop taking whey protein, and to use instead a liquid that the coach told him was 'Vitamin B-Complex'. The athlete drank all the liquids provided by the coach without questioning him as to what precisely those liquids contained, and did not contact the head coach nor the school's team doctor nor anyone else before ingesting the liquids provided to him. He subsequently tested positive for selective androgen receptor modulator ('SARM S-22'), a prohibited substance.

In his defence, the athlete asserted that his counsel had contacted JADCO and provided it with important information regarding the circumstances leading up to his positive test, as well as information regarding the coach, who had, by that time, had his contract terminated by Calabar, and had been refusing to answer phone calls or text messages. Although the CAS chided JADCO for not acting upon the information provided by the athlete's counsel, noting that this was 'difficult to explain' and 'inexplicable',[304] it was nevertheless found that even if JADCO had conducted an investigation of the former coach, the information provided, without more, would not have led to the discovery or establishment of an anti-doping rule violation. The information provided by the athlete, including that the coach was terminated from his coaching position at Calabar and that he no longer answered counsel's phone calls, 'while perhaps enough to raise suspicion, [was] hardly sufficient, standing on its own, to establish an anti-doping rule violation by [the former coach] '.[305] In short, the CAS was of the view that even where an athlete provides an anti-doping organization with 'as much assistance as he reasonably could under the circumstances', substantial assistance under Article 10.6 WADC is not established if that assistance does not lead to the discovery or establishing an anti-doping rule violation committed by another person.

Similarly, in *JADCO v Asafa Powell*,[306] the renowned Jamaican athlete, Asafa Powell, was found to have committed an anti-doping rule violation where oxilofrine, a prohibited specified stimulant, was found in his sample. Powell admitted to the anti-doping rule violation, but argued that he was entitled to a suspension of his otherwise applicable period of ineligibility on

301 Article 10.6.1 WADC. Where this arises before the final appellate decision or before the expiration of the time for appeal, no issues arise in terms of the anti-doping organization suspending a part of the period of ineligibility. Note, however, that if this arises after the final appellate decision is made or after the expiration of the time for appeal, the anti-doping organization may only suspend part of the otherwise applicable period of ineligibility with WADA's approval and the approval of the relevant international federation.

302 And, indeed, international cases, including CAS 2016/A/4615 *Asli Çakir Alptekin v WADA*, award of 4 November 2016 (operative part of 5 July 2016).

303 CAS 2014/A/3820, award of 14 July 2015.

304 Ibid [98].

305 Ibid [99].

306 *Jamaica Anti-Doping Disciplinary Panel* (decision no. 5 of 2013).

the ground that he had provided substantial assistance to the Italian police and the USADA by notifying both entities that his adverse analytical finding was caused by epiphany D1, which his trainer had given to him. He argued that because of the information he supplied, the Italian authorities carried out a search of the room of the trainer, confiscated all of the supplements found therein, and that the USADA's dietary supplement high risk list subsequently added epiphany D1 as a source of oxilofrine. The CAS, in similar vein to the *Damar Robinson* case discussed above, however, rejected Powell's argument, noting that although he did not intend to enhance his performance, oxilofrine was not placed on USADA's high risk list because of the information he supplied, since that information was only supplied by Powell after the supplement was added to the list. In short, the panel noted, with regret, that although the assistance provided by Powell and his agent was quite commendable, it was not tantamount to the type of assistance contemplated by Article 10.6.1 WADC.

Although the extent to which there is a suspension of part of the otherwise applicable period of ineligibility where substantial assistance is provided by an athlete very much depends on the seriousness of the anti-doping rule violation committed by the athlete or other person and the significance of the assistance to the elimination of doping in sports, as a matter of principle, no more than three-quarters of the applicable period of ineligibility may be suspended. Further, if the otherwise applicable period is lifetime ineligibility, the minimum period to be served by the person providing the substantial assistance cannot be less than eight years. That said, it appears that WADA, in exceptional circumstances, retains a residual discretion to suspend the period of ineligibility and other related consequences of the anti-doping rule violation over and above the three-quarter or eight-year period referred to above for assistance provided, which is not appealable.[307] In fact, in these exceptional circumstances, WADA may even choose to impose no period of ineligibility, and/or no return of prize money or payment of fines or costs. An important caveat, however, applies in all cases where the period of ineligibility or part thereof otherwise applicable has been suspended – this suspended period can in fact be reinstated if the athlete fails to continue to cooperate or provide complete and credible substantial assistance, although this decision could be appealed against under Article 13 WADC.

Although the rules governing the period of ineligibility that could be suspended in appropriate cases where substantial assistance has been provided appear to be fair and robust in nature, this has not always been seen in practice, as illustrated in the matter of *NAAATT v Kelly-Ann Baptiste*.[308] In that case, Trinidad and Tobago's athlete, Kelly-Ann Baptiste, submitted that she had provided substantial assistance to the doping authorities within the meaning of Article 10.6 WADA, and was thus entitled to a suspension of the otherwise applicable sanction of two years' ineligibility. The NAAATT Disciplinary Panel, chaired by one of the authors of this text, came to the conclusion that the sanction to be applied to the athlete, by virtue of the substantial assistance that she provided, was that of a suspension of 12 months of the 24-month period of ineligibility otherwise applicable.[309] Interestingly, however, the IAAF appealed against the suspension of the 12-month period imposed by the NAAATT. Ultimately this matter, like the *Hackett* case, was settled before the appeal was heard by CAS. Baptiste ended up serving a 21-month period of ineligibility.[310] The *Baptiste* case raises the question, invariably, as to whether

307 Article 10.6.1.2 WADC.

308 *NAAATT v Kelly-Ann Baptiste (*decision of The IAAF Doping Review Board, 1 August 2014).

309 *Final Decision of The National Association of Athletics Administration Of Trinidad And Tobago in The Matter of Kelly-Ann Baptiste* (decision of 10 August 2014).

310 Andy Brown, 'CAS clears Kelly-Ann Baptiste to compete' (*Sports Integrity Initiative*, 31 January 2015) www.sportsintegrityinitiative.com/cas-clears-kelly-ann-baptiste-compete/.

the athlete in this case was treated fairly.[311] This question is particularly apposite in light of the fact that, in a case bearing the same facts involving a US male athlete and Baptiste's training partner, Tyson Gay, the athlete in that case was subject to a 12-month period of ineligibility, while Baptiste was, in effect, subject to 21 months' ineligibility. While it can be argued that there is no guarantee that similar cases will inevitably be treated alike in the absence of *de jure stare decisis* in the context of sports arbitration, one cannot help but consider this argument to be both superficial and devoid of a basic understanding of the principle of fairness, which requires that, among other things, like situations be treated alike. What distinguishes the differential treatment of these similar cases remains a mystery, particularly in light of the fact that both athletes' assistance contributed to the institution of proceedings against a high-profile coach, namely Jon Drummond, and the subsequent imposition of an eight-year period of ineligibility. The *Baptiste* case, in this context, suggests that the rules regarding substantial assistance do not always work fairly for all athletes, including those in identical situations, which is necessarily problematic.

### 7.14.4 Admission

An athlete who voluntarily admits to the commission of an anti-doping rule violation before receiving notice that his sample will be collected in circumstances where the admission is the *only reliable* evidence of a violation at the time of the admission may be entitled to a reduction of the otherwise applicable period of ineligibility by not more than one-half of the original period.[312] In *Mohammed Shafi Al Rumaithi v FEI*,[313] the CAS took the opportunity to remind the athlete who wished to rely on this provision that his admission must be the *only reliable evidence* of the violation at the time of the admission. Without this 'trigger', the CAS considered that the rule will not apply.

Suffice it to say, if, after being confronted with an anti-doping rule violation for the presence, use or attempted use or possession of a prohibited substance or method, or evasion or refusal to or failure to submit to doping control or tampering or attempted tampering with doping control, the athlete promptly admits to the anti-doping rule violation, WADA and the anti-doping organization in question may approve and, at their discretion, grant a reduction of the otherwise applicable period of ineligibility down to a minimum of two years, depending on the seriousness of the violation and the athlete's degree of fault.[314]

## 7.15 MULTIPLE BASES FOR A REDUCTION IN SANCTION

Where there are several bases warranting a reduction of sanction, namely where the athlete establishes no fault or no negligence (Article 10.4) or no significant fault or no significant negligence (Article 10.5) or substantial assistance or admission (Article 10.6), the relevant period of reduction in respect of Articles 10.4 and 10.5 should be determined first, before going on to further deduct from the applicable sanction pursuant to Article 10.6 WADC, though the overall deduction should not be less than a quarter of the otherwise applicable period of ineligibility.[315]

311 'BACK ON TRACK: Baptiste free to compete after doping ban lifted' (*Trinidad Express*, 29 January 2015) www.trinidadexpress.com/sports/BACK-ON-TRACK-290274641.html.
312 Article 10.6.2 WADC.
313 CAS 2015/A/4190, award of 1 March 2016 [60].
314 Article 10.6.3 WADC.
315 Article 10.6.4 WADC.

## 7.16 MULTIPLE VIOLATIONS

Where an athlete commits a second anti-doping rule violation within a 10-year period from the first violation, the period of ineligibility will be the greater of:

(1) six months; or
(2) one-half of the period of ineligibility imposed for the first anti-doping rule violation, without regard to any reduction in sanction on the basis of admission or substantial assistance that was previously granted; or
(3) twice the period of ineligibility applicable to the second anti-doping rule violation, it being treated as if it were the first violation, without regard to any reduction in sanction on the basis of prompt admission or substantial assistance that was previously granted.[316]

That said, whatever the period of ineligibility that is arrived at under this provision (for the second anti-doping rule violation), this period may be reduced on the basis of prompt admission or substantial assistance.

An alleged second anti-doping rule violation will only count as such if it is established that the athlete had, subsequent to the first violation, received notice of that first violation or reasonable efforts were taken to give said notice.[317] If the anti-doping organization cannot establish that said notice was given, the alleged violations will be treated as one, and the sanction ultimately imposed will be based on the violation (first or second) that carried the more serious sanction.[318]

Where a third anti-doping rule violation occurs, this will always result in a period of lifetime ineligibility, except where the third violation satisfies the requirements of no intention and no fault or negligence or no significant fault or negligence under Articles 10.4 and 10.5, respectively.[319] That said, it must be borne in mind that if an athlete had, in respect of his first anti-doping rule violation, established no fault or negligence, this is not to be considered a prior violation for the purposes of sanctions in relation to subsequent violations.[320]

Two regional cases illustrate how the rules with regard to multiple violations work in practice. In *Steve Mullings v JADCO*,[321] Mullings, the former Jamaican 100 metre sprinter, tested positive for a banned substance, methyltestosterone, and was rendered ineligible for two years in 2004. At that time, Mullings, who was a student abroad, had initially flown to Jamaica for the hearing, but the hearing was cancelled. Mullings was unable to attend the rescheduled hearing due to financial constraints and the fact that he had to attend class. He was not represented by counsel. Subsequently, in 2011, Mullings tested positive for furosemide, a banned substance, in effect giving rise to his second anti-doping rule violation within a 10-year period. Under the then 2009 WADC, a second anti-doping rule violation gave rise to a lifetime period of ineligibility, though the athlete argued that the first alleged violation should be treated as null and void because of a number of alleged inconsistencies associated with the 2004 hearing. In particular, the athlete alleged that he was not permitted to provide evidence at the 2004 hearing; that there were inconsistencies in the control number on the test results that were positive; that he could not afford to test his B sample at the time; and that because the initial hearing in 2004 was cancelled, he could not afford to subsequently return to Jamaica for the rescheduled hearing.

316 Article 10.7.1 WADC.
317 Article 10.7.4.1 WADC.
318 Ibid.
319 Article 10.7.2 WADC.
320 Article 10.7.3 WADC.
321 CAS 2012/A/2696, award of 4 March 2013.

Interestingly, the athlete also attacked the 2011 hearing in respect of his second anti-doping rule violation, pointing out that he did not call any witnesses at the hearing, nor was he present, although he was represented by counsel. He also alleged that, in respect of the 2011 doping control, he was given liquids to drink in order to induce urine; the chaperones did not go to the washroom with athletes; and that there was a relatively lengthy delay in shipping his sample to the lab.

The CAS rejected the athlete's request to nullify the 2004 first anti-doping rule violation, holding that although he encountered difficulties, the circumstances did not at the time warrant a more lenient sanction. More specifically, it was held that the JAAA had conducted a hearing in 2004, at which evidence was presented and considered, and that Mullings had been given an opportunity to participate. It highlighted that 'it simply would not be appropriate for a Panel to be more lenient on an individual by virtue of the fact that he did not present his case as well as he could have in the first instance'.[322] By virtue of the fact that the athlete could not establish, in respect of his second anti-doping rule violation, that there was a basis for disregarding the adverse analytical finding, he was subject to a lifetime period of ineligibility.[323]

A slightly more lenient, though no less robust, approach to sanctioning was adopted in the subsequent case of *Dominique Blake v JADCO*.[324] Here, the Jamaican athlete had been subject to a sanction of nine months' ineligibility in respect of her first inadvertent violation, in circumstances where her mother had given to her vitamin C and Cape Aloe Vera, the latter of which contained ephedrine, a banned substance. In that instance, the athlete benefited from a reduction in sanction on the basis of no significant fault or negligence.

Later, however, within a 10-year period, she was again tested and returned a positive result for the banned substance, methylhexanamine (MHA). In this connection, she admitted to purchasing neurocore upon the recommendation of her mentor to alleviate stress, although neurocore contained geranium, which in turn contained MHA. She requested a reduction in her period of ineligibility for her second anti-doping rule violation from six years to four years. The only issue that had to be determined by the CAS was whether, in respect of the second anti-doping rule violation, the athlete intended to enhance her sport performance.

The CAS, although reducing her period of ineligibility to four years six months, nonetheless considered that the athlete had not established, to its comfortable satisfaction, that she had no intent of enhancing her sport performance. Among the factors identified by the CAS in arriving at this conclusion were the fact that she had ingested neurocore an hour before she participated in the sporting event, showing a clear nexus between the use of the banned substance and her sporting performance; she omitted to fully declare her use of neurocore on her doping control form; and the product's label indicated that it was a stimulant, and warned that it contained geranium and should therefore not have been used by athletes. Although the CAS did not consider her to be a 'cheat', it nonetheless indicated that there were no objective circumstances that corroborated her word so as to establish, to the comfortable satisfaction of the panel, the absence of an intent to enhance her sport performance. Luckily for the athlete, unlike Steve Mullings who did not establish any mitigating factors in his favour, Blake in this case was able to satisfy the CAS that a reduction in her otherwise applicable period of ineligibility was warranted on the basis that she had actually done some research, comparing neurocore's

322 Ibid [7.9].

323 The CAS (at paragraph 7.4) considered that because Mullings was unable to present any basis for challenging the lab documentation and results, his request for DNA testing on the sample had to be denied. It noted that such testing is 'complex and expensive, and it cannot be ordered whenever an athlete requests it. Rather, the athlete should first be required to present some reasonable basis for questioning the lab results to justify any DNA testing.'

324 CAS 2013/A/3361, award of 2 May 2014.

ingredients listed on the manufacturer's nutrition website and the WADA prohibited list; she was provided with barely any anti-doping education by her university or club in Jamaica; and she only had one previous experience with doping control when she was 19 years old.

## 7.17 COMMENCEMENT OF THE PERIOD OF INELIGIBILITY

In principle, under Article 10.11 WADC, the period of ineligibility starts on the date of the final hearing decision providing for ineligibility or, if the hearing is waived or there is no hearing, on the date ineligibility is accepted or otherwise imposed. Although this would obtain in a large majority of cases, there are two exhaustive instances in which the period of ineligibility may begin at an earlier time, as early as the date of sample collection. The first is where there are substantial delays in the hearing process or other aspects of doping control that are not attributable to the athlete or other person.[325] Although the CAS in *FIFA v KFA & Kang Soo Il*[326] pointed out that this is a discretionary power and what amounts to 'substantial delay' depends on the circumstances of each case, it must equally be borne in mind that there is a

> need for judicial bodies to adjudicate anti-doping matters as expeditiously and efficiently as possible not only because the athlete remains provisionally suspended during the proceedings, but also because third parties affected by the alleged anti-doping rule violation could potentially suffer harm or prejudice pending a final and binding decision in relation to the charges proffered against the athlete.[327]

Second, the body imposing the sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection or the date on which another anti-doping rule violation last occurred where the athlete or other person promptly (which, in all events, for an athlete means before the athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by the anti-doping organization.[328] In *WADA v Ali Nilforushan & FEI*[329] the CAS considered that if an athlete's counsel requests documentation relating to the testing of the sample, this does not negate a finding of early admission, since the athlete is entitled to ensure that the laboratory testing was carried out in the appropriate manner, as this was a necessary aspect of his right of defence. Further, a finding of timely admission is not negated by a contention before the tribunal by an athlete that he bore no fault or negligence, since the athlete is allowed to seek mitigation. In other words, an athlete is not required to give up any challenge he might have to the case in dispute in order to benefit from a finding of early admission.[330]

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325 For example, in CAS 2013/A/3361 *Dominique Blake v JADCO,* award of 2 May 2014, the conduct of this matter was quite protracted and not in harmony with the expediency envisioned by the JADCO Rules. Although the athlete did cause delays by changes of attorneys, the substantial delay was not attributable to her, hence the period of ineligibility commenced at the date of the sample collection. Cf CAS 2012/A/2859 *Alexander Ruoff v VBL*, award of 12 September 2012 (operative part of 24 August 2012). The sole arbitrator observed that, in general, a total duration of eight months in disciplinary proceedings with regard to an anti-doping violation does not constitute a substantial delay by itself, but that multiple delays in separate phases of the proceedings may constitute the substantiality of the delay.

326 CAS 2015/A/4215, award of 29 June 2016.

327 Ibid [206].

328 CAS 2008/A/1494 *FIFA v FIGC & Alessio Recchi*, award of 30 April 2009 [56].

329 CAS 2012/A/2959, award of 30 April 2013.

330 Ibid. The CAS (at paragraph 8.33) also considered that 'the athlete's candor (or lack thereof) is not necessarily a relevant consideration in the determination of whether the athlete has made a timely admission. Of course, a tribunal may choose not to exercise its discretionary power to back-date the period of ineligibility in circumstances where an athlete has failed to be truthful at a hearing, but this is the inherent nature of an exercise of discretion.'

## 7.18 STATUS DURING PERIOD OF INELIGIBILITY AND RETURN TO TRAINING

An athlete or other person who has been declared ineligible may not, during the period of ineligibility, participate in any capacity in a competition or activity authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in competitions authorized or organized by any professional league or any international or national-level event organization or any elite or national-level sporting activity funded by a governmental agency, other than authorized anti-doping education or rehabilitation programmes.[331] That said, an athlete or other person subject to a period of ineligibility longer than four years may, after completing four years of the period of ineligibility, participate as an athlete in local sport events not sanctioned or otherwise under the jurisdiction of a code signatory or member of a code signatory, but only so long as the local sport event is not at a level that could otherwise qualify such athlete or other person directly or indirectly to compete in or accumulate points toward a national championship or international event, and does not involve the athlete or other person working in any capacity with minors.[332] Importantly, an athlete or other person subject to a period of ineligibility remains subject to testing.

Where an athlete or other person who has been declared ineligible violates the prohibition against participation during ineligibility, the results of such participation will be disqualified and a new period of ineligibility equal in length to the original period of ineligibility will be added to the end of the original period of ineligibility. The new period of ineligibility may, however, be adjusted based on the athlete's or other person's degree of fault and other circumstances of the case.[333] The determination of whether an athlete or other person has violated the prohibition against participation, and whether an adjustment is appropriate, is made by the anti-doping organization whose results management led to the imposition of the initial period of ineligibility, though this decision may be appealed under Article 13 WADC.

An athlete may, however, return to train with a team or to use the facilities of a club or other member organization of a Signatory's member organization during the shorter of (1) the last two months of the athlete's period of ineligibility, or (2) the last one-quarter of the period of ineligibility imposed.[334]

## 7.19 FAIR HEARING

Where it is asserted that an athlete or other person has committed an anti-doping rule violation, the anti-doping organization must afford the person the right to a fair hearing.[335] Among other things, this right entails a hearing within a reasonable time[336] by an independent[337] and impartial tribunal. The natural corollary of this fair hearing right is that an athlete must be afforded

331 Article 10.12.1 WADC.
332 Ibid.
333 Article 10.12.3 WADC.
334 Article 10.12.2 WADC.
335 Article 8.1 WADC.
336 Note that under Article 8.2 WADC, hearings held in connection with events may be conducted by an expedited process as permitted by the rules of the relevant anti-doping organization and the hearing panel.
337 CAS 2013 /A/3277 *The International Association of Athletics Federations v The National Association of Athletics Administration of Trinidad and Tobago and Semoy Hackett, submissions by the National Association of Athletics Administration of Trinidad and Tobago*, 27 August 2013. While noting that the disciplinary tribunal is a separate entity from the prosecuting authority (the anti-doping rule organization), the NAAATT explained that,

the opportunity to represent himself or by counsel; he must be informed in a fair and timely manner of the asserted anti-doping rule violation; he must be afforded the right to present evidence, including the right to call and question witnesses, but subject to the panel's discretion to accept testimony by telephone or written submission; he must be afforded an interpreter at the hearing; and, ultimately, provided with a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of ineligibility.[338] The right to a hearing may, however, be waived either expressly or by the athlete's or other person's failure to challenge an anti-doping organization's assertion that an anti-doping rule violation has occurred within the specific time period provided in the anti-doping organization's rules.[339] Waiver, in this context, does not, however, remove an athlete's right to apply to a court, tribunal or other body for a review/appeal of a decision.[340]

The right to a fair hearing process, although instrumental to the proper administration of sports justice, is not an absolute right.[341] As such, there are times when, although it could be demonstrated by an athlete that there have been some deficiencies in the hearing process, such deficiencies would not result in a finding of a breach of the right in circumstances where the appellate body has had the opportunity to 'cure' these deficiencies.[342] For example, in *Amar Muralidharan v NADA, Indian National Dope Testing Laboratory, Ministry of Youth Affairs & Sports*,[343] although the athlete's case was heard two years after he was notified of the anti-doping rule violation and his appeal was heard more than four months after this hearing, the CAS considered that the athlete's 'entitlement, which he fully received, was to a system which allowed any defects in the hearing to be cured by the hearing before the CAS'.[344] While the CAS noted that it could foresee a situation where an athlete's right to a timely and fair hearing in the first instance procedure was so fundamentally violated that such omissions in the underlying procedure results in an automatic dismissal of a violation (for example, in cases where an athlete is not aware at all that a procedure is ongoing), such did not arise on the facts on this case.

Similarly, in *Traves Smikle v JADCO*,[345] although the Jamaican athlete's anti-doping rule violation was referred to the Jamaica Anti-Doping Disciplinary Panel on 23 August 2013, it was only on 1 July 2014 that the disciplinary panel informed him that he was suspended from competition for two years. The decision did not include any reasons supporting the suspension, though these reasons came more than one year after the matter was first referred to the panel, and more than six weeks after issuing its decision. The athlete brought an appeal before the appeals tribunal, but before a decision was issued in relation thereto, he also filed an application for the matter to be heard directly by the CAS. The CAS found that the time limits set by the Jamaica Anti-Doping in Sport Act were not complied with, but that his application had to be rejected because the CAS did not have jurisdiction, since he was not an 'international-level' athlete otherwise having the right to appeal the disciplinary panel's decision directly to the

'due process safeguards, including the respect of natural justice principles, must be a central feature of the disciplinary process'.

338 Article 13.2.2 WADC.

339 Article 8.3 WADC.

340 CAS 2013/A/3242 *Benjamin Hill v Cycling Australia*, award of 24 September 2013, [5.5].

341 CAS 2003/A/507 *Marko Strahija v FINA*, award of 9 February 2004, 5. The CAS held that 'the principle of a fair hearing does not apply without restriction'.

342 CAS 2004/A/714 *F v IOC*, award of 31 March 2005, [11]. The CAS held that 'even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS' and that 'the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery" '.

343 CAS 2014/A/3639, award of 8 April 2015.

344 Ibid [89].

345 CAS 2014/A/3670, award of 23 February 2015 (operative part of 4 November 2014).

CAS. While the CAS refused to exercise jurisdiction on the facts, it noted, however, that had the athlete been deprived of his right to a fair trial within a reasonable time, he might have been able to appeal directly to the CAS, implying that the one-year period before the notification of the athlete of his anti-doping rule violation and the panel's hearing did not breach his right to a fair trial, and could have, in any event, been cured by the appeals tribunal's hearing process that was underway at the relevant time. That said, it must be remembered that where there is an undue delay, this may impact when the period of ineligibility commences for a particular athlete guilty of an anti-doping rule violation.[346]

## CONCLUSION

This chapter sought to provide an authoritative and critical analysis of the legal regulation of drugs in sports from a doctrinal perspective. The various themes discussed in this chapter illustrate in no uncertain terms that doping remains one of the biggest issues in sport in the twenty-first century, and for good reason.

The brief, but insightful, historical overview of the gradual progression in the use of questionable substances and methods in sports illustrated that although doping has always been an inherent part of sport, it is only relatively recently that the international sporting community has demonstrated any degree of resolve in combatting what is clearly a legal, social, economic and, indeed, ethical issue. While the chapter applauds recent developments in the field of anti-doping, including the enactment and promulgation of the World Anti-Doping Code and national legislation pursuant thereto, it nonetheless brought to the fore the inherent tensions and factious issues that arise in respect of the regulation of drugs in sports. These controversies were illustrated in the nuanced discussion about the theoretical approaches to doping, which demonstrate not only the dynamic nature of anti-doping regulation, but also the high level of discontent that exists among stakeholders with respect to the manner in which doping is currently regulated, in particular in so far as the strict liability principle is concerned. In this connection, it should come as no surprise that both medical and legal practitioners have increasingly called for a move away from the heavily paternalist approach that characterizes current anti-doping regulation to a more soft, safe approach that will see the increased involvement of physicians in monitoring and supervising athletes who wish to exercise their arguably inalienable choice to dope. The issues of privacy, autonomy, fairness and healthcare were all implicated in this discussion, though the conclusion we ultimately arrived at is that the current anti-doping regime, characterized by the principle of strict liability, is the most rational approach that could justifiably be advanced to maintain tight control on drugs in sports.

Aside from addressing the controversial issue of whether a departure from international testing standards gives rise to the nullification of an otherwise applicable anti-doping rule violation, this chapter discussed, in significant detail, the circumstances leading to a finding of an anti-doping rule violation, pointing to a litany of cases to illustrate the tremendous complexity inherent in this area of law. The chapter also critically explored the range of sanctions that may be imposed in respect of different anti-doping rule violations, and considered, from a comparative perspective, the lengths to which athletes, both internationally and regionally, have to go to demonstrate that they qualify for the elimination or reduction of their otherwise applicable period of ineligibility. A key issue arising from this discussion is the divergent ways in which relatively similar facts have been interpreted by various CAS tribunals, and the impact which this

346 CAS 2015/A/4215 *FIFA v KFA & Kang Soo Il,* award of 29 June 2016.

has had on the legitimacy of the anti-doping regime, the perceived competence of arbitrators and the future of athletes. The chapter also considered a number of other related considerations, including the role and presence of aggravating circumstances, instances in which the commencement period with respect to ineligibility may be backdated, and the question of the right to a fair trial.

# CHAPTER 8

# EMERGING ISSUES IN COMMONWEALTH CARIBBEAN SPORTS LAW

## 8.1 INTRODUCTION

Sports law is a dynamic and ever-evolving field of specialism that has increasingly been characterized by disputes over a range of 'emerging' issues. Among the main issues that currently confront Sports Lawyers across the globe and, indeed, in the Caribbean, is the question of whether the 'no disrepute' clause typically found in sport contracts unduly circumscribes the rights and interests of sportspeople. This question not only raises legal issues, but also ethical and philosophical issues, which are addressed in this chapter. Aside from this question, the chapter also addresses the question of whether, and to what extent, discrimination exists in sports today, and the likely impact that said discrimination on the grounds of race, sex and disability, among other things, has on players, in particular. Further, the chapter addresses the important question of free movement of sportspeople, by not only examining the importance of this right in modern Sports Law, but also by assessing the increasing juridification of this right following several ground-breaking decisions delivered by supranational courts, including the Court of Justice of the European Union (CJEU). The chapter concludes by exploring the issue of Sports Law education, and the long-term implications that this recent development is likely to have on the sporting landscape in the region.

In short, this chapter intends to provide a nuanced analysis of some of the more interesting and, indeed, controversial developments in Commonwealth Caribbean Sports Law today, thereby creating the space for reimagining Sports Law in both a practical and philosophical light.

## 8.2 BRINGING THE PLAYER/SPORT INTO DISREPUTE

The 'no disrepute' or 'morality' clause, as it is sometimes called, is arguably one of the main, and perhaps most contentious, clauses found in sports contracts today.[1] This should come as no surprise however as, increasingly, sponsors, marketing agents and the public in general have attached considerable good will to clubs, leagues, athletes and their coaches, all of whom now have a moral and legal obligation to maintain a practically unscathed reputation. Notwithstanding the axiomatic value of including such a clause in a sports contract, however, the interpretation and application of this clause has proven to be a tremendously debatable issue, raising financial, legal, ethical and even cultural considerations.

### 8.2.1 Different formulations

There are many different formulations of the 'no disrepute' clause. These varied formulations are found not only in contracts between clubs and players, but also between clubs and leagues

1 See Patrick George, 'Sport in disrepute' (2009) 4(1) Australian and New Zealand Sports Law Journal 24; Paul Jonson, Sandra Lynch and Daryl Adair, 'The contractual and ethical duty for a professional athlete to be an exemplary role model: Bringing the sport and sportsperson into unreasonable and unfair disrepute' (2013) 8(1) Australian and New Zealand Sports Law Journal 55; Daniel Auerbach, 'Morals clauses as corporate protection in athlete endorsement contracts' (2005) 3 DePaul Journal of Sports Law and Contemporary Problems 1.

and leagues and governing bodies, and, more recently, even between coaches and clubs. The 'no disrepute' clause can be expressed as requiring the athlete not to bring *himself* into disrepute or the *sport* or *game* into disrepute.

In contrast to these generic formulations, clubs, leagues or governing bodies may wish to specify the types of conduct that they consider to be disreputable. Disreputable conduct, in this context, could include engaging in discriminatory behaviour, such as public disparagement of, discrimination against, or vilification of, a person on account of a particular attribute; harassment, whether of a sexual, verbal or physical nature; offensive behaviour, such as the use of offensive, obscene, provocative or insulting gestures, language or chanting; provocation or incitement of hatred or violence; violence; intimidation; corruption; abuse of one's position to obtain personal benefits; and the commission of, or being charged with, a criminal offence.

Regardless of which formulation is included in a sports contract, the burden rests on the party seeking to enforce the 'no disrepute' clause to prove that the athlete has brought himself or the sport into disrepute or has committed one or more of the specified acts mentioned above.

### 8.2.2 The test

Tribunals have to date developed a specific test for determining whether a player has engaged in disreputable conduct. In *D'Arcy v Australia Olympic Committee (AOC)*[2] the CAS stated that the test is whether the person has lowered his reputation in the eyes of ordinary members of the public to a sufficient extent as a result of his behaviour,[3] though some questions remain following the decision of *Mikhaylo Zubkov v Fédération Internationale de Natation (FINA)*[4] as to whether this test can be applied to cases in which the relevant clause prohibits conduct bringing the *sport* into disrepute (as in *Zubkov*) as opposed to the player himself (as in *D'Arcy*). In *D'Arcy*, the Australian Olympic Committee's team membership agreement provided that players should not engage in conduct which, if publicly known, would be likely to bring the player into disrepute, which the CAS found was rightly relied upon by the President of the AOC when he, by letter, indicated to D'Arcy that he would not be selected for the 2008 Beijing Olympic Games on account of the fact that he had got into an altercation, while intoxicated, with former Olympian Simon Cowley. The altercation resulted in Cowley sustaining serious injuries to his face, in consequence of which D'Arcy was charged with inflicting grievous bodily harm, and ultimately convicted in ensuing criminal proceedings. The CAS was of the view that given that the public had heard that D'Arcy had only recently been selected for the Olympics, but had already caused serious injury to another person while intoxicated at a pub early in the morning, his estimation in the eyes of ordinary members of the public had been lowered to a sufficient degree. In fact, the extent of the disrepute was shown by the voluminous media reports which pointed to the unpleasant details of the incident, and the likely impact that this would have had on how he was viewed by ordinary members of the public.

By contrast, in *Zubkov v FINA*, where FINA's constitution spoke of sanctions 'for bringing the *sport* into disrepute', the CAS considered that it actually had to be shown, to the comfortable satisfaction of the panel, that Zubkov, a swimming coach who was physically aggressive to his daughter, a swimmer selected to represent the team he coached, had brought the sport of swimming into disrepute. As FINA was unable to establish that the sport (as opposed to the coach himself) had been brought into disrepute, Zubkov's six-year ban from coaching was set aside. The CAS went even further by stating that if the provision that a party is seeking to invoke

2 CAS 2008/A/1539 *Nicholas D'Arcy v AOC*, award of 27 May 2008.
3 Ibid [8].
4 CAS 2007/A/1291, award of 21 December 2007.

speaks to 'bringing the sport into disrepute', evidence of *potential* disrepute is not sufficient; it must be proved that the sport was *actually* brought into disrepute.

More generally, it must be borne in mind that the reputation of the person or sport/game in question must be lowered to a *sufficient extent* in the eyes of ordinary members of the public. Although this notion of a 'sufficient extent' has not been commented upon by courts/tribunals to date, it would appear from the decision of *Jongewaard v Australian Olympic Committee (AOC)*[5] that the conduct in question must cause or be likely to cause a reasonable member of the public to 'think *considerably* less'[6] of the person. In *Jongewaard*, Cycling Australia had nominated the appellant for selection to the Australian Olympic team for the 2008 Beijing Olympics. However, following the exercise of the AOC President's discretion under clause 7.2(3) of the AOC's Selection By-Laws, the AOC Selection Committee declined to select the appellant as a member of the Australian Olympic team on account of the fact that he was involved in an accident with a fellow cyclist while driving a car in circumstances where he was drinking alcohol during the course of the day before driving the car. His fellow cyclist, Matthew Rex, who had also been drinking alcohol, was very seriously injured in the accident. The conduct relating to the accident was such as to cause members of the South Australian police to reasonably believe that Jongewaard was guilty of serious criminal charges, as it was alleged that his blood alcohol level at the time of the accident was .094, or at least in excess of .08. It was also alleged that Jongewaard did not stop at the scene of the accident. For these reasons, the AOC had considered that members of the public, being aware of Jongewaard's conduct and the charges relating thereto through various media reports, formed the view that his conduct was likely to and did bring himself into disrepute. In other words, 'a reasonable member of the public would or would be likely to think *considerably less* of [Jongewaard] on account of the conduct',[7] albeit that the AOC recognized that he might very well have had a defence to the criminal proceedings and might even have been acquitted at trial.

On appeal before the CAS, it was found that the AOC correctly exercised its discretion to refuse to select the appellant to be part of the team, since the appellant's adverse conduct was publicly known. In this context, the CAS considered that:

> An athlete nominated for the Australian Olympic Team is presumed to be a person of good repute. He/she is perceived as both a leader and a role model within the Australian community. The Appellant ha[d] to answer two serious criminal charges. He face[d] severe statutory penalties if found guilty. The presumption of innocence is no answer to a determination by an AOC Selection Committee that the Appellant ha[d], by particular conduct, brought himself into disrepute and therefore was found not eligible for selection to the Australian Olympic Team.[8]

Although this decision appears to suggest that the person's adverse conduct must result in a reasonable member of the public thinking 'considerably less' of the person, it would become immediately apparent from the discussion hereafter that players are often sanctioned even when it is arguable that members of the public do not think considerably less of them as a result of engaging in alleged misconduct.

### 8.2.3 Which public?

The test enunciated in *D'Arcy* requires that that there is public exposure of the adverse conduct on the part of the athlete in question. In theory, this should mean that if an incident occurs that

5 CAS 2008/A/1605, award of 19 September 2008.
6 Ibid [14].
7 Ibid.
8 Ibid [19].

is not reported in the public domain, the test cannot be said to be satisfied, since the person's or the sport's estimation cannot be said to be lowered in the eyes of ordinary members of the public.

This supposition raises the all-important question – who are 'ordinary members of the public'? Is the 'public' the sporting public or the non-sporting public or both? And how does culture influence the views of members of the public in so far as their perception of the seriousness of adverse conduct engaged in by an athlete?

Although the courts/tribunals have not to date definitively pronounced on who exactly constitutes 'ordinary members of the public', it would appear that much depends on the facts of each case, and, in this regard, it is very likely that the court will take a broad view of the 'public'[9] as including both the sporting and non-sporting public. This is both a rational and pragmatic approach since sporting bodies, when including the no disrepute clause in sports contracts, are not simply concerned with maintaining the reputation of the sport in question in the eyes of the sporting public, but the public more generally, who might identify with certain values, including probity and hard work, and who might accordingly be drawn to the sport, not only as players but also as spectators and potentially as sponsors. That said, there may be times when identifying a commonly held public view is virtually impossible, in light of the divergence of opinions on a particular type of conduct engaged in by the athlete across cultural divides. By way of example, Chris Gayle, a leading West Indian and Melbourne Renegade cricketer, was fined AU $10,000 in circumstances where he made controversial comments to television presenter Mel McLaughlin after a game in the Australia Big Bash T/20 Cricket League. Gayle provoked outrage when he effectively propositioned McLaughlin on air, saying he had been keen to be interviewed by her 'just to see your eyes for the first time', and candidly hoping that 'we can win this game [so] we can have a drink after'. Gayle's response to a noticeably embarrassed McLaughlin was to tell her, 'don't blush, baby!'[10]

Although Gayle, and, arguably the majority of the West Indian populace, viewed his comments and provocative gestures as 'a simple joke', the reaction in other parts of the world, including Australia, was one of shock and condemnation, with many viewing his antics as both disrespectful and sexist.[11] Clearly, in fining Gayle, the Australian authorities were prepared to view the Australian and, by extension, British society, where the matter was widely reported, as constituting ordinary members of the public for the purposes of invoking the no disrepute clause, illustrating that culture does play some role in determining whether the test is satisfied.

### 8.2.4 Scope of the 'no disrepute clause'

The existing jurisprudence reveals that the 'no disrepute' clause has been applied in a variety of situations, encapsulating both on and off-field conduct. While, as will be demonstrated below, there is a rational basis for invoking the clause to address on-field misconduct, the application of the clause in off-field situations raises more tendentious questions.

#### *8.2.4.1 On-field conduct*

For on-field conduct to bring a player/sport into disrepute, such conduct must have a negative bearing on the person's capacity to perform his duties in the sport. In this context, Kosla has

9 Ibid [13]. The CAS accepted that the relevant conduct was known by the public through media reports, but did not indicate who exactly 'ordinary members of the public' are.

10 'Chris Gayle fined £4,900 for asking female reporter Mel McLaughlin out for a drink live on TV during T20 game' (*Daily Mail Online*, 5 January 2016) *www.dailymail.co.uk/sport/cricket/article-3384781/Chris-Gayle-apologises-don-t-blush-baby-remark-female-reporter-T20-game.html*.

11 'Unabashed Gayle names baby daughter Blush' *(cricket.com.au*, 21 April 2016) *www.cricket.com.au/news/chris-gayle-daughter-blush-west-indies-royal-challengers-bangalore-big-bash-controversy/2016–04–21*.

identified three circumstances in which on field conduct may allow a club/team/league or sporting body to successfully invoke the no disrepute clause.[12] First, where the conduct leads to a refusal by the individual's peers to take further part in the competition, for example, if the player makes a foul or uses abusive remarks to match officials, or causes or takes part in a melee, or intimidates a match official or engages in acts of violence. Second, where the conduct causes friction and division amongst those engaged in sport, such as inciting crowd violence, engaging in an altercation with a spectator, threatening and abusing an opponent or being involved in a confrontation with spectators. Third, where the conduct is so outrageous or shocking that the sport is subject to public ridicule, such as biting the ear of an opponent, as was the case in the boxing match between Mike Tyson and Evander Holyfield.[13]

From a Caribbean perspective, there have been a number of examples of athletes engaging in on-field conduct in relation to which the no-disrepute clause has been successfully invoked or at the very least threatened to be invoked. For example, Daren Sammy and Marlon Samuels were fined 20% and 10% of their match fees respectively in circumstances where, in the context of an ODI between West Indies and England, they hurled insults at Ravi Bopara, as he took a single.[14] Tino Best was also fined 10% of his match fee in the context of the CPL in circumstances where, at the Kensington Oval, he engaged in a verbal altercation with Shoaib Malik in a match between St Lucia Zouks and the Barbados Tridents.[15] Similarly, Kieron Pollard, while playing for the Mumbai Indians in the Indian Premier League, was fined 75% of his match fee in circumstances where he swung his bat in the direction of Royal Challengers Bangalore's player, Mitchell Starc, who had bowled the ball at his leg after he pulled away from the stumps.[16]

The 'no disrepute clause' was also reportedly invoked against Bahamian international footballer, Happy Hall, who was suspended for three years from all football-related activities in The Bahamas in circumstances where he, along with several others, allegedly brought the game into disrepute by knowingly playing ineligible players during a Caribbean Football Union championship tournament in Haiti in 2015.[17] The wide remit and application of the 'no disrepute' clause could also be seen in the sanctioning of a schoolboy footballer after he removed his jersey upon scoring the winning goal in a match between Clarendon College and St Elizabeth Technical High in Jamaica.[18]

Interestingly, not only players have been subject to sanctions as a result of engaging in conduct that constitutes disreputable conduct; coaches have also, in recent years, been targeted by clubs, leagues and sports governing bodies. For example, Jamaica's Inter-Secondary Schools Sports Association (ISSA) suspended Jamaica College's Manning Cup coach, Alfred Henry, from all ISSA competitions for one year for allegedly bringing the sport of football into disrepute after he reportedly described the organizers and referees as incompetent and further labelled the referees as 'idiots' and 'nincompoops' in a 2009 match between Jamaica College

12 Martin Kosla, 'Disciplined for "Bringing a Sport into Disrepute" – A Framework for Judicial Review' (2001) 25(3) Melbourne University Law Review 654.

13 Guy Cook, *Language Play, Language Learning* (Oxford University Press, 2000) 84.

14 'Bopara, Sammy and Samuels fined for verbal showdown' (*ESPNcricinfo*, 10 March 2014) *www.espncricinfo.com/story/_/id/21549452/bopara-sammy-samuels-fined-verbal-showdown.*

15 'Tino Best, Shoaib Malik fined over CPL altercation' (*News18*, 25 July 2014) *www.news18.com/cricketnext/news/tino-best-shoaib-malik-fined-over-cpl-altercation-703983.html.*

16 'Pollard, Starc fined for altercation' (*ESPNCricInfo*, 7 May 2014) *www.espncricinfo.com/indian-premier-league-2014/content/story/742639.html.*

17 'BFA Suspensions 2017' (Bahamas Football Association, 27 September 2017) *www.bahamasfa.com/news/article/644/bfa_suspensions_2017.html.*

18 'Clarendon, Dinthill to contest Ben Francis Cup KO final' (*Jamaica Observer*, 5 November 2017) *http://m.jamaicaobserver.com/sports/clarendon-dinthill-to-contest-ben-francis-cup-ko-final_116158?profile=1348&template=MobileArticle.*

and Wolmer's Boys School.[19] Phil Simmons, former West Indies coach, was also temporarily suspended from his coaching responsibilities after he alleged that there was 'outside interference' in the selection of the West Indies ODI team to tour Sri Lanka in 2015.[20]

Although the above examples are illustrative rather than indicative of all on-field sporting scenarios that might constitute disreputable conduct, they do nonetheless demonstrate the ubiquitous nature of the clause and the wide-ranging circumstances in which the clause may be successfully invoked in order to maintain the integrity/reputation of the sport in question.

### *8.2.4.2 Off-field conduct*

Since 1967 when Mohammad Ali was suspended from boxing by the New York Athletic Commission for refusing to be inducted into the US army for religious reasons,[21] there have been numerous instances in which the no disrepute clause has been applied to penalize off-field misconduct both by athletes and their coaches. Although not every instance of off-field misconduct will amount to disreputable conduct, where the conduct in question has a negative bearing on the individual's capacity to perform their duties in the context of the sport, this might be sufficient to invoke the no disrepute clause. According to Kosla, the typical circumstances in which conduct may be deemed to be disreputable are where dissent and/or unfavourable comments are made or where the person has flaunted his role/responsibility.[22]

Apart from *D'Arcy* and *Jongewaard*, which clearly show that alcohol use resulting in injury to others is disreputable conduct, a number of other cases demonstrate this fact. For example, former Australian cricketer, Andrew Symonds, was suspended for two one-day international matches after turning up drunk to a one-day international match on Australia's tour to England in 2005.[23] Subsequently, Symonds' contract was terminated after he breached the team's policy on alcohol use in 2008, thereby bringing the sport into disrepute, and, unfortunately, bringing his career to a sad end.[24]

Not only has the 'no disrepute' clause been invoked in alcohol-related incidents, but also in relation to cases of sexual misconduct in recent years. For example, in 2010, John Terry was sacked as England's football captain because of a sexual affair that he had with the ex-partner of his England team-mate, Wayne Bridge. This decision was taken because it was considered that, as a result of Terry's conduct, the team's preparation for the 2010 FIFA World Cup was adversely impacted.[25] In other words, Terry's sexual misconduct, though it occurred off the field, brought England's football into disrepute. Similarly, Ashley Cole, a Chelsea footballer and a married man, was fined to the equivalent of two weeks' wages after he, while in Seattle with the team, took a woman back to the team's hotel and reportedly slept with her during a pre-season tour of the United States. Chelsea successfully punished him for bringing the game into disrepute, not only because of his sexual misconduct, but also because he had deceived the team's Head of Communications, Steve Atkins, into unwittingly covering up what had really

19 Ryon Jones, 'One-year ban for JC coach' (*Jamaica Gleaner*, 2 December 2009) *http://old.jamaica-gleaner.com/gleaner/20091202/sports/sports2.html.*

20 'Simmons asked to answer "breaches of confidentiality"' (*EspnCricInfo.com*, 30 September 2015) *www.espncricinfo.com/westindies/content/story/924509.html.*

21 Gloria Browne-Marshall, *Race, Law and American Society* (Routledge, 2013) 276.

22 Kosla (n 12) 674.

23 'Symonds sent home by Australia over drinking' (*Independent*, 4 June 2009) *www.independent.co.uk/sport/cricket/symonds-sent-home-by-australia-over-drinking-1696782.html.*

24 Chris Davies, 'The International World of Sport and the Liability for Off-Field Indiscretions' (2011) 23(1) Bond Law Review 4, 57.

25 'Gordon Rayner, 'John Terry sacked as England captain' (*The Telegraph*, 5 February 2010) *www.telegraph.co.uk/sport/football/teams/england/7166895/John-Terry-sacked-as-England-captain.html.*

happened.[26] As mentioned earlier, Chris Gayle, a leading West Indies cricketer, was also subject to a fine of AU $10,000 in circumstances where he made provocative comments to a female television reporter on air which were construed as sexist comments, which brought the game of cricket in Australia into disrepute.[27]

### *8.2.4.3 Sanctions*

Although a player may not suffer sanctions from his team or club where he engages in off-field misconduct, he may nonetheless suffer massive financial consequences. By way of illustration, after it was reported that Tiger Woods had had extra-marital affairs with more than 10 women and had been going through a divorce as a result, Gillette pulled its sponsorship of Woods, resulting in him losing millions of dollars, though he was not refused admission to participate in the 2010 PGA tour.[28] Interestingly, Nike continued in its support of Woods, notwithstanding the saga, which may seem to suggest that sports-based sponsors might be more inclined to continue with their engagements with a player who has committed some disreputable activity, as opposed to a non-sports-based sponsor, such as Gillette. This latter suggestion is also illustrated in respect of leading international swimmer, Michael Phelps, whose sponsorship contract with Kellogg's, a non-sports-based sponsor, was terminated by the company in circumstances where a photograph circulated in the public domain of Phelps appearing to smoke marijuana from a bong at a private party several months after the Beijing Olympic games.[29]

By contrast, although West Indies cricketer, Lendl Simmons, was ordered by the High Court of Trinidad and Tobago in *Therese Ho v Simmons*[30] to pay a fine after he disclosed intimate photographs of a woman with whom he had a sexual relationship to the public ('revenge porn'), he was not reportedly subject to any disciplinary measures by Cricket West Indies or any other franchise with which he was engaged at the time. Presumably, this was on account of the fact that he had already, in the view of CWI, been formally reprimanded by the court, but it begs the question as to whether players who are of particular value to a team are immune from being disciplined by sporting bodies for disreputable conduct, since to do so might result in said sporting bodies losing the services of these valuable players.

In a recent Caribbean case, *Nekeisha Blake v Trinidad and Tobago Badminton Association (TTBA)*,[31] the tribunal suggested that although it is permissible to impose certain sanctions on an athlete who has engaged in disreputable conduct, these sanctions must be proportionate, having regard to all the circumstances of the case. In this case, a complaint was brought by the TTBA regarding the conduct of a leading Trinidadian national badminton player, Nekeisha Blake, who was alleged to have acted in contravention of clause 10.2 of the constitution of the TTBA, which outlaws conduct that brings the TTBA or game into disrepute. More specifically, Blake was alleged to have engaged in insubordination towards the head coach as he gave instructions during training, as well as failed to comply with the TTBA's request to apologize to the head coach following a previous insubordinate act. It was also alleged that Blake sought to intimidate

26 'Chelsea could hit Ashley Cole with suspension and fine' (*Belfast Telegraph*, 22 February 2010) *www.belfasttelegraph.co.uk/sport/football/premier-league/chelsea-could-hit-ashley-cole-with-suspension-and-fine-28519603.html*.

27 'Chris Gayle fined in Big Bash League reporter' "sexism" row' (*BBC*, 5 January 2016) *www.bbc.com/news/world-australia-35229309*.

28 'Tiger Woods dropped by Gillette' (*The Guardian*, 24 December 2010) *www.theguardian.com/media/2010/dec/24/tiger-woods-dropped-by-gillette*.

29 Kevin Van Valkenburg, 'Phelps' marijuana controversy' (*Baltimore Sun*, 9 February 2009) *www.baltimoresun.com/news/maryland/bal-phelps-bong-storygallery-storygallery.html*.

30 HC 1949/2014. CV.2014–01949.

31 *Trinidad and Tobago Badminton Association (TTBA) Appeals Committee* (26 January 2016).

the head coach, and had made a Facebook post that attempted to defame the character of board members. The disciplinary committee of the TTBA adjudicated on the charges, and ruled that Blake was 'to be exited from the sport of Badminton indefinitely'.

Blake appealed against the sanction imposed, arguing that not only the sanction itself was disproportionate, but that the process leading to the imposition of the sanction was flawed, demonstrating a breach of natural justice principles. The appeals committee of the TTBA agreed with Blake, although it ultimately imposed a one-year sanction period of suspension from the sport on account of her actions, which it deemed to 'warrant disciplinary action', and which, in fact, had to be 'condemned'. In reviewing the process by which the decision was arrived at, the appeals committee found 'prima facie breaches of natural justice', including the fact that the TTBA, in its notices of offence and disciplinary hearing, confined itself to the text of the constitution and did not provide specific details of the alleged offences. Additionally, one day's notice to Blake to attend the hearing was held to be unreasonable, as well as the limitation on the number of witnesses (two) that Blake was allowed to call in support of her case. The appeals committee further chided the 'very sparse and economical language and reasoning' that characterized the lower tribunal's findings, although it found that this, as well as the other breaches, could have been cured and/or formally mitigated by responsible behaviour on Blake's part, as she had deliberately absented herself from the tribunal's hearing.

#### *8.2.4.4 Summary*

A final, but no less interesting, question arises as to whether it is justifiable to bring what transpires in a sportsperson's private life into a discussion about the need for 'role models' in sport. Clearly, sportspeople, like any other member of the society, are entitled to the right to respect for their private and family life, though admittedly this right is not absolute. Another way of looking at it, however, is to draw an analogy with politicians or diplomats; if a person decides to become a politician or diplomat, he exposes himself to the prospect of his conduct in private life being used to determine whether he has brought himself/his profession into disrepute, as evidenced by a recent incident involving Vincentian diplomat, Sehon Marshall, who was forced to resign after he reportedly physically abused his wife at their New York residence in late 2017.[32] Applied to the sporting context, although not every instance of misconduct off the field would amount to disreputable conduct, where the conduct in question is such as to lower the person's/the sport's estimation in the eyes of ordinary members of the public, he is likely to be deemed to have brought himself/the sport into disrepute.

## 8.3 HUMAN RIGHTS IN SPORT

Like in many other areas of human endeavour, human rights maintain an inescapable presence in sports. Indeed, whether it concerns a dispute over the right to participate in sporting events or the imposition of disproportionate sanctions on an athlete, human rights cannot be divorced from the sporting context,[33] especially in this modern era where 'human rights' have become somewhat of a watchdog principle.

32 Nelson King, 'Vincentian diplomat recalled after fracas' (*CaribbeanLifeNews.Com*, 29 November 2017) *www.caribbeanlifenews.com/stories/2017/12/2017-12-01-nk-vincentian-diplomat-recalled-cl.html*.

33 Bruce Kidd and Peter Donnelly, 'Human rights in sports' (2000) 35(2) International Review for the Sociology of Sport 131.

Ensuring respect for, protection and fulfilment of, various human rights prescriptions is an inherent part of a State's international human rights due diligence obligation.[34] In this context, a State cannot sit idly by while human rights abuses are perpetrated against sportspersons or, indeed, other members of society, without intervening. In the same vein, sports entities, such as clubs and leagues, cannot, as a matter of principle, suppress the rights of sportspersons through repressive measures that curtail even the most basic of rights, including the right to freedom of expression and non-discrimination.

Notwithstanding the theoretical and practical significance of human rights and, indeed, their increasing importance in the modern dispensation of sports justice, a number of outstanding concerns remain in relation to which one cannot, on both legal and moral grounds, turn a blind eye. Among the main human rights issues that confront sport today are the exploitation of children, human trafficking, the suppression of elementary civil, political, social and cultural rights, as well as discrimination. Although these issues, given their axiomatic importance, would otherwise merit a treatise, in the interest of space, they are addressed briefly hereafter.

### 8.3.1 Child protection, human trafficking and the quest for justice

Children, internationally defined as persons under the age of 18 years,[35] increasingly play an important part in the composition of various sporting teams across the world today. These children bring a distinct sporting advantage to clubs, leagues and sporting bodies, both because of their ability to draw and captivate a diverse international audience, as well as their undeniable sporting prowess, as illustrated by recently retired track star Usain Bolt and cricket legend Sir Garfield Sobers, amongst others, both of whom made their international debuts with tremendous acclaim before the age of 18.

Apart from the issue of capacity as discussed in Chapter 3 on sports contracts, there are a number of other issues that confront children who participate in sports. Among these issues are child exploitation and human trafficking, in relation to which there have been recurrent reports over the last two decades. Although FIFA has intervened through rule 19 of its Transfer Rules, which severely restricts the circumstances in which child footballers could play in other jurisdictions, there is undoubtedly still a long way to go.

Article 19 of FIFA's Regulations for the Status and Transfer of Players (RSTP) prohibits international transfers of minor players, subject to exceptions, including:

- The player's parents move to the country of the new club for reasons that are not linked to the activity of the minor as a football player (Art. 19(2)(a));
- The transfer takes place within the territory of the EU or the European Economic Area and the player is aged between 16 and 18, under certain circumstances (Art. 19(2)(b));
- The player lives near a border and the registering club is located close to this border (maximum distance of 100 km, Art. 19(2)(c));
- The international transfer of minors is allowed in cases where the players concerned could establish without any doubt that the reason for relocation to another country was related to their studies, and not to their activity as football players;

34 Jan Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 Buffalo Human Rights Law Review 54.

35 The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), Article 1.

- The international transfer is also allowed in cases in which the association of origin and the new club of the players concerned have signed an agreement within the scope of a development programme for young players under certain strict conditions (agreement on the academic and/or school education, authorization granted for a limited period of time).

Although these exceptions are not exhaustive, the CAS has held that given the objective that they pursue, they must be strictly construed. In *FC Midtjylland A/S v FIFA*,[36] the appellant appealed against a decision by FIFA's Players Status Committee that had the effect of preventing it from benefiting from the aforementioned exceptions in circumstances where it sought to bring a number of Nigerian minor footballers to Denmark to play football, while also attending school, pursuant to a cooperation agreement between the appellant and FC Ebedei. The CAS upheld the decision of the Players Status Committee, finding that there was no evidence that the relocation of the players to Denmark was related to their studies. According to the CAS, having regard to the commentary on the club's website, which spoke of the existence of a cooperation between the appellant and FC Ebedei, the principal objective behind the desire to relocate the minor players to Denmark was to enable the appellant to find new talent in the field of football, not to select the best Nigerian students in order to develop their academic abilities in northern Europe. Although the transferred players were studying in a public school and were attending a serious and recognized educational programme, this did not mean that the relocation of the players was driven by reason of education and not for sporting reasons. As such, it was not sufficient for the club to benefit from one of the two latter exceptions permitted by FIFA. In short, the CAS concluded that the main reasons for the players' move to Denmark were related to football and not to the furtherance of their education, and that, therefore, no exception to the principle of the prohibition of international transfer of minor players could be invoked in the present case. Quite instructively, the CAS cited with approval the view of the Status Committee, which had determined that:

> the inclusion of [Article 19] was the result of an alarming situation that had occurred relating to abuse and maltreatment of many young players, mostly still children ... solely an interdiction allowing only very limited exceptions under specific circumstances could bring a halt to such a situation and protect minor players from their rights being infringed upon ... such aim can only be reached by a strict, consistent and systematic implementation of Article 19 of the Regulations pointing out that no means allowing a more lenient modus operandi appear to exist.[37]

While this decision is, indeed, a welcome one, it must be noted that, quite apart from being overworked, under-paid, poorly educated, poorly trained, physically abused, neglected, unwontedly chastised and subject to disproportionate contractual terms, child athletes, and, indeed, even some adult athletes, continue to face the additional challenge of being trafficked. In the typical human trafficking case, a player would be recruited, often from a lesser developed country, and subsequently exploited for their sexual or labour services, upon arrival at his destination, by various means, including coercion, force and abuse of a dominant position. What is particularly troublesome about this vicious cycle is that the inherent vulnerability of these youngsters, largely linked to their age, poor financial position and lack of adequate support system, is typically exploited by clubs and leagues in many places across the globe with virtual impunity. The result is, quite naturally, devastating; these youngsters often end up destitute, particularly

36 CAS 2008/A/1485, award of 6 March 2009.
37 Ibid.

if their performance falls below vaguely defined targets[38] and, in some cases, they may even remain indebted to their recruiters in a vicious cycle of debt bondage.

More recently, the former doctor for the American gymnastics team, Dr Larry Nassar, was sentenced to 40–175 years; imprisonment for multiple sex crimes. He was accused of molesting over 150 girls, now young women, under the guise of giving them examinations or medical treatment. The court heard that some of these girls were as young as six years old at the time, and though many complained to family members, among other persons, their stories were never believed. At the extraordinary sentencing exercise, which was broadcast live on television, the victims spoke to the hurt, shame and embarrassment that they experienced as a result of the long-term abuse, describing 'Larry [as] the most dangerous type of abuser'. Interestingly, the United States Olympic Committee has since been condemned by critics for not doing enough to protect children from the predatory actions of people in positions of trust, like Dr Nassar, while the entire board of USA Gymnastics[39] was compelled to resign.[40]

Thankfully, in more recent times, issues of child protection in sports, and human trafficking, in particular, have increasingly been placed in the spotlight, largely due to the work of mainstream media, international conferences and various rules, regulations and legislation, which attempt to address the causes and consequences of exploitation.[41] This is commendable, but there is more to be done. This is certainly true in the Caribbean where there have been occasional instances of alleged abuse of children in sport.[42] For example, in 2014, martial arts instructor, Anthony Charles, was charged on 12 counts of buggery and indecent sexual assault on three schoolboys (ages 13, 14 and 16) in Trinidad and Tobago.[43] Meanwhile, Terrence Marcelle, a former Pleasantville secondary and Trinidad and Tobago national youth team football coach, was allegedly dismissed from his posts after he was accused of sending explicit messages to a Pleasantville schoolboy, despite the latter's objection.[44]

### 8.3.2 Sporting events and the suppression of human rights

Although most major sporting events attract a wide gamut of support from international sporting bodies and governments, there have been far too many instances, particularly in recent years, in which human rights violations have occurred within the very context of these widely supported events. The danger with human rights abuses perpetrated in the sporting context lies in the fact that they are often subtle, driven by an insatiable appetite for money and recognition, and often involve elements of complicity. By way of example, a number of South African sports

38 Mike Woitalla, 'How FIFA rules hurt immigrant children in the USA' (*Soccer America*, 7 April 2017) *www.socceramerica.com/publications/article/72935/how-fifa-rules-hurt-immigrant-children-in-the-usa.html*.

39 Rachel Axon and Nancy Armour, '*Entire USA Gymnastics board resigns in wake of Larry Nassar scandal*' (*USA Today*, 31 January 2018), *www.usatoday.com/story/sports/olympics/2018/01/31/entire-usa-gymnastics-board-resigns-usoc-larry-nassar-scandal/1082855001/*.

40 Scott Cacciola and Victor Mather, 'Larry Nassar Sentencing: "I Just Signed Your Death Warrant"' (*New York Times*, 24 January 2018) *www.nytimes.com/2018/01/24/sports/larry-nassar-sentencing.html*.

41 'Protection of minors' (*FIFA*, September 2016) *http://resources.fifa.com/mm/document/affederation/administration/02/83/14/23/faq_protectionofminors_august2016_en_english.pdf*.

42 Glenford Prescott, 'Trinidad Youth Cricketer Allegedly Sexually Assaulted in St. Vincent' Iwitness News (20 December 2016) *www.iwnsvg.com/2016/12/20/trinidad-youth-cricketer-allegedly-sexually-assaulted-in-st-vincent/*. According to various reports filed, the coach is said to have invited the opening batsman into his room for a massage to ease an injury suffered during the three-day tournament, and during the course of the massage, made sexual advances on an under-19 opening batsman.

43 Azard Ali, 'No Bail for Man on buggery charges' (*Newsday*, 16 October 2014) *https://archives.newsday.co.tt/2014/10/16/no-bail-for-man-on-buggery-charges/*.

44 Lasana Liburd, 'Ex-TTFA coach ponders youth football return despite schoolboy scandal' (*Wired868.com*, 23 March 2014) *https://wired868.com/2014/03/23/ex-ttfa-coach-ponders-youth-football-return-despite-schoolboy-scandal/*.

teams, during the apartheid era, perpetrated undoubtedly racist policies against 'non-whites', particularly in the context of international cricket, even amidst much international condemnation.[45] Sadly, though fully cognizant of the human rights abuses perpetrated by the racist regime at the time in South Africa, 18 West Indian cricketers, including fast-bowler Colin Croft, wicketkeeper Alvin Kallicharran, and 1979 World Cup hero, Collis King, were tacitly complicit, when they agreed to a tour of South Africa in 1983[46] on being offered US$120,000 for a single tour, though for many of the players such as Richard Austin, the money was short-lived.

In more recent years, although the face of human rights abuses in sports has changed from overtly racist policies, new dimensions of injustice have taken root. Two recent incidents are illustrative of this sentiment. In 2013, a large number of people demonstrated in dozens of Brazilian cities, expressing their discontent with increased public transportation costs, high spending and insufficient investment in public services as a result of Brazil hosting the FIFA World Cup in 2014. Unfortunately, the military police engaged in violent and abusive practices to curtail the rights of freedom of expression and association of these demonstrators, such that a number of persons were subject to the indiscriminate use of tear gas, rubber bullets and beatings from hand-held batons. Hundreds were reportedly injured and hundreds more were indiscriminately rounded up and detained, some under laws targeting organized crime, without any indication that they were involved in criminal activity. This led to Amnesty International, in May 2014, launching the campaign 'No foul play, Brazil', warning about restrictions to freedom of expression and police abuses during protests and urging the authorities to ensure security forces 'play by the rules' during demonstrations that were expected to take place ahead of and during World Cup 2014.[47]

Russia also faced similar accusations of repression of human rights during the Winter Olympics in Sochi in 2014. In fact, it was reported that any voice of dissent was quickly silenced, including that of Yevgeny Vitishko, an environmental activist, who was accused of vandalism and sentenced to three years in prison for allegedly using swear words while standing at a bus stop, though she had been desperately trying to prove that rare trees were chopped down to make way for sporting facilities.[48]

Most recently, media attention has been focused on the 2022 FIFA World Cup which is slated to be held in Qatar, with the prime issue being the deplorable conditions under which migrant workers are building the infrastructure for the games.[49] Despite numerous calls for action, little has reportedly improved over the past five years, which makes for a grim appreciation of the uneasy interaction between sports and human rights.

Notwithstanding the foregoing, however, it is submitted that all is not lost in the war against human rights abuses in sport. Indeed, there remains great potential for sport to be used as an instrument, given its lucrative nature, to enhance the lives of those who are disenfranchised, as evidenced by the Caribbean's hosting of the 2007 ICC World Cup cricket competition. Despite the existence of this potential, however, it is clear that robust guidelines and action must be taken to eliminate all instances of human rights abuses in sports, as recently noted by Amnesty International, which has called on States and organizing bodies, like the IOC and FIFA, to put

45 Alex Hanton '10 Sporting Events Plagued By Human Rights Abuses' (*ListVerse*, 26 June 2015) *http://listverse.com/2015/06/26/10-sporting-events-plagued-by-human-rights-abuses/*.

46 Tim Quelch, *Stumps & Runs & Rock 'n' Roll: Sixty Years Beyond a Boundary* (Pitch Publishing, 2015).

47 Amnesty International, 'Brazil' (2016) *www.sportandhumanrights.org/wordpress/index.php/2015/06/18/brazil-2016-summer-olympics/*.

48 Sibylle Freiermuth, 'Human Rights Day 2015: The darker side of sport and human rights' (*SportandDev.org*, 10 December 2015) *www.sportanddev.org/en/article/news/human-rights-day-2015-darker-side-sport-and-human-rights*.

49 Ibid.

in place robust due diligence procedures to ensure that sporting events do not cause or contribute to human rights violations.[50]

### 8.3.3 Discrimination in sports

Discrimination in sports is an uncomfortable area, which raises philosophical, constitutional, and ethical questions. Despite monumental shifts in the way discrimination in sports is viewed and responded to, it is undoubtedly the case that much work remains to be done in this sensitive area, where fairness is often sacrificed on the altar of expediency.

Even accepting that there is discrimination in sports, the questions arise as to what really amounts to discrimination in the sporting context? What are the jurisprudential principles to be applied when assessing cases of alleged discrimination? And what are the grounds in relation to which a sportsperson can be discriminated against?

#### *8.3.3.1 Basic principles of anti-discrimination law*

Simply put, discrimination involves the *less favourable* treatment of a person in comparison to another person who is similarly placed without a defensible justification.[51] This definition, though not particularly prescriptive, nonetheless requires the showing of some benefit or advantage being afforded to one athlete as opposed to a similarly placed athlete or some disadvantage or restriction that affects one athlete but not the other. Invariably, discrimination law is founded on comparisons; it must be established that the parties in question are in comparable/similar circumstances in order for discrimination to arise.[52] That said, even if there is a difference in treatment as between similarly placed parties, this does not automatically give rise to discrimination, since differentiation does not equate to discrimination[53] and, in any event, there can be appropriately sound reasons that justify the difference in treatment. On the question of justification, sporting performance[54] and the imposition of commensurate sanctions[55] are often advanced as bases for differential treatment, and these are in most cases accepted by sports tribunals, provided that the treatment meted out is necessary and proportionate.

#### *8.3.3.2 Standard and burden of proof*

Discrimination cases in the sporting context are decided no differently from other cases decided upon in domestic courts, at least in so far as the standard and burden of proof are concerned.

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50 Amnesty International, 'Human Rights And Sports: Amnesty's recommendations' (2016) *www.sportandhumanrights.org/wordpress/index.php/2015/06/18/human-rights-and-sports-amnestys-recommendations/*.

51 CAS 2013/A/3297 *Public Joint-Stock Co 'Football Club Metalist' v UEFA & PAOK FC*, award of 29 November 2013 [8.39]. The CAS stated that 'the principle of equal treatment is violated only when two similar situations are treated differently'.

52 CAS ad hoc Division (OG Turin) 06/002 *Andrea Schuler v Swiss Olympic Association & Swiss-Ski*, award of 12 February 2006 [27]. The CAS noted that there are different standards set out for men and women which are based on the different levels of competitiveness of the respective competitions, but this differentiation does not amount to discrimination.

53 CAS ad hoc Division *OG* 14/001 *Daniela Bauer v AOC & ASF*, award of 4 February 2014 [7.8]. The CAS noted that the applicant must be in the 'same situation' as the other person to whom comparison is being made.

54 CAS ad hoc Division *OG* 14/003 *Maria Belen Simari Birkner v COA & FASA*, award of 13 February 2014 [8.2]. The CAS noted that there is no discrimination if there is a legitimate 'sports performance' justification for the non-selection of an athlete.

55 CAS 2015/A/4215 *FIFA v KFA & Kang Soo Il*, award of 29 June 2016.

In *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*,[56] the CAS took the opportunity to confirm that the following principles apply in the sporting context:

- the athlete bears the burden of proving that the treatment meted out to him is *prima facie* discriminatory. If the less favourable treatment only applies to him alone, there is a strong argument that it is *prima facie* discriminatory;[57]
- If the athlete establishes that the treatment is *prima facie* discriminatory by reference to a higher ranking rule or otherwise, on the balance of probabilities, the burden shifts to the party imposing the particular treatment to establish that the treatment serves a legitimate objective and is justifiable as reasonable and proportionate.[58] In other words, in order to justify the discrimination, the party against whom the action is brought must prove that a legitimate objective,[59] such as pursuing fairness in sport or levelling the playing field, is being pursued; that the measure does not do more than is necessary to achieve that objective;[60] and that it has struck a fair balance between the rights of the athlete and the broader interests of the sport;[61] and
- If the party imposing the particular treatment establishes justification, the burden then shifts back to the athlete to disprove the bases of that justification.[62]

### *8.3.3.3 Grounds of discrimination*

There are a number of grounds in relation to which a sportsperson may be discriminated against, some of which are discussed below.

#### 8.3.3.3.1 Race

Discrimination on the ground of race is an insidious act that undermines the spirit of fair play and good sportsmanship that forms the fundamental basis of sport. It detracts from the fan experience, from the play of the game, and it creates a reprehensibly uncomfortable environment for the individuals who are the target of its ugly expression.[63]

Despite the dreadful nature of discrimination on the ground of race, racism has, quite unfortunately, had a long and pervasive history in sport. From capable black cricketers reportedly being denied the captaincy of the West Indies cricket team until Barbadian, Frank Worrell, broke the trend in the 1960s,[64] to Learie Constantine being refused accommodation at a hotel

56 CAS 2014/A/3759.
57 Ibid [443].
58 Ibid.
59 CAS 2010/A/2235 *UCI v T. & OCS,* award of 21 April 2011 [52]. The CAS held that anti-doping rules and sanctions serve a legitimate objective; that is, to secure the organization and proper conduct of competitive sport and its very purpose which is to ensure healthy rivalry between athletes.
60 CAS anti-doping Division OG AD 16/011 *IOC v Misha Aloian,* award of 8 December 2016 [38]. The CAS ruled that the principle of proportionality requires an assessment of whether a sanction is appropriate to the violation committed in the case at stake. Excessive sanctions are prohibited.
61 CAS 2016/O/4684 *ROC & Lyukman Adams et al. v IAAF,* award of 10 October 2016 (operative part of 21 July 2016) [92]. The CAS held that the effect of anti-doping sanctions on innocent athletes, though unfortunate, is outweighed by the benefits of retaining public confidence in the integrity of international competition and preventing other athletes from being cheated out of the medals, prize money and glory they deserve.
62 *Dutee Chand* (n 56) [445].
63 CAS 2015/A/4256 *Feyenoord Rotterdam NV v Union des Associations Européenes de Football (UEFA),* award of 24 June 2016 [80].
64 Hubert Devonish, 'African and Indian Consciousness at Play: A Study in West Indies Cricket and Nationalism' in Hilary Beckles and Brian Stoddart (eds), *Liberation Cricket: West Indies Cricket Culture* (Manchester University Press, 1995) 181.

in London on the basis of his race,[65] to Indo-Caribbean cricketers more recently allegedly being subjected to unfair selection practices perpetrated by a predominantly black Cricket West Indies (CWI) hegemony,[66] racism appears to be an inescapable, yet disturbing, feature of sport.

In *Constantine v Imperial Hotels*, the claimant, a well-known West Indian cricketer, claimed damages against the defendants, the proprietors of the Imperial Hotel and also of the Bedford Hotel, London, both of which were in the same neighbourhood, for refusing to receive and lodge him at the Imperial Hotel, on 30 July 1943. Although the plaintiff had a contract with the defendants for the reception of his wife, his daughter and himself at the Imperial Hotel, no claim was made in contract. The action was, instead, framed in tort, on the ground that accommodation that was available was refused by the innkeepers to a traveller without lawful excuse. Although no special damage was pleaded or proved, the court held that the defendants were innkeepers and that the Imperial Hotel was a common inn; that the plaintiff came to the Imperial Hotel and requested the defendants to receive and lodge him as a traveller; that the defendants had sufficient room for receiving him at the hotel; that the plaintiff was ready and willing to pay all proper charges for his accommodation; and that the plaintiff was a man of high character and that, although he was a man of colour, no ground existed on which the defendants were entitled to refuse to receive and lodge him at the hotel. On the question of damages, however, Birkett J adopted a wholly conservative approach:

> I hold this action by Mr Constantine to be maintainable without proof of special damage. His right, I think, is founded on the common law. That right I found was violated. The law affords him a remedy, and the injury which he has suffered imports damage.
>
> It only remains for me to say that I was urged by Sir Patrick Hastings to award exemplary or substantial damages, because of the circumstances in which the denial of the right took place when Mr Constantine suffered, as I find that he did suffer, much unjustifiable humiliation and distress, but on the authorities I do not feel that I can accede to that submission, having regard to the exact nature of this action and the form in which it comes before me. My conclusion is that I must give judgment for Mr Constantine for nominal damages only, and I, therefore, award him the sum of five guineas.[67]

Regrettably, although there has been greater awareness, and penalization, of discrimination in sport on the ground of race in recent years, a number of modern examples highlight that the movement to eliminate racism in sport is far from complete. For example, in 2017, Jamaican-born Raheem Sterling was kicked and subject to racial abuse outside the entrance of the City Football Academy ahead of Manchester City's win over Tottenham.[68] Although the offender was reportedly ultimately sentenced to 16 weeks' imprisonment by the Manchester and Salford magistrates' court, it remains particularly disturbing that in the twenty-first century a professional footballer of colour and who is of tremendous value to his club and his partner could be subject to seriously inflammatory and humiliating remarks about an immutable characteristic – his race.[69] Further afield, it is also disturbing that Liverpool youngster, Rhian

65 *Constantine v Imperial Hotels Ltd* [1944] KB 693; see also Martin Williamson, 'We won't have niggers in this hotel' (*ESPN CricInfo*) *www.espncricinfo.com/magazine/content/story/333401.html.*

66 'Race and Cricket Narratives in the West Indies' (*Citizensreportgy.com*, 5 August 2016) *http://citizensreportgy.com/?p=30314.*

67 *Constantine v Imperial Hotels Ltd* [1944] KB 693, 708.

68 'Manchester City footballer Raheem Sterling "completely shocked" at race attack' (*Sky News*, 20 December 2017) *https://news.sky.com/story/man-jailed-for-racially-assaulting-footballer-raheem-sterling-11178621.*

69 'Raheem Sterling: Man jailed after being convicted of a racially aggravated attack on Manchester City star' (*The Independent*, 20 December 2017) *www.independent.co.uk/sport/football/premier-league/raheem-sterling-attack-racism-in-football-verdict-court-manchester-city-a8120271.html.*

Brewster, was disparaged because of his colour by a player from an opposing team in Russia;[70] that Mario Balotelli was subject to Bastia supporters in France making monkey noises for a whole game in which he played; and Brazilian midfielder, Everton Luiz, was subjected to monkey chants and jeers from the terraces throughout his side's match in Belgrade.[71]

Notwithstanding these incidents, however, it cannot be said that no efforts have been taken to combat racism in sports today. Indeed, although FIFA in 2016 disbanded its Anti-Racism Task Force, a number of clubs, sporting associations and international sports governing bodies have adopted rules and regulations aimed at recognizing and penalizing racism, which are, of course, in addition to domestic laws against racism. Indeed, Trinidad and Tobago's standout World Cup 2006 goalkeeper, Shaka Hislop, was a lead advocate in the *Show Racism the Red Card* campaign years ago.[72] Furthermore, clause 58 of FIFA's Disciplinary Code prohibits and sanctions a person who, by words or conduct, offends the dignity of another person in so far, *inter alia*, as their race is concerned,[73] while the International Olympic Committee has as one of its 'fundamental principles' non-discrimination on the basis, *inter alia*, of race.[74]

At a jurisprudential level, the CAS has authoritatively pronounced on the question of discrimination on the ground of race in sport, and has, in the process, taken the opportunity to outline some of the underlying principles that are to be applied in the determination of race discrimination cases. In *Feyenoord Rotterdam NV v Union des Associations Européenes de Football (UEFA)*,[75] the appellant, a Dutch professional football club, appealed against a decision by UEFA's Control, Ethics and Disciplinary Body to impose a fine of 50,000 euros and an order requiring the appellant to play a match behind closed doors in circumstances where one of the appellant's supporters, who incidentally happened to be a dark-skinned man of Antillean parentage (presumably, Dutch Caribbean), threw an inflatable banana in the direction of a black AS Roma player, Gervais Yao Kouassi, during a UEFA Europa League football match in Rotterdam. In upholding the fine, the CAS found that the club, by virtue of the act of its supporter, had been guilty of an act of racism, and ruled that 'sport has no place in it for racist conduct and acts'.[76] While acknowledging the importance of context, which it considered to be 'highly relevant to the outcome of whether what occurred constitutes a racist act',[77] it nonetheless considered that the test for determining whether an act is racist is an objective one; that is, whether an 'objective onlooker, wherever he or she is situated, be it in the stadium either on the pitch or in the stands, or behind a screen in any location (worldwide or indeed in outer space), could reasonably conclude that the act constitutes an insult to human dignity'.[78] Although the impression of one player (even the player towards whom the act is ostensibly directed) may be relevant, it is not solely determinative. This objective test rejects a relativist view of racism, so that it cannot successfully be argued that the incident in question is less severe than other incidents elsewhere. Against this backdrop, the CAS rejected the argument that there were more severe incidents of

70 'Liverpool's Rhian Brewster opens up on vile racial abuse from Spartak Moscow player' (*Mirror Online*, 28 December 2017) *www.mirror.co.uk/sport/football/news/suck-d-you-nr-liverpools-11763644*.

71 'Partizan Belgrade's Everton Luiz leaves the pitch in tears after being racially abused' (*The Independent*, 20 February 2017) *www.independent.co.uk/sport/football/european/everton-luiz-partizan-fk-rad-racism-abuse-serbia-a7590321.html*.

72 'Show Racism the Red Card – A personal plea from Shaka Hislop' (*The Red Card*, 22 October 2012) *www.theredcard.org/news/2012/10/22/a-personal-plea-from-shaka-hislop*.

73 A stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000.

74 Principle 6 of the Olympic Charter.

75 CAS 2015/A/4256, award of 24 June 2016.

76 Ibid [80].

77 Ibid [61].

78 Ibid [66].

racism in eastern Europe such as monkey chants, swastikas and other such reprehensible symbols, holding that 'to find otherwise would be permissive of acts that are racist or otherwise reprehensible to some individuals on the basis that they are not to others'.[79]

In relation to the victim's view, the CAS held that the fact that Gervais also considered the act racist was an additional (but not essential) indication that it could reasonably be considered as such. Meanwhile, on the question of the offender's view, the CAS considered that this was of 'limited relevance given the objective dimension of the relevant test',[80] though, having regard to the principle of proportionality, the CAS took account of 'the reasonable possibility that the inflatable banana was indeed only thrown out of frustration without any racist intentions'.[81] In this context, the CAS introduced a notion of 'unintentional racism', which is, from a jurisprudential perspective, progressive as much as it is anomalous. This principle recognizes that even where the offender in question does not have the intention to commit a racist act, the mere fact that the act has been committed and it is perceived to be a racist act by the objective observer is sufficient to establish discrimination on the ground of race. The unintentional nature of the act, however, serves as a mitigating factor in so far as the sanction ultimately imposed is concerned.

Although the CAS did not provide exacting details as to the framework within which the notion of unintentional racism operates, an interesting question arises as to whether the 1999 cricket incident in Barbados involving a match between West Indies and Australia can be viewed through the lens of unintentional racism. In that case, angry West Indian supporters threw bottles, blocks, chicken bones and plastic chairs onto the field at the Kensington Oval in Barbados, with a bottle narrowly missing Australian cricket captain Steve Waugh, in circumstances where Barbadian and West Indies opening batsman Sherwin Campbell was run out after a mid-pitch collision with Australian bowler, Brendon Julian, in the final game of a tense and enthralling one-day series.[82] If, indeed, the CAS ruling was to be applied, it may appear that a presumably black Caribbean supporter throwing a bottle at the then Australian captain, a Caucasian man, though out of frustration, may nonetheless be construed as a racist act by the reasonable onlooker. Interestingly, on the basis of the *Feyenoord Rotterdam NV* decision, even where the media reports did not portray the incident in a race discrimination light, 'no weight'[83] is to be attached to the media reports, since the only question is whether the reasonable observer would conclude that the act in question was racist. While one can indeed only speculate as to how the CAS may decide upon a matter of this nature were it to occur in future, it would appear that the notion of unintentional racism is a powerful tool to curtail subtle acts which may have racial implications.

While the unintentional nature of the racism complained of appears to provide some discretion for the CAS to reduce any sanction imposed by a disciplinary tribunal, it also appears that the existence of an intention or at least negligence has quite the opposite effect. For example, in *Josip Šimunič v FIFA*,[84] the appellant, a Croatian/Australian national, who played for the national football team of Croatia, around 40 minutes after the conclusion of a UEFA match against Iceland, went to the centre of the pitch, without any of his teammates, with a microphone in his right hand and a shirt in his left hand. While making rising arm movements (Nazi salute) with his left hand, he first pronounced the words 'za dom' ('for the

79 Ibid.
80 Ibid [70].
81 Ibid [77].
82 Gayle Alleyne, 'Bottle field: Fans protest Campbell runout' (*ESPN CricInfo*, 26 April 1999) *www.espncricinfo.com/ci/content/story/77877.html.*
83 *Feyenoord Rotterdam NV* (n 63) [68].
84 CAS 2014/A/3562, award of 29 July 2014.

homeland'), replied by the spectators with the word 'spremni' ('we are ready'). The expression 'za dom spremni!' is a Croatian salute that was used during World War II by the fascist Ustaše movement. The FIFA Disciplinary Committee initiated a disciplinary procedure against the player, and formally suspended him for 10 official matches. Upon appeal, the CAS upheld the sanction, finding that the player was clearly interacting with the remaining supporters in the stadium and longing for their reply, and that, as an aggravating factor, the player, by his actions, involved the supporters in his disparaging behaviour instead of pronouncing the words himself. As such, the CAS ruled that the entire expression 'za dom – spremni' was attributable to the player as if he had pronounced the word 'spremni' himself, although the player tried to argue that he was citing certain phrases from an eighteenth-century opera. According to the CAS, the racial implications of the statement lie in the fact 'za dom – spremni' was used at the time as part of the salutation by the Ustaše, which demonstrably was responsible for atrocities against various ethnic groups, mainly Serbs, Jews and the Roma people. The panel found the player's behaviour was even more worthy of condemnation because it was not a spontaneous action. The incident occurred some 40 minutes after the end of the match, leaving the player some time to think and to reconsider his plan. Furthermore, the player had to wait some minutes to obtain a microphone, again giving him the chance to reconsider his plans. Also, the player entered the pitch without any teammates, walking towards the remaining supporters in the stadium and only then started shouting the words, through a microphone, to the supporters. On the question of intent, the CAS found that the player was perfectly aware of his exact expressions and that, in any event, he was negligent in the sense that he should have known about the fascist connotation of the words used, or at least that the groups of people that had been suppressed by the Ustaše regime would feel discriminated against by his public association with this fascist regime.

The objective test to determining the existence of racism was recently applied by the CAS in *Football Association of Albania (FAA) v Union des Associations Européennes de Football (UEFA) & Football Association of Serbia (FAS)*.[85] In that case, both the FAA and FAS were subject to fines and a reduction in points in circumstances where their supporters engaged in plainly racist words and actions. On the one hand, the Albanian supporters who attended the UEFA European Championship qualifying match held in Belgrade flew a drone over the playing area, attaching a banner with a map of the so-called 'Greater Albania', while, on the other hand, the Serbian supporters chanted, 'Slaughter the Albanians until they are exterminated' and other illicit chants and banners in addition to them invading the field and violently attacking the visiting team, in the face of indifference on the part of the stewards. Applying the objective test, the CAS found that the hateful chants calling for the killing or extermination of one national or ethnic group would be perceived by any reasonable onlooker as an insult to the human dignity of a group of persons on grounds of ethnic origin, while also concluding that a drone carrying a banner depicting Albanian extremely nationalistic and patriotic symbols was highly likely to be viewed by a reasonable onlooker as insulting. In rejecting the argument raised by the FAA that it should not be held responsible for the acts of the persons flying the drone, the CAS concluded that a strict liability[86] approach was countenanced under UEFA regulations, and that once a reasonable observer would find that a person supports a club, whether he provides this support while in the stadium or out of sight, that person is to be viewed as a 'supporter', whose misbehaviour at a match may render his club liable.

85 CAS 2015/A/3874, award of 10 July 2015.

86 Ibid [187]. The CAS noted that strict liability is 'one of the few legal tools available to football authorities to deter hooliganism and other improper conduct on the part of supporters'.

#### 8.3.3.3.2 Sex

Although tremendous progress has been made in recent years to provide sportswomen with the space and opportunity to fully maximize their skills, this was not always the case. In fact, from as far back as 1896 when the modern Olympics were founded by Pierre de Coubertin, there has been a prevailing, though wholly inaccurate, perception that women, as a matter of biology, do not have the capacity to deal with the demands of elite sports. This view, according to Birrell and Theberge, is not at all surprising when viewed against the backdrop of sports traditionally being a patriarchal institution that privileges males, and is based on a sexist ideology and stereotypes that effectively disadvantage females who wish to participate in sports.[87]

Whether it be requiring female footballers to play on artificial turf while their male counterparts play on grass turf, to systematically subjecting women to lower remuneration than their male counterparts for the same type of work, women have been on the receiving end of a paternalistic, flawed and problematic system that perpetrates discrimination on the dubious basis of their sex. This reality is no different from a Caribbean sporting perspective. In fact, a leading West Indies female cricket all-rounder, Deandra Dottin, recently reported that she was contemplating assuming a full-time job outside of cricket while only playing cricket on a part-time basis as she felt, understandably, aggrieved by her, and her colleagues, having been retained to play international cricket for between USD $1,500–3,000 a month, while her male counterparts receive USD $8,500–13,000 a month for no less demanding work.[88] Even if it were to be accepted that, with time, this picture of inequality would subside, the continued blatant discrimination against female athletes by international sporting bodies and national associations perpetuated in recent years leaves much to be desired. In this context, it has been reported that while the International Cricket Council paid for all men's teams to fly business class to participate in the 2016 T20 World Cup in India, the women had to fly economy class. More than this, at the conclusion of the said World Cup, although both the West Indies men and women won their respective world T20 competitions on the same day, the men shared USD $1.1 million in prize money, while the women received only USD $70,000.[89]

Quite apart from less favourable treatment in so far as remuneration is concerned, female athletes' intrinsic biological traits, including their own sex, have been questioned by sporting authorities over the years and progressively subject to discriminatory regulation. Indeed, from at least the 1960s, there was a general concern that some countries might try to win more medals through the use of male athletes masquerading as females. This perceived threat led to the implementation of 'sex testing' or 'gender verification' tests. Initially, these tests involved a crude physical examination of a female athlete's anatomy. This was quickly replaced by chemical sex chromatin testing, which used mouth swabs to determine whether an athlete had XX or XY chromosomes. Those tests were predicated on the assumption that all female athletes had XX chromosomes while all male athletes had XY chromosomes. Subsequent advances in science and medicine showed this to be flawed, and it became clear that the binary division made in sport between males and females is not replicated in nature. In particular, some people are intersex, meaning they do not neatly fall into one category or another. Unfortunately, a number of elite athletes were subject to these discriminatory practices, including Professor Martinez-Patino, who, during her career as a young elite athlete, was subjected to gender-verification testing.

87 Susan Birrell, and Nancy Theberge, 'Ideological control of women in sport' (1994) Women and sport: Interdisciplinary perspectives 341.

88 'Female West Indies star Deandra Dottin slams gender pay disparity' (*Sydney Morning Herald*, 26 April 2016) *www.smh.com.au/sport/cricket/female-west-indies-star-deandra-dottin-slams-gender-pay-disparity-20160426-goexid.html.*

89 Tim Wigmore, 'Women's Cricket Gains in Numbers and Visibility, but Gender Gaps Remain' (*The New York Times*, 16 December 2016) *www.nytimes.com/2016/12/16/sports/cricket/womens-game.html.*

In fact, in 1985, she had 'failed' the Barr body test and was declared ineligible to compete in the women's competition because of a genetic condition relating to her chromosomes. As a result, she experienced significant public criticism; her private medical information was disclosed to the world; and her status as a woman was widely questioned. Professor Martinez Patino later successfully challenged her ineligibility and was ultimately permitted to continue competing in women's athletics events. However, the facts of her case had been made public after a doctor leaked the results of her medical tests to journalists. As a result of the disclosure, her partner left her and her status as a woman was the subject of worldwide discussion and speculation. The experience was a sad and painful one with significant and enduring personal consequences.

In time, through enhanced medical and scientific understanding, sports governing bodies came to appreciate that there are not two discrete categories of sex. Instead, there is a spectrum ranging from male at one end to female at the other. In the case of intersex athletes who lie between the two, 'gender verification' is extremely complicated, if not impossible. The then existing testing procedures were therefore deemed unfit for purpose, given their potential to single out the wrong athletes and cause them harm. In any event, fears about male athletes masquerading as females have receded in the modern climate.

In any event, in 1992, sex testing/gender verification was formally abandoned. In place of general screening, medical examinations of female athletes were undertaken on an ad hoc basis. In fact, the IOC continued screening all female participants in the Olympic Games until 1998. In 1999, it, however, discontinued its programme of mandatory chromosome-based gender verification testing.

In 2003, the IOC Medical Commission established an expert panel to review the rules and procedures regarding sex reassignment in sport. The Medical Commission's Stockholm Consensus Statement on sex reassignment in sports was later published. The statement provided that an athlete who has undergone male-to-female sex reassignment was eligible to compete in the female category: (1) provided that reassignment occurred before puberty; or (2) if the reassignment occurred after puberty, the gonads have been removed and the athlete has undergone oestrogen replacement therapy for a sufficient length of time to remove as much as possible of the advantage derived from the earlier exposure to male levels of testosterone.

In 2012, the IOC adopted the contentious Hyperandrogenism Regulations for the 2012 Olympic Games in London. These Regulations have since been applied to a number of competitions, including the 2014 Winter Olympics in Sochi. The regulations establish a process for opening investigations into suspected cases of hyperandrogenism. In such cases, an expert panel comprising a genetic expert, a gynaecologist and an endocrinologist must evaluate the case in order to determine: (1) whether the athlete is hyperandrogenic; and (2) if so, whether the condition confers a competitive advantage. Under the Regulations, a female athlete could be rendered ineligible from participating in international competitions if her level of endogenous testosterone was greater than 10 nmol/L, until and unless she takes medication, including contraceptives, to reduce this level of testosterone.

Since their adoption, the view has been held in some corners that these regulations have been used to target, in particular, women of colour, including South Africa's Caster Semenya, Francine Niyonsaba of Burundi, Kenya's Margaret Wambui and, more recently, India's Dutee Chand.[90] Against the backdrop of negative public criticism and the inherently paternalistic approach taken by the regulations, Dutee Chand, a then 19-year-old prolific Indian sprinter,

90 Sarah Knapton, '"Intersex" athletes to learn if they will be forced to take drugs to suppress testosterone' (*Telegraph*, 11 August 2017) *www.telegraph.co.uk/science/2017/08/11/intersex-athletes-learn-will-forced-take-drugs-suppress-testosterone/*.

challenged the discriminatory nature of the regulations before the CAS, and succeeded, at least in the interim, with the CAS suspending the regulations for a period of two years. In *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*,[91] the young female athlete was tested, and subsequently received a decision letter indicating that she would not be permitted to compete in the then forthcoming World Junior Championships and would not be eligible for selection for the Glasgow 2014 Commonwealth Games because her 'male hormone' levels were too high. Chand, in a passionate letter in response, indicated that the high androgen level produced by her body was natural, and was forced to defend her identity as a woman:

> I am unable to understand why I am asked to fix my body in a certain way simply for participation as a woman. I was born a woman, reared up as a woman, I identify as a woman and I believe I should be allowed to compete with other women, many of whom are either taller than me or come from more privileged backgrounds, things that most certainly give them an edge over me.
>
> I have spent nearly half of my life working hard to excel in athletics and to make my country proud. I hope I am allowed to continue to do so without feeling coerced to undergo medical intervention for participation as a woman.

Upon confirmation of her ineligibility to participate in the competitions, Chand bravely petitioned the CAS, arguing that the Hyperandrogenism Regulations discriminated against certain athletes based on a natural and essentially immutable physical characteristic, namely the quantity of testosterone their bodies produce without any artificial intervention. In this context, she argued that any performance advantage that athletes like herself enjoy is the product of a natural genetic gift, which should not be viewed differently from other natural advantages derived from exceptional biological variation. In other words, Chand argued that there was no principled or permissible reason for prohibiting a female athlete from competing because of an unusual natural genetic trait, even if that trait confers an advantage over fellow female competitors who lack that trait. Additionally, Chand contended that the Hyperandrogenism Regulations discriminated against women, like herself, as there is no testosterone limit applicable to male athletes. Male athletes with testosterone levels falling above the upper limit of the 'normal' range of male testosterone are permitted to compete without having to satisfy any medical criteria or to undergo any medical examination or treatment as a precondition to eligibility. Female athletes – unlike their male counterparts – must therefore satisfy an additional eligibility criterion before they are permitted to compete, which in her view was clearly discriminatory. In short, her contention was that the differential treatment between male and female athletes constituted discrimination on the ground of sex and therefore contravened the anti-discrimination provisions of the IAAF Constitution, the Olympic Charter, the laws of Monaco and even the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[92]

After hearing a wide gamut of scientific evidence, the CAS concluded that Chand had discharged her burden of proof in establishing that the Hyperandrogenism Regulations, in placing restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce

91 CAS 2014/A/3759.

92 Article 13(c) of the Convention requires State Parties to 'take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular ... [t]he right to participate in recreational activities, sports and all aspects of cultural life.'

naturally) when these restrictions do not apply to male athletes, were *prima facie* discriminatory. More importantly, the CAS found that, on the evidence presented, the IAAF had failed to establish that the regulations were justifiable as reasonable and proportionate, since it was not 'self-evident that a female athlete with a level of testosterone above 10nmol/L would enjoy the competitive advantage of a male athlete'. In the CAS' view, a 1% difference in testosterone levels between female athletes could not justify a separation between athletes in the female category, given the many other relevant variables that also legitimately affect athletic performance. In this context, in order to justify excluding Chand from competing in a particular category on the basis of a naturally occurring characteristic such as endogenous testosterone, it was not enough simply to establish that the characteristic had some performance-enhancing effect; instead, the IAAF needed to establish that the characteristic in question conferred such a significant performance advantage over other members of the category that allowing individuals with that characteristic to compete would subvert the very basis for having the separate category, and thereby prevent a level playing field. In light of the paucity of data concerning the magnitude of the performance advantage that hyperandrogenic females typically derive from enhanced androgen levels, the IAAF was unable to establish the degree of competitive advantage that results from a level of endogenous testosterone over 10nmol/L in an athlete, and thus had not discharged its burden of proof.

The CAS ultimately refused to uphold the validity of the regulations, and accordingly suspended the Regulations for a period of two years, subject to the IAAF, during this period, submitting further written evidence to the CAS concerning the magnitude of the performance advantage that hyperandrogenic females enjoy over other females as a result of their abnormally high androgen levels, and the athlete responding to that. Importantly, the CAS cautioned that in the event that the IAAF did not file any evidence within that two-year period, then the Hyperandrogenism Regulations would be declared void. In concluding, the CAS forcefully articulated that:

> Every athlete must in principle be afforded the opportunity to compete in one of the two categories and should not be prevented from competing in any category as a consequence of the natural and unaltered state of their body. A rule that prevents some women from competing at all as a result of the natural and unmodified state of their body is antithetical to the fundamental principle of Olympism that 'every individual must have the possibility of practicing sport, without discrimination of any kind'. So too is a rule that permits an athlete to compete on condition that they undergo a performance-inhibiting medical intervention that negates or reduces the effect of a particular naturally occurring genetic feature. Excluding athletes from competing at all on the basis of a natural genetic advantage, or conditioning their right to compete on undergoing medical intervention which reduces their athletic performance, imposes a significant detriment on the athletes concerned, and is therefore only valid if it is clearly established to be a necessary and proportionate means of achieving fair competition.
>
> Once an athlete is legally recognized as female, the Panel considers that an athlete must be permitted to compete in the female category unless her naturally high androgen levels confer a significant performance advantage over other female competitors, comparable to the performance advantage that male athletes enjoy over female athletes.

It is submitted that the CAS's ruling is, from both a practical and jurisprudential perspective, sound and is a strikingly progressive approach to the question of sex discrimination in sport. Indeed, notwithstanding a study recently published in the *British Journal of Sports Medicine*,[93]

93 'Levelling The Playing Field In Female Sport: New Research Published In The British Journal Of Sports Medicine' (*IAAF*, July 3, 2017) *www.iaaf.org/news/press-release/hyperandrogenism-research*.

which contends that females with higher levels of endogenous testosterone obtain a significant benefit over other female athletes, which the IAAF funded and is likely to be relied upon before the CAS, it is submitted that the regulations have no place in the modern era of sports where equality is the new watchword. Indeed, from a critical gender theory perspective, the regulations undoubtedly incite scrutiny, suspicion and fear of particular body types and particular modes of gender presentation. Intrusive investigations of this nature, it is submitted, adversely affect an athlete's self-perception and identity as a woman, and may also cause other people to question her identity. Moreover, the regulations may increase the pressure on female athletes to conform to stereotypical expectations of 'feminine' behaviour and appearance for fear of being investigated and prevented from competing.

While the Hyperandrogenism Regulations require any investigation to remain confidential, the reality is that there is no guarantee that this will be achieved. The investigation process can take months to complete, during which time the athlete is unable to participate in competitive events. An athlete's absence from competition is likely to arouse suspicion. Indeed, although the investigation process is supposed to be confidential, there is an inevitable risk of public speculation or disclosure that an athlete is being investigated for hyperandrogenism. In addition, the fact that the Hyperandrogenism Regulations enable anyone to raise doubts about an athlete to an IAAF medical director may result in leaks of private medical information. Where an investigation into the athlete's testosterone levels is leaked to the media, this may lead the athlete to be publicly shamed and humiliated by intrusive and hurtful questions about her femininity.

The Hyperandrogenism Regulations mean that athletes are likely to undergo medical procedures to reduce their testosterone levels that are neither medically necessary nor the result of free and informed consent on the part of the athlete. A female athlete who declines or fails an assessment under the Hyperandrogenism Regulations is barred from competing in any event unless she is able to reduce her testosterone levels below 10nmol/L. There is therefore a serious risk that elite-level athletes who have devoted their whole lives to sport will feel an overwhelming compulsion to undergo any surgical or pharmacological treatment that enables them to continue competing, regardless of its medical necessity or possible side effects. This is particularly serious since some medical interventions to reduce testosterone levels may have serious and permanent health consequences. Moreover, following treatment, most, if not all, athletes experience a decrease in athletic performance. Sadly, of the athletes who received treatment, approximately half would return to a high level of international competition, while the others do not repeat their initial level of performance and then retire.

The regulations also endorse unhealthy patriarchal and paternalistic views about women in sports, as evidenced by the IAAF's argument that the regulations help the IAAF to protect the health of hyperandrogenic athletes, by facilitating an expert diagnosis of their condition (at the IAAF's expense), enabling the affected athlete to obtain appropriate and beneficial medical treatment for her condition. The regulations also provide an international sports governing body, largely led by men, to police women's bodies, and make determinations as to what is in their best interest, such as the requirement to use oral contraceptive to reduce testosterone levels.

Another important perspective that one must bear in mind in this context is the fact that poor women from the Global South, particularly women of colour, appear to be the population most affected by the Hyperandrogenism Regulations. The disproportionate impact on women from certain regions and ethnic groups increases the concerns about lack of informed consent, particularly as women from poorer socio-economic backgrounds may be affected by additional pressures which arise from the fact that their families, teams and nations may be particularly reliant on them competing.

More generally, there is no reason to treat hyperandrogenism differently to other biological advantages derived from exceptional biological variation. In this context, it is important to bear in mind that some runners and cyclists have rare mitochondrial conditions that give them extraordinary aerobic capacity and resistance against fatigue; some basketball players have a hormonal condition known as acromegaly, which results in exceptionally large hands and feet; the proportion of elite baseball players with perfect vision is significantly higher than amongst the general population; and some elite athletes have genetic variations that respectively increase muscle growth/efficiency and blood flow to skeletal muscles. None of these traits are the subject of eligibility restrictions, but hyperandrogenism, a naturally occurring phenomenon, that only affects women, is. Furthermore, the Hyperandrogenism Regulations are no less discriminatory than prohibiting a woman with gigantism from playing women's basketball on the basis that she falls within the 'male range' for height.

It is submitted that considerations of fairness support an approach that allows all legally recognized females to compete with other females, regardless of their hormonal levels, providing their bodies naturally produce the hormones. Indeed, we need to move beyond policing biologically natural bodies and the resultant exceptional scrutiny of extraordinary women. Removing an elite athlete's ability to compete can, in any event, result in sudden personal trauma with serious psychological consequences for the woman in question. The potential benefits of a medical diagnosis cannot justify that erosion of informed consent.

In short, the Hyperandrogenism Regulations discriminate against women by subjecting female athletes to a restriction that does not exist for men. In contrast to female athletes, there is no level of naturally produced testosterone above which a man would be considered to have an 'unfair advantage' to compete against other men. The Hyperandrogenism Regulations are therefore objectionable on moral, ethical and legal grounds, and resort to flawed scientific perspectives to police that separation and target women whose self-presentation is inconsistent with dominant gender stereotypes should be rejected.

Similarly, the new regulations introduced by the IAAF in early 2018 remain fundamentally flawed, and should accordingly be struck down by the CAS as discriminatory. The new Eligibility Regulations for Female Classification (Athlete with Differences of Sexual Development) apply to athletes who are either female or intersex, invariably including Semenya, in the context of events from 400 metres to the mile, including the 400 metres, hurdles races, 800 metres, 1500 metres, one-mile races and combined events over the same distances. Under these new rules, once an athlete who is recognized at law as being either female or intersex (or equivalent) has a testosterone level of 5 nmol/L or higher, that person is required to reduce her blood testosterone level to below 5 nmol/L for a continuous period of at least six months, for example, by use of hormonal contraceptives, in order to qualify for competition. More than this, she is required to thereafter maintain her blood testosterone level below 5 nmol/L continuously, whether she is in competition or out of competition, for so long as she wishes to remain eligible.[94] The enactment of these new rules has led some onlookers to argue that they specifically target athletes of colour, like Semenya, and appear to reflect a warped sense of racial/gender profiling and could be seen as geared towards enforcing unjustified controls on women's bodies that parallel those imposed in the mediaeval era. Although, arguably, the IAAF remains an autonomous body that is largely free to pass regulations of this kind, it is not inconceivable that such a potentially disproportionate approach may be sufficiently egregious to invite a claim of unreasonable restraint of trade or, in any event, a constitutional challenge. Certainly, in jurisdictions such

94 Philasande Sixaba, 'Semenya's Athletics Career at Risk after IAAF Introduces New Testosterone Laws' (*EyeWitness News*, 25 April 2018) *http://ewn.co.za/2018/04/26/semenya-s-athletics-career-at-risk-after-iaaf-introduces-new-testosterone-laws*.

as South Africa[95] and Jamaica[96] where the horizontal application and enforcement of human rights (a constitutional suit between private individuals/entities) is possible, including the rights to privacy and non-discrimination on the ground of sex,[97] a serious argument could be made that the IAAF and its member organizations that seek to enforce such debilitating regulations should be subject to constitutional review by the courts. This is notwithstanding the fact that these regulations make allowance for these athletes to participate in competitions that are not international competitions or at non-restricted events at international competitions or in the male classification or applicable intersex competitions.

#### 8.3.3.3.3 Disability

It is undisputed that persons with disabilities may on occasion possess tremendous sporting prowess, which can only be enhanced with the provision of equal opportunities and reasonable accommodation. Indeed, long before the modern onslaught of successful non-disabled athletes like Shaunae Miller-Uibo and Elaine Thompson, Caribbean athletes with disabilities, such as Alphonso Cunningham, dominated several editions of the Paralympic Games, though with not much recognition.[98]

While, in recent years, the Special Olympics and Paralympics Games have given regional athletes with disabilities a chance to compete at the international level, discrimination on the ground of disability remains a pervasive issue in Commonwealth Caribbean Sports Law. Discrimination, in this context, falls along a wide spectrum ranging from inadequate transportation to and from sports events and sport facilities to the said facilities not catering for the special needs of competitors and spectators with disabilities (lifts, ramps, special change rooms and restrooms); from there being a lack of adequately trained personnel to work with sportspeople with disabilities, to limited opportunities for persons with disabilities to fully hone their skills. Indeed, the list is strikingly long.[99]

The existing state of affairs is arguably on account of a lack of awareness of the needs of persons with disabilities, but, more fundamentally also, on account of a perceived lack of political will to address the varied needs of sportspersons with disabilities. For example, in late 2017, the National Awards Committee of Trinidad and Tobago awarded para-athletics double-gold winner Akeem Stewart with the Humming Bird Medal Gold, while the (non-disabled) members of the Trinidad and Tobago relay team were awarded a higher honour – the Chaconia

95 South Africa Constitution (1996) section 13(1)(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this chapter; (5) A provision of this chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right. See *Khumalo v Holomisa* [2003] 2 LRC 382 [22]–[24].

96 Jamaica Charter of Fundamental Rights and Freedoms (2011) section 13(5) A provision of this chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right. See *Tomlinson v Television Jamaica*, unreported, 15 November 2013 (FC Jam).

97 South Africa Constitution, section 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) [including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth]; (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. Jamaica Charter of Fundamental Rights and Freedoms section 13(3)(i) provides that no person shall discriminate against another person on the ground of (i) being male or female; (ii) race, place of origin, social class, colour, religion or political opinions.

98 '"We are people first!" Disabled group wants more respect from State and public' (*Jamaica Observer*, 28 December 2017) *www.jamaicaobserver.com/news/-8216-we-are-people-first-8217-disabled-group-wants-more-respect-from-state-and-public_120908?profile=&template=PrinterVersion*.

99 Jennifer Ellison-Brown, 'Special Athletes And Sport' (*The Gleaner*, 11 May 2015) *http://jamaica-gleaner.com/article/sports/20150511/special-athletes-and-sport*.

Medal Gold.[100] Stewart, apart from winning his individual event, had the added distinctions of winning gold twice and setting a new world record in the shot put, a record that had been on the books for 20 years. Regrettably, the only reason, it seems, why Stewart was not awarded the higher honour was because he was disabled. In this modern dispensation of equality and justice, this is indeed unacceptable, and reinforces flawed, dominant stereotypes about the perceived worth of persons with disabilities.

Notwithstanding the foregoing, however, it is important to bear in mind that, as a matter of principle, not every instance in which a person with disability is treated differently from non-disabled persons amounts to discrimination. Indeed, there are instances, as demonstrated in the *Justin Gatlin*[101] case, where the differential treatment of an athlete with a disability may be justifiable.[102] In the *Gatlin* case, the CAS upheld the four-year period of ineligibility imposed on Gatlin in respect of a second doping violation, though he advanced the argument that he had, on an earlier occasion, been taking medication to suppress his attention deficit hyperactivity disorder (ADHD). In this context, the CAS pointed out that while a sports governing body/club has a duty to accommodate a person with a disability by making reasonable modifications to its structures and processes, the strict liability rule in respect of doping offences is not one of these instances. More than that, what was particularly instructive in this case was the fact that Gatlin never indicated to the relevant authorities that he needed to use the medication in question to control his ADHD; how could they have been aware of his disability if he had not made it known? In short, it would appear that the fact of having a disability does not absolve an athlete from complying with his due diligence obligation, in particular in respect of anti-doping rule violations.

In the *Gatlin* case, the CAS also took the opportunity to lay down a number of foundational principles that should guide the determination of cases in which discrimination on the ground of disability is alleged. The first, and perhaps elementary, consideration is that for an individual to rely on the non-discrimination principle in respect of his disability, he must provide proof that he, in fact, has a medically recognized disability. It must also be proved that the disability actually relates to his performance in the sport in question. In the *Gatlin* case, where the athlete alleged that the disability affected his classroom performance but not his sporting performance, he unsuccessfully advanced the argument that it was discriminatory to restrict the use of the drug in question since the disability related in no way to his performance in track and field.[103] Furthermore, it must be proved that the athlete was prevented from competing *because* of his disability; that is, he must have been treated less favourably because of his disability. As intimated above, it must also be established that reasonable accommodation was requested so as to enable the athlete to compete on an equal footing with non-disabled athletes, but no such accommodation was provided.

An interesting case that illustrates the application of these principles is that of *Pistorius v/IAAF*.[104] In that case, Oscar Pistorius, a double amputee South African professional athlete who competed in the 100, 200 and 400 metre sprints at the international stage, was banned from competing against able-bodied athletes in IAAF-sanctioned events, pursuant to Decision No 2008/01 of the IAAF Council, which held that Pistorius's 'Cheetah' prosthetic legs constituted a technical device and provided him with an advantage over able-bodied athletes in violation of IAAF

100 Carolyn Kissoon, 'Why a lesser national award for Akeem? ... because he is disabled, says Down Syndrome Family Network' (*Trinidad Express Newspaper*, 26 September 2017).

101 CAS 2008/A/1461 *Justin Gatlin v United States Anti-Doping Agency (USADA) &* CAS 2008/A/1462 *IAAF v USA Track & Field (USATF) & Justin Gatlin*, award of 6 June 2008.

102 This is unless, of course, the person bears no fault or negligence. See CAS 2007/A/1312 *Jeffrey Adams v CCES*, award of 16 May 2008.

103 The CAS stated that, 'while Mr Gatlin's disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track. Indeed, until recently, he was the reigning 100m Olympic champion'.

104 CAS 2008/A/1480, award of 16 May 2008.

competition rule 144.2(e). Upon appeal to the CAS, Pistorius argued that the IAAF decision was in breach of its obligation of non-discrimination, because it did not search for an appropriate accommodation as required by law. He claimed that, in finding him ineligible to participate in all IAAF-sanctioned events without attempting to seek an alternative solution, modification or adjustment that might permit him to participate in such events on an equal basis with all able-bodied athletes, the IAAF had denied him his fundamental human rights, including his right to equal access. Interestingly, although the CAS ultimately revoked the council's decision with immediate effect and thereby rendered Pistorius eligible to compete in IAAF-sanctioned events, it stopped short of developing its jurisprudence on disability discrimination. Indeed, instead of recognizing that by virtue of the decision, Pistorius was effectively treated less favourably than able-bodied athletes through him being rendered ineligible to compete, the panel simply found that the IAAF had not met its 'on the balance of probability' burden of proof that rule 144.2(e) was contravened by Pistorius' use of the Cheetah Flex Foot prosthesis; that is, it could not establish that Pistorius gained an overall net advantage over other runners through his use of the prosthesis.

What is particularly puzzling about the CAS's ruling is that, on the one hand, it found that 'disability laws require that an athlete such as Pistorius be permitted to compete on the same footing as others', while in the same breadth finding that 'Pistorius' submission based on unlawful discrimination is accordingly rejected.' The challenge with this dubious approach lies in the fact, as intimated above, that Pistorius was indeed not allowed to compete on the same basis as non-disabled athletes, since he was rendered ineligible from participating in IAAF-sanctioned events – a clear instance of discrimination, particularly in light of the fact that the CAS ultimately found insufficient evidence that he gained an unfair advantage over non-disabled athletes. Additionally, what is also concerning is the fact that the CAS refused to outrightly recognize the facts as giving rise to discrimination on the ground of disability when it had, in fact, found that the decision was apparently directed not at athletes with prostheses generally, but at Pistorius specifically, as encapsulated in its finding that,

> it is likely that the new Rule was introduced with Pistorius in mind, and that it started the process that led to IAAF declaring him ineligible to compete in IAAF-sanctioned events in January 2008.
>
> ...
>
> ... the IAAF's officials must have known that, by excluding the start and the acceleration phase [when testing Pistorius], the results would create a distorted view of Pistorius' advantages and/or disadvantages by not considering the effect of the device on the performance of Pistorius over the entire race. The Panel considers that this factor calls into question the validity and relevance of the test results on which the Cologne Report was based.[105]

In short, it is submitted that although the decision ultimately arrived at by the CAS is a correct one, namely, that the IAAF Council's Decision was void, the tribunal's process of reasoning demonstrated a crabbed appreciation of the fundamental principles of anti-discrimination law, and is arguably dubious in nature in light of key facts that the CAS itself recognized as implicitly being indicative of the athlete being singled out for less favourable treatment.

#### 8.3.3.3.4 Other grounds

Apart from race, sex and disability, there are several other grounds in relation to which a sportsperson may experience discrimination. These include, *inter alia*, age, political opinion, status, nationality and religion. While there is a relative dearth of jurisprudence on these areas,

105 Ibid [9], [13].

the CAS has nonetheless had the unique opportunity to address the former three grounds of discrimination, though admittedly not in a revolutionary manner.

On the issue of discrimination on the ground of age, the case of *Daniela Bauer v Austrian Olympic Committee (AOC) & Austrian Ski Federation (ASF)*[106] is instructive. In that case, the applicant, an Austrian halfpipe freestyle skier, argued that she had been discriminated against on the ground of her age in circumstances where the AOC had selected two younger athletes to fill the slopestyle and halfpipe quota allocations, while she was prevented by this decision from participating in the Olympic Games. While the CAS accepted that the 'the practice of sport is a human right' and that 'every individual must have the possibility of practicing sport, without discrimination of any kind', no discrimination was held to arise on the facts since the applicant was not in the same situation as the other two, younger athletes. Unlike the younger athletes who were recommended for a quota allocation based on their strong performance, the applicant had not been so recommended for sports performance-related reasons. In short, the panel found that the selection of the other two younger athletes based on the AOC's judgement that they were 'promising young athletes with upward performance potential' did not result in the applicant being treated less favourably, since 'the Applicant did not possess similar potential' to the younger athletes.

In the Caribbean context, an argument was raised, though unsuccessfully, that Shivnarine Chanderpaul, the second highest West Indian test cricket run scorer of all time, was discriminated against on the ground of his age in circumstances where he was not selected to represent the West Indies in their tour of Australia in 2015. Although Chanderpaul, then aged 40, was just 87 runs away from becoming the leading West Indies test run scorer of all time, he was dropped from the squad after a miserable tour of England in which his average was 15.33. He was replaced by two younger cricketers, namely Shane Dowrich and Rajindra Chandrika, whose then recent from, in contradistinction to Chanderpaul's, was reportedly strong.[107] Although it can be argued that the issue of age discrimination did arise in Chanderpaul's case, in particular, given that he was 40 years old and fewer than 100 runs away from achieving a phenomenal milestone, the case of *Daniela Bauer* provides a strong basis for contending that no such discrimination arose since Chanderpaul's performance did not, from an objective viewpoint, merit his selection to the team.

That said, Chanderpaul's case raises a broader issue regarding the dubious bases upon which some leading players, including Dwayne Bravo and Kieron Pollard,[108] have not gained selection to play for the West Indies cricket team at the highest level. While some may question their allegiance to West Indian cricket, in light of their myriad lucrative cricketing prospects elsewhere, one cannot help but consider the broader jurisprudential question as to the legal bases of their non-selection. Although this discussion does not attempt to provide concrete answers to the disputable matters with which the players vis-à-vis CWI are faced, it is prudent nonetheless to note that to avoid arguments of discrimination on various bases in so far as selection decisions are concerned, clubs, leagues and sports governing bodies more generally need to:

(1) ensure that their decision is not arbitrary, unfair, or unreasonable. Even when exercising a discretion, these entities must ensure that there is a legitimate sports performance justification for not selecting a player;[109]

106 CAS ad hoc Division (OG Sochi) 14/001 *Daniela Bauer v Austrian Olympic Committee (AOC) & Austrian Ski Federation (ASF)*, award of 4 February 2014.

107 'Chanderpaul dropped from WI squad' (*ESPNCricInfo*, 30 May 2015) *www.espncricinfo.com/west-indies-v-australia-2015/content/story/882527.html.*

108 Nagraj Gollapudi, 'Gayle slams selectors over Bravo, Pollard omissions' (*ESPNCricInfo*, 12 January 2015) *www.espncricinfo.com/south-africa-v-west-indies-2014-15/content/story/819977.html.*

109 CAS ad hoc Division (OG Sochi) 14/001 *Daniela Bauer v Austrian Olympic Committee (AOC) & Austrian Ski Federation (ASF)*, award of 4 February 2014 [7.15].

(2) establish, identify, and publish clear criteria regarding qualification for selection in a timely manner so that the player is not left in the wilderness of uncertainty or misled as to his/her prospects of selection.[110] Unless selection rules set out completely objective criteria (e.g., ranking or points in a given competition), a selection process must always rely in some fashion or other on the subjective judgement of the persons who select the athletes;[111]

(3) ensure that the selection criteria applies equally to all athletes;[112]

(4) refrain from publishing additional selection criteria at a late stage, which may have the effect of prejudicing players;[113] and

(5) refrain from revoking a player's nominated status unless there is a reasonable cause for doing so.[114]

Additionally, it must be borne in mind that where a sporting organization, in circumstances deemed by it to be appropriate, chooses to depart from its established rules on selection procedure and to nominate, in advance, a particular athlete as its selected choice for a particular event and, in doing so, creates expectations in and obligations upon that individual, then it is bound by its choice unless proper justification can be demonstrated for revoking it.[115]

Apart from discrimination on the ground of age, another evolving ground of discrimination is that of politics, which merits a brief discussion in light of a CAS ruling that has implications for the participation of national and regional sporting clubs/teams in competitions of an international nature. In *Fiji Association of Sports and National Olympic Committee (FASANOC) v Commonwealth Games Federation (CGF)*[116] members of FASANOC brought an action against the CGF alleging that it had discriminated against them on the ground of politics, in circumstances where they were prevented from participating in the Commonwealth Games. The decision to prevent their participation was on account of the fact that Fiji was suspended from the Councils of the Commonwealth following the military overthrow of its civilian government, and the subsequent refusal of the military rulers to commit to democratic elections. Interestingly, the suspension of Fiji was tantamount to expulsion, in the sense that Fiji was not only barred from participating in all governmental Commonwealth meetings, but its athletes were prevented from participating in Commonwealth sporting events. The CAS ultimately ruled that although the athletes were, in effect, being punished for the political behaviour of its government, discrimination on the ground of politics was not established on the facts since their suspension of Fiji from the Commonwealth and thus the Commonwealth Games was justified under the relevant Commonwealth rules. In short, the CAS found that 'to take action against a country because it does not countenance democracy does not per se discriminate against it even if the grounds for treatment could be described as "political"'.

Although this is an atypical case of discrimination on political grounds, since the majority of cases will involve athletes claiming to be discriminated against because they hold a particular political opinion, the decision arguably has serious implications. In this context, it can be argued that if a situation like Grenada's 1979 revolution,[117] which resulted in the suspension of that country's constitution, occurs today, the Commonwealth Games Federation could very

110 Ibid [7.16].
111 CAS ad hoc Division (OG Turin) 06/002 *Andrea Schuler v Swiss Olympic Association & Swiss-Ski*, award of 12 February 2006 [35].
112 CAS 2000/A/278 *Chiba / Japan Amateur Swimming Federation (JASF)*, award of 24 October 2000 [12].
113 *Andrea Schuler v Swiss Olympic Association* (n 111) [23].
114 *CAS 96/153 Watt/ Australian Cycling Federation (ACF) and Tyler-Sharman*, award of 22 July 1996 [26(*g*)].
115 Ibid [26(h)].
116 CAS 2010/O/2039.
117 Wendy Grenade, *Grenada Revolution: Reflections and Lessons* (University Press of Mississippi, 2015).

well be in the right to suspend the particular country in question, and thereby deprive national athletes from that country of the opportunity to participate in Commonwealth organized sporting events. This clearly demonstrates that while politics and sport are, in most cases, not one and the same, there are times when they are inextricably linked, producing serious externalities.

## 8.4 FREEDOM OF MOVEMENT IN SPORTS

The ability to move freely in pursuance of elite sporting opportunities, whether nationally, regionally or internationally, is an undoubtedly important right without which Caribbean sportspersons would be unable to exploit their unique skills and, indeed, their commercial value. Against this backdrop, a set of rules have been drafted by the Caribbean Community (CARICOM),[118] encapsulated in the Revised Treaty of Chaguaramas (RTC), and the Organisation of Eastern Caribbean States (OECS),[119] encapsulated in the Revised Treaty of Basseterre (RTB),[120] to regulate the movement of, *inter alia*, sportspersons between CARICOM/OECS countries. These rules largely mirror those contained in the Treaty on the Functioning of the European Union (TFEU), and are critical to sportspersons being fully able to maximize their sporting prowess beyond national boundaries, where opportunities are invariably more limited.

### 8.4.1 The European Union

The freedom of movement of workers is one of the fundamental principles of the European Union (EU), and this is guaranteed by Article 45 of the TFEU. This provision has direct effect, meaning that it can be relied upon by nationals of EU Member States in their own national courts where a breach is alleged, and not only before the Court of Justice of the European Union (CJEU).

On numerous occasions, the CJEU has held that the right to free movement of 'workers', which has been interpreted to include sportspersons, is intended to facilitate the pursuit by EU citizens of sporting activities throughout the Union, and thus precludes measures that might place Union citizens at a disadvantage when they wish to pursue sport as an economic activity in the territory of another Member State.[121]

Sportspersons who are nationals of a Member State have, in particular, the right to leave their country of origin to enter the territory of another Member State and reside there in order to pursue an economic activity there. In this context, provisions in laws, rules or regulations that preclude or deter these persons from leaving their country of origin or from entering the receiving country in order to exercise their right to freedom of movement constitute an obstacle

118 The following are CARICOM Member States: Antigua & Barbuda; Belize; Commonwealth of Dominica; Grenada; Republic of Haiti; Montserrat; Federation of St. Kitts & Nevis; St. Lucia; St. Vincent & the Grenadines; Commonwealth of the Bahamas; Barbados; Co-operative Republic of Guyana; Jamaica; Republic of Suriname; Republic of Trinidad and Tobago. Note that The Bahamas does not take part in the CARICOM free movement regime.

119 Today the OECS consists of nine Member States: The independent countries of Antigua and Barbuda, Dominica, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines; as well as the British Overseas Countries and Territories of Anguilla, the British Virgin Islands and Montserrat.

120 Article 12 Revised Treaty of Basseterre provides '12.1 Freedom of movement for citizens of Protocol Member States shall be secured within the Economic Union Area. 12.2 Such freedom of movement shall entail the abolition of any discrimination based on nationality between citizens of the Protocol Member States as regards employment, remuneration and other conditions of work and employment.'

121 Marion Schmid-Drüner, 'Fact Sheets on the European Union: Free movement of workers' (*European Parliament*, December 2017) *www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.5.html*.

to that freedom, even if they apply without regard to the nationality of the workers concerned. Indeed, the right to free movement would be rendered meaningless if a Member State of origin could prohibit sportspersons from leaving its jurisdiction in order to establish themselves in another Member State. The same considerations apply with regard to rules that impede the freedom of movement of nationals of one Member State wishing to engage in gainful employment in another Member State.

The CJEU has, on a number of occasions, had opportunity to develop its jurisprudence on this important subject matter, beginning with the case of *Walgrave v Union Cycliste Internationale*,[122] which held that, in so far as the sporting activity in question occurs within the EU and it has an economic dimension, EU law is applicable. This effectively means that if a measure adopted in one Member State has the effect of limiting the ability of a sportsperson from another EU Member State from legitimately plying his trade, that measure is subject to EU law, and may be disapplied on grounds of discrimination in breach of the right to free movement, since the sporting activity in question is considered to be an economic activity.[123]

Perhaps the biggest sporting decision of all time, at least in the context of EU Sports Law, illustrative of this progressive approach to the resolution of sporting disputes by the CJEU, is the case of *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman*,[124] the facts of which have been described earlier in this book (Chapter 3). In that case, the CJEU found that Article 45 TFEU precludes the application of rules laid down by sporting associations under which a professional footballer who is a national of one Member State (Belgium, on the facts) may not, on the expiry of his contract with a club, be employed by a club of another Member State (France, on the facts) unless the latter club has paid to the former club a transfer, training or development fee. More than that, the CJEU went further by concluding that Article 45 TFEU also precludes the application of rules laid down by sporting associations, otherwise referred to as 'nationality clauses', under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

The impact of the *Bosman* ruling was profound, and its numerous externalities have remained to this day. Whereas prior to the *Bosman* ruling, professional clubs in some parts of Europe (such as the United Kingdom) were able to prevent players from joining a club in another Member State even if their contracts had expired, this position was dramatically changed after *Bosman*, in that players could now move to a new club at the end of their contract without their old club receiving a fee. Indeed, players can now agree to a pre-contract with another club for a free transfer if the players' contract with their existing club has six months or less remaining. More than that, the *Bosman* ruling also prohibits domestic football leagues in EU Member States, and also UEFA, from imposing quotas on foreign players since these quotas have the effect of discriminating against nationals of EU States, which rebalanced the earlier position where many leagues placed quotas restricting the number of non-nationals allowed on certain teams.

The CJEU's seemingly revolutionary approach, which was initiated in *Bosman*, was further extended in the subsequent case of *Deutscher Handballbund eV v Marcos Kolpak*.[125] As opposed to the *Bosman* case, which dealt with a situation involving restrictions placed on the free movement

122 [1974] ECR 1405.

123 Sport is subject to EU law only in so far as it constitutes an economic activity. This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service. See Case 13/76 *Dona v Mantero* [1976] ECR 1333, [12].

124 Case C-415/93.

125 Case C-438/00, [2003] ECR I-4135.

of an EU sportsperson, the *Kolpak* case dealt with discriminatory restrictions imposed on a non-EU player (at the time) of Slovakian nationality. The player had obtained a valid residence permit to work and live in Germany and had entered into a fixed-term employment contract for the post of goalkeeper in the German handball team TSV Östringen eV Handball, a club that played in the German Second Division. He alleged that there was a breach of the non-discrimination principle contained in Article 38(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part, in circumstances where the German sports governing federation applied a rule under which clubs could only have fielded in league and cup matches a limited number of players who came from countries not belonging to the European Communities (Slovakia was not an EU member state at the time). The CJEU agreed. It found that although the agreement did not grant a non-EU sportsperson who was covered by an association agreement with the EU *access* to the employment market in a member state, it nonetheless granted him the right to work in an EU Member State without being treated less favourably in terms of working conditions than sportspersons in that EU Member State, provided that he has already obtained a job in that jurisdiction.[126] In other words, the player, who had been employed in Germany on a valid permit was entitled to participate without restriction in competitions under the same conditions as German and EU players by reason of the prohibition of discrimination resulting from the combined provisions of the then EC Treaty and the EC's Association Agreement with Slovakia.

In short, while accepting that the treaty provisions on the free movement of persons do not preclude rules or practices that exclude foreign players from certain matches for reasons that are not economic in nature, namely, those which relate to the nature and context of such matches and are thus of sporting interest only, such as matches between national teams from different countries, this did not arise on the facts, since the player was not demanding to play for the German national side, but merely a German club. For this reason, the CJEU found that discrimination arising in the present case could not be regarded as justified on exclusively sporting grounds.

This decision was affirmed in the subsequent case of *Igor Simutenkov v Ministerio de Educacion y Cultura and Real Federacion Espanola de Futbol*,[127] wherein the CJEU held that it was contrary to Article 23 of the Communities–Russia Partnership Agreement for the Spanish sports federation to apply to the professional sportsman of Russian nationality who was lawfully employed by a Spanish football club a rule that provided that clubs could use in competitions at national level only a limited number of players from countries outside the European Economic Area.

Other free movement rights that can usefully be relied upon by sportspersons within the European context are Article 56 of the TFEU, which provides for the *freedom to provide services*, a right that could be relied upon by individual sportspersons in appropriate circumstances to ply their trade, on a temporary basis, outside of their EU state of origin in another EU territory without being curtailed in doing so by unnecessary/discriminatory impediments.[128] The corollary of this right is that nationals in the receiving EU Member State have the right to receive the services provided by the athlete who has travelled to the receiving State to provide his services.

126 The CJEU considered that 'the provision applies only to workers of Slovak nationality who are already lawfully employed in the territory of a Member State and solely with regard to conditions of work, remuneration or dismissal. In contrast to Article 48 of the Treaty, that provision does not therefore extend to national rules concerning access to the labour market.'

127 Case C-265/03, [2005] ECR I-2579.

128 Mark James, *Sports Law* (2nd edn, Palgrave McMillan, 2013) 274.

Litigation surrounding the freedom to provide services and, indeed, the EU's anti-competition rules,[129] arose in the case of *David Meca-Medina, Igor Majcen v Commission*.[130] Here, the applicants, two professional athletes who compete in long-distance swimming, challenged the compatibility of certain regulations adopted by the IOC and implemented by FINA and certain practices relating to doping control with EU rules on competition and freedom to provide services. First, they argued the fixing of the limit on nandrolone, a banned substance, at 2 ng/ml was concerted practice between the IOC and the 27 laboratories accredited by it, and that that limit was scientifically unfounded and led to their being banned from the sport, initially for four years, which was later reduced to two years by the CAS. They claimed that the excesses in nandrolone which was found in their samples could have been the result of the consumption of a dish containing boar meat. Additionally, they also claimed that the IOC's adoption of a mechanism of strict liability and the establishment of tribunals responsible for the settlement of sports disputes by arbitration (the CAS and the ICAS) that were allegedly insufficiently independent of the IOC strengthened the anti-competitive nature of that limit. In short, their view was that the application of the anti-doping rules at issue led to the infringement of the athletes' economic freedoms, guaranteed *inter alia* by Article 49 of the then applicable EC Treaty and, from the point of view of competition law, to the infringement of the rights that the athletes can assert under Articles 81 and 82 of said treaty.

Although the CAS confirmed that sport is subject to EU law in so far as it constitutes an economic activity, on the facts, the general objective of the rules was to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. In addition, given that the penalties were necessary to ensure enforcement of the doping ban, their effect on the athletes' freedom of action was considered to be, in principle, inherent itself in the anti-doping rules. Accordingly, even if the anti-doping rules at issue were to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they did not necessarily constitute a restriction of competition incompatible with the common market since they were justified by a legitimate objective. Such a limitation was held to be inherent in the organization and proper conduct of competitive sport and its very purpose was to ensure healthy rivalry between athletes. Although the ultimate outcome of this case rested on competition rules and not freedom to provide services, the guidance provided by the CJEU, which may influence the approach taken in future cases, is instructive:

> It must be acknowledged that the penal nature of the anti-doping rules at issue and the magnitude of the penalties applicable if they are breached are capable of producing adverse effects on competition because they could, if penalties were ultimately to prove unjustified, result in an athlete's unwarranted exclusion from sporting events, and thus in impairment of the conditions under which the activity at issue is engaged in. It follows that, in order not to be covered by the prohibition laid down in Article 81(1) EC, the restrictions thus imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport ...
>
> Rules of that kind could indeed prove excessive by virtue of, first, the conditions laid down for establishing the dividing line between circumstances which amount to doping in respect of which penalties may be imposed and those which do not, and second, the severity of those penalties.[131]

129 Article 101 and 102 TFEU respectively prohibit anti-competitive business conduct and the abuse of a dominant position in the EU.

130 C-519/04 *P*, judgment of July 18, 2006.

131 Ibid [77]–[48].

On a final note, it is important that, quite apart from the freedom to provide services discussed above, the *freedom of establishment*, as guaranteed by Article 49 TFEU, also allows sportspersons or sporting entities from one EU Member State to move to another Member State in an effort to *permanently* establish themselves in the receiving State without being subject to unnecessary impediments. This provision is especially relevant to self-employed sportspersons who wish to move to another Member State to *permanently* establish themselves there.

### 8.4.2 The Caribbean

The *Kolpak* and *Simutenkov* cases have serious implications for regional sportspersons who are employed in the EU, and who wish to be treated on the same terms as nationals of the particular Member State in question. Indeed, given the growing number of regional cricketers,[132] including Dwayne Smith, Ravi Rampaul and, more recently, Shivanarine Chanderpaul, who have benefitted from being drafted into English county clubs on the basis of the *Kolpak* ruling,[133] it is fair to say that this is a revolutionary development largely beneficial to Caribbean athletes.

Putting aside the fact that regional athletes would first have to apply, for example, to the UK Border Authority and thereby satisfy the points-based system in order to ascertain a work permit,[134] the *Kolpak* ruling, however, means that once they have gained access to that particular jurisdiction, they must be treated fairly in terms of their working conditions, thanks to the Cotonou/ Economic Partnership Agreement (EPA), which has been duly signed by a number of Caribbean countries and the European Union and its Member States. According to the CAS decision of *FC Midtjylland A/S v Fédération Internationale de Football Association (FIFA)*,[135] Article 13(3) of the Cotonou Agreement, although not guaranteeing access to employment in the European Union, nonetheless confers the right to non-discrimination of African Caribbean and Pacific (ACP) sportspersons as regards employment terms and conditions, which effectively means that they must not be subject to discrimination in so far as their employment conditions are concerned. Thus, any rule that limits the number of players from ACP countries, who already are employed in an EU Member State, from participating in competitions may fall afoul of these rules. That said, it would certainly be interesting to see whether the CJEU is able to maintain this progressive approach in light of the UK's recent decision to leave the European Union,[136] which might mean that regional players wishing to ply their trade in the United Kingdom might not be able to benefit from the *Kolpak* decision.

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132 'The Kolpak rule explained' (*ESPNcricinfo.com*, 5 January 2017) *www.espncricinfo.com/story/_/id/18411981/the-kolpak-rule-explained*.

133 Gokul Gopal and Rob Johnston, 'Everything you need to know about Kolpak' (*CricBuzz.com*, 13 January 2017) *www.cricbuzz.com/cricket-news/70926/the-kolpak-deal-frequently-asked-questions*.

134 'Points Based System Governing Body Endorsement Requirements For Players' (UK Border Authority, 2017). To be eligible for a governing body endorsement under points-based system:

1 The applicant club must be in membership of the Premier League or Football League. During the period of endorsement, the player may only play for clubs in membership of those leagues (i.e. the player may not be loaned to a club below the Football League);.
2 The player must have participated in at least 75% of his home country's senior competitive international matches where he was available for selection during the two years preceding the date of the application; and.
3 The player's National Association must be at or above 70th place in the official FIFA World Rankings when averaged over the two years preceding the date of the application.

135 CAS 2008/A/1485, award of 6 March 2009.

136 'Kolpak and the Brexit effect' (*ESPNcricinfo*, 13 December 2016) *www.espncricinfo.com/story/_/id/18269915/kolpak-brexit-effect*.

Aside from the Cotonou Agreement, CARICOM and the OECS have respectively promulgated rules that have the potential to regulate the free movement of sportspersons in the Caribbean. These rules are primarily contained in Articles 45 and 46 of the Revised Treaty of Chaguaramas (RTC) and Article 12 of the Revised Treaty of Basseterre (RTB), as well as the various pieces of domestic legislation that have sought to give effect to these free movement provisions.[137] Under Article 46 RTC, sportspersons have been specifically identified as one of the categories of persons who are entitled to benefit from hassle-free travel throughout the CARICOM region, as they are guaranteed free movement for economic purposes.[138] Once a person so qualifies, that person is regarded as a 'Caribbean skilled national', which entitles them and their dependents to freedom of movement, including the freedom to leave and re-enter the receiving country without further permission; the freedom to acquire property for their use as their residence or business; and the right to engage in gainful employment in the receiving country.

To obtain a CARICOM skills certificate, the sportsperson must first apply for the certificate by completing the application form and submitting relevant documents in support of their application to the competent authority on free movement of skills either in their jurisdiction or in the receiving CARICOM country. The free movement committee, established by the competent authority, will process their application and advise the competent authority on whether or not to grant the skills certificate. The competent authority will have regard to a number of factors when making a determination as to whether to grant the skills certificate, including whether the person holds a valid passport issued to them by a Member State or other form of identification approved by the minister and whether the person is seeking to enter the receiving island for the purpose of engaging in or finding gainful employment with an employer or as a self-employed person. The skills certificate, when issued by another Member State other than the receiving/host country, ensures that the person obtains six months' definite entry when they present the certificate at the point of entry or at the Department of Immigration. Within that six-month period, they would need to visit the accreditation unit in the receiving country in order to obtain a letter of accreditation, which he would then need to take to the immigration office, which will thereafter afford them indefinite stay. This relatively lengthy process can be circumvented if the person applies in the receiving state, in which case, the certificate, when granted, will be for an indefinite period.

As intimated above, the receiving Member State will verify whether the person indeed belongs to one of the eligible categories; that is, whether they are, in fact, a sportsperson. The challenge with this determination lies in the fact that different CARICOM Member States have in place different rules, some stricter than others, as to who qualifies as an eligible 'sportsperson'. Whereas in Trinidad and Tobago, the definition is loose, encompassing a person who is deemed by the minister to be a sportsperson by virtue of their qualification or experience or a

137 Antigua and Barbuda Caribbean Community Skilled Nationals Act, 1997, No 3; The Bahamas (not part of the CSME); Barbados Immigration (Amendment) Act, 1996, Chapter 190; Belize Caribbean Community (Free Movement of Skilled Persons) Act, 1999, No.45; Dominica Caribbean Community Skilled Nationals Act, 1995, No 30; Grenada Caribbean Community Skilled Nationals Act, 1995, No 32; Guyana Immigration (Amendment) Act, 1992 No 9; Suriname Caribbean Community (Free Entry of Skilled Nationals) Act, 1996, No 6; Jamaica Caribbean Community (Free Movement of Skilled Persons) Act, 1997, No 18; Montserrat (not yet); St. Kitts and Nevis Caribbean Community Skilled Nationals Act, 1997, No 12; Saint Lucia Caribbean Community Skilled National Act, 1996, No 18; St. Vincent and the Grenadines Immigration (Caribbean Community Skilled Nationals) Act, 1997 No 4; Trinidad and Tobago Immigration (Caribbean Community Skilled Nationals) Act, 1996, No 26.

138 This is to be contrasted with free movement for non-economic purposes, which sportspersons are also entitled to, which is guaranteed by Conference Decision of 2007.

combination of both,[139] the schedule to the Jamaica Caribbean Community (Free Movement of Skilled Persons) Act[140] narrowly restricts eligibility to 'persons certified by the competent authority of a Member State as representing that state in sports'. A narrow construction of the latter provision potentially means that only sportspersons who are serving in their official capacity as a representative of their state could exercise their right to free movement, which arguably defeats the object and purpose of Article 46 of the RTC, which contemplates all sportspersons being afforded this right to move freely within CARICOM.

That said, apart from Article 46 RTC, the RTC and RTB, like EU law, also usefully provides for the right of sportspersons to provide their services *temporarily* in approved activities in another Member State, and allowance must be made by the receiving State for these services to be provided under the same conditions enjoyed by nationals of that Member State.[141] These sentiments were made by the CCJ in the case of *Cabral Douglas v Dominica*,[142] a case in which the applicant, the son of former Dominica Prime Minister Rosie Douglas, sued his own State, Dominica, on the basis that his contract to bring to Dominica the Jamaican recording artist and entertainer, known as 'Tommy Lee Sparta', was frustrated, when the entertainer, his manager and personal assistant were denied entry into Dominica, and deported the following day, leading to the cancellation of the concert. The applicant alleged that pursuant to Article 222 RTC, he was entitled to special leave to commence proceedings against his own State, Dominica, in his capacity as proprietor of his privately owned entertainment business. Among other things, he relied on Article 45 RTC and the 2007 conference decision on free movement of persons. He claimed that the alleged infringement caused him consequential financial, reputational and other loss. Although the CCJ ultimately rejected the applicant's claim,[143] it nonetheless clarified that a skilled Community national moving between CARICOM Member States pursuant to Article 46 RTC to seek employment does not have the treaty right, by virtue only of such movement, to provide services in accordance with Article 36. Article 46 contemplates movement to another jurisdiction to obtain a job, whereas Article 36 contemplates temporarily moving to another jurisdiction to provide services in that jurisdiction in certain approved sectors.

On another note, it is important to note that the RTC also provides for the right to freedom of establishment, which potentially allows sportspersons to engage in their professional activities on a *permanent* basis in another Member State, effectively as self-employed persons.[144]

Notwithstanding the existence of these progressive free movement rights, however, there are necessarily limitations to the exercise of these rights, albeit that such limitations must serve a legitimate objective and must also be necessary and proportionate. Among the exceptions highlighted to date by the Caribbean Court of Justice's (CCJ) landmark cases of *Shanique Myrie v Barbados*[145] and *Maurice Tomlinson v Belize and Trinidad and Tobago*[146] are restrictions that limit entry to an 'undesirable' person and those that apply to a person who would be a charge

139 Section 9A(c) Immigration (Caribbean Community Skilled Nationals) Act Chapter 18:03.
140 Act No 18/1997.
141 Article 36(2) RTC.
142 [2017] CCJ 1 (OJ).
143 The CCJ held that although the applicant was a national of Dominica, he could not satisfy the criteria imposed by Article 222(a) and (b) with respect to *locus standi*. More specifically, the RTC did not directly confer upon him a right or benefit. He could not rely on Article 7 (non-discrimination provision, since he could not be discriminated upon on the basis of his nationality, since he was Dominican); he was not a patron (he was merely a 'middle man' standing between the concert patrons and the entertainment suppliers) so he was not entitled to the correlative right to receive services under Article 36. The right did not accrue in his favour, but rather in favour of the entertainers themselves, Tommy Lee et al. In any event, there could be no prejudice if he was not entitled to the right claimed in the first place.
144 Ibid Article 32(1)–(2) RTC.
145 [2013] CCJ 3 (OJ).
146 [2016] CCJ 1 (OJ).

on public funds. In short, CARICOM Member States could, in general, legitimately refuse entry to a sportsperson of another CARICOM Member State if they are deemed to be an 'undesirable' person, a term that has been construed by the CCJ to mean persons posing a *genuine, present and sufficiently serious threat* to the maintenance of public morals, public order, public safety, life and health. Additionally, a State may assess whether a sportsperson who is desirous of entering the country in question has sufficient funds available to cover the duration that he intends to stay in the country concerned. That said, it is important to note that these exceptions are not to be invoked as a matter of course; they are to be narrowly construed, and, in any event, they do not absolve a Member State from complying with certain procedural requirements. Indeed, a decision to deny entry to a regional sportsperson is of exceptional character and, thus, in accordance with the principle of accountability that forms part of CARICOM law, the receiving State is required to provide promptly and in writing the reasons underlying the denial of entry, as well as afford the person the opportunity to review such a denial. In short, the State is under an obligation to provide an effective and accessible appeal or review procedure to the person with adequate safeguards to protect his fundamental right to free movement. It is not enough for the receiving State's officials to have the decision to deny the person entry reviewed by a superior immigration official; rather, they have to afford the person the opportunity to consult an attorney-at-law or consular official, if available, or in any event to contact a family member.

In the event of a breach of the right to free movement, it appears likely that, in addition to issuing a declaration to the effect that the State has breached the person's right of entry 'without harassment or the imposition of impediments', the CCJ also has the power to award damages, though not of an exemplary nature, as illustrated in the *Shanique Myrie* case in which the applicant, a Jamaican national, received a handsome award of both pecuniary and non-pecuniary damages after she was subject to a humiliating cavity search and was returned to Jamaica the following day by Barbadian immigration officials.[147]

## 8.5 TRANSFER OF CITIZENSHIP/RESIDENCE AND THE NEW IAAF RULES ON ELIGIBILITY

Although each country participating in the Olympic Games is only allowed up to three representatives in any one event, it has become increasingly commonplace for several other athletes who were born in a particular country but who have since transferred to another nation to represent that other territory in the Games. This interesting dichotomy has not only placed African athletes, known for their impressive performances in long distance events, in the spotlight, but increasingly also Caribbean athletes, in particular those emanating from Jamaica, a country known for its enviable excellence in shorter-distance track events. Whether on account of better financial opportunities or greater prospects for advancing their professional careers outside of an overly competitive local environment, Jamaican-born athletes have increasingly transferred their residence, citizenship and representation to other jurisdictions.[148]

A curious example transpired during the 2016 Rio Olympic Games in which a total of seven individuals competing in the semi-finals of the 100-metres race on 14 August 2016 were

147 On free movement in the Caribbean generally, see Jason Haynes, 'The right to free movement of persons in Caribbean community (CARICOM) law: towards juridification?' (2016) 2(2) Journal of Human Rights in the Commonwealth 57; Jason Haynes, 'The Transplantation of the European Principle of "State Liability" in Caribbean Community (CARICOM) Law: A Normative Assessment' (2014) 14(1) Oxford University Commonwealth Law Journal 73; David Berry, *Caribbean Integration Law* (Oxford University Press, 2014).

148 'Three Jamaican Athletes seek to run for Another Country' (*The Hindu*, July 22, 2015).

born in Jamaica. Usain Bolt, Yohan Blake and Nickel Ashmeade competed for Jamaica proper in the event, while Kemarley Brown and Andrew Fisher represented Bahrain, being cleared to do so by the IAAF in July 2016. Curiously, Brown and Fisher had earlier competed for St Elizabeth Technical High School and were members of the University of Technology Jamaica team in 2015 before applying for Bahraini citizenship. Additionally, Jak Ali Harvey, who was formerly known as Jacques Harvey, competed for Turkey, while Asuka Antonio 'Aska' Cambridge ran for Japan, and Akeen Haynes represented Canada in the event. Interestingly, in the 4×100-metre relay, Jamaican-born Emre Zafer Barnes competed for Turkey, while Aaron Brown and Brendan Rodney, who both have at least one Jamaican parent, competed for Canada in the 100 metre and the sprint relay, respectively.[149]

In light of the foregoing, representatives from the Jamaica Administrative Athletics Association (JAAA), in particular, have repeatedly called upon the IAAF to adopt more stringent rules to 'protect athletes' rights and well-being, and to prevent unscrupulous national associations from exploiting other countries' talents'.[150] More specifically, Dr Warren Blake, the President of the JAAA, has noted that while some countries have their own internal programmes they can still be found 'seeking to attract athletes from other countries by large sums of money. But as soon as they stop running (representing), their new countries have nothing to do with them.'[151] Dr Blake also expressed his concern that 'in Africa, especially Ethiopians and Kenyans, who switch to countries like Bahrain, they are not made citizens; they are given a passport that enables them to compete, but if they lose the ability to run, the passport is removed'.[152]

To address these challenges, the IAAF recently amended its rules on eligibility[153] to provide that athletes switching allegiance between countries must serve a three-year mandatory waiting period before being able to represent their new country of residence/citizenship. Additionally, before such transfer of allegiance can be granted, a review panel is to be established to determine the credibility of applications made. This panel will have regard to evidence that demonstrates that the recipient country offers full citizenship and associated rights to transferred athletes. Furthermore, the new rules provide that an athlete can only transfer once, albeit that, exceptionally, he can be transferred back to his country of origin, and that no transfers can be completed before the age of 20.

In welcoming the new rules, Dr Blake stressed that Jamaica's prominence in athletics means that its talented athletes have been targeted by rich countries, such as Bahrain, and that the new rules are particularly welcomed because they attempt to address 'serious talent drain, as Ethiopia found out'. In Blake's view, the new rules

> protect [athletes] from countries just interested in getting medals by any means. We are fully behind these changes, as we want to make sure transfers are real. You can't have situations where you want to run for a country and you have never been there and you are still living and training in your country. You haven't changed anything, except a passport. That is being frowned upon.[154]

While it is arguable that the IAAF's new rules raise questions about whether they amount to an unlawful restraint of trade, it is clear that a legitimate objective is being pursued by these rules,

149 'A Record 7 Jamaican-Born Runners in the Olympic 100-Meter Semi-Final Round' (*Jamaicans.com*, 2016).
150 Livingston Scott, 'Stay Put! – JAAA Supports New IAAF Transfer Rules' (*Jamaica Gleaner*, July 30, 2018).
151 Ibid.
152 Ibid.
153 'Amendments to The IAAF 2018–2019 Competition Rules Definitions and Rule 5 Eligibility To Represent A Member' (Approved by the IAAF Council with immediate effect, in force as from July 27, 2018).
154 Ibid.

namely to protect the interests both of athletes, some of whom are vulnerable and therefore in need of protection from exploitation, and countries, like Jamaica, which are seemingly blessed with an oversupply of talented athletes.

## 8.6 OLYMPIC LAW

The prominent role played by the IOC in global sport is unquestioned. From the commencement of the modern Olympics in 1896 under the influence of Baron Pierre de Coubertin during that era, the last century of sport has been indelibly shaped by the principles of Olympism.

The Olympic Charter stands out as a thorough and meticulous legal document that sits at the heart of the Olympic movement. The charter describes itself and its function in the following terms:

> The Olympic Charter (OC) is the codification of the Fundamental Principles of Olympism, Rules and Bye-laws adopted by the International Olympic Committee (IOC). It governs the organisation, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games. In essence, the Olympic Charter serves three main purposes:
>
> a) The Olympic Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of Olympism.
> b) The Olympic Charter also serves as statutes for the International Olympic Committee.
> c) In addition, the Olympic Charter defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement, namely the International Olympic Committee, the International Federations and the National Olympic Committees, as well as the Organising Committees for the Olympic Games, all of which are required to comply with the Olympic Charter.[155]

The Olympic Charter, therefore, is the IOC's constitution. There is a worldwide expectation that there will be compliance with its provisions, whether by athletes, coaches, bidding nations, anti-doping organizations, arbitral tribunals or governments. The preeminence of the charter as a governance document has been the springboard for the birth of 'Olympic Law'.

In his ground-breaking text, *The Law of the Olympic Games*, Alexandre Miguel Mestre, addresses the growing influence of Olympic Law. He states:

> It is clear that the growth of the Games and of the IOC itself forced a transition from a utopian to a more pragmatic outlook, which was to see the progressive emergence of 'Olympic Law' at the apex of which today sits the Olympic Charter, the founding agreement or originating source of the Olympic legal order.[156]

Mestre highlights the primacy of the Olympic Charter as a legal instrument, the interpretation of which is producing an increasingly useful *Lex Olympica*. The emergence of Olympic Law as a subset of Sports Law has been given notable endorsement from an academic perspective with the publication in late 2017 of the text, *Sports Law: Lex Sportiva and Lex Olympica* by Professor Dimitrios P. Panagiotopoulos.

From a Caribbean perspective, it is submitted that the relative youth of the Caribbean Association of National Olympic Committees (CANOC), with the attendant scarcity of legal

155 Olympic Charter (September 2017 edn) 9.
156 Alexandre Miguel Mestre, *The Law of the Olympic Games* (TMC Asser Instituut, 2009) 9.

interventions for or against it, has had the inevitable consequence of a slow development of Olympic Law in the region. However, the seeds have already been planted if one considers the interesting dynamics that arise in evaluating the legal nature of national Olympic committees (NOCs).[157] In this connection, Mestre notes:

> The Olympic Charter attempts to exert a harmonising influence on the ordering of NOCs, but does not lay down uniform requirements as to their legal nature, which would in any case be impracticable given the different types of legislation in force in the various countries that have NOCs. Accordingly, there are significant differences from country to country ... Most NOCs have private legal status and are completely independent of public authorities ... The Italian example is unique: the CONI is a non-governmental body but has a public law legal personality; it is subject to government review but does not need governmental approval for changes to its statutes. This NOC is also a confederation of national sports federations and has a dual function to go with its hybrid nature: it has a fiduciary relationship with the IOC, and is also the public body that oversees the entire organisation and regulation of Italian sport.[158]

It may be that the legal nature of NOCs is more accurately a company law question than one of Olympic or Sports Law, but it nevertheless presents a potentially fascinating opportunity for academic discourse, as seen in Frederic Rich's contribution on the topic, *The Legal Regime for a Permanent Olympic Site*.[159] Rich raises questions such as international legal capacity, the legal devices for autonomy and the capacity to contract under international law.[160] The ventilation of these and related matters sets the stage for the steady development of Olympic Law.

One of the rare cases involving a Caribbean NOC occurred during the period following the 2008 Beijing Summer Olympics. In *Netherlands Antilles Olympic Committee (NAOC) v International Association of Athletics Federations (IAAF) & United States Olympic Committee (USOC)*,[161] the NAOC,[162] on behalf of its athlete, Mr Churandi Martina, challenged his disqualification from the 200 metre final in which he originally placed second behind Usain Bolt. Although the NAOC's challenge would only be fully heard after the closing ceremony of the Beijing Games, the assessment of whether or not the CAS had jurisdiction to hear the appeal was an interesting one. It became necessary to interpret Article 59 of the applicable edition of the Olympic Charter, which stated that: 'Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the code of Sports-Related Arbitration.' The IAAF and the USOC opposed the jurisdiction of the CAS primarily on the basis of the 'field of play' doctrine, which essentially seeks to treat as sacrosanct sporting decisions made by match officials during the game, event or competition. Ultimately, the NAOC won the battle, but lost the war with the CAS holding that although it did, in fact, have jurisdiction to hear the appeal, the facts of the case did not warrant a reversal of the on-field decision to disqualify Martina. In citing previous CAS precedent, the sole arbitrator in *NAOC v IAAF & USOC* usefully noted that:

> CAS precedents made reference to something which is described as 'arbitrary', 'bad faith', 'breach of duty', 'malicious intent', etc... In the Panel's view, each of those phrases means more than that the decision is wrong or one that no sensible person could have reached. If it were otherwise, every field of play decision would be open to review on its merits. Before a CAS Panel

157 Ibid. See Chapter 2 for a discussion of the legal nature of sporting bodies.
158 Ibid 47.
159 Ibid 183.
160 Ibid.
161 CAS 2008/A/1641, award of 6 March 2009.
162 Since the time of this dispute, political changes in the kingdom of the Netherlands led to the eventual dissolution of the NAOC in October 2010 with the consequence that athletes from the former Netherlands Antilles now compete as Dutch athletes.

> will review a field of play decision, there must be evidence, which generally must be direct evidence, of bad faith. If viewed in this light, each of those phrases means that there must be some evidence of preference for, or prejudice against, a particular team or individual. The best example of such preference or prejudice was referred to by the Panel in Segura, where they stated that one circumstance where a CAS Panel could review a field of play decision would be if a decision were made in bad faith, e.g. as a consequence of corruption. The Panel accepts that this places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the review of a field of play decision.[163]

Finally, current and future Olympic hosts can expect to be confronted with an evolving *Lex Olympica* as the legal backdrop for delivering the Games is now well-entrenched. Notably, in the *Handbook of the London 2012 Olympic and Paralympic Games (Volume One*), the editors saw it fit in their recounting of London 2012 to include an entire chapter devoted to understanding the legal context of the Games. The title to that chapter, 'The Olympic Laws and the Contradictions of Promoting and Preserving the Olympic Ideal',[164] presents the indisputable narrative that the prestigious Olympic Games are largely dependent on an effective legal framework for their successful delivery. Olympic Law appears set to be a pivotal cog in the wheel of International and Global Sports Law.

## 8.7 SPORTS LAW EDUCATION

One of the most exciting developments, at least institutionally, in the sporting context in the Caribbean to date is the adoption of specialized Sports Law programmes at the leading universities in the region[165] – namely, the University of Technology, Jamaica and the University of the West Indies, at its Mona, St Augustine and, more recently, Cave Hill campuses. The importance of Sports Law education cannot be understated, as it provides a strong basis upon which students could obtain first-class quality education in the evolving dynamics of sport in the region from a legal perspective, resulting in the formation of a vibrant cadre of students, and ultimately, legal practitioners who are destined to advance the law and practice of sports in the region.[166]

To date, not only has the development of these programmes contributed to the expansion of the knowledge-base of students in the region, but also an increasingly strong and vibrant academic community, that has seen dissertations being published by students, academic papers being drafted by regional academics in the field and Sports Law conferences being hosted by academic and other private sector institutions across the region. There has also been the creation of various institutions across the region outside of academia geared towards enhancing Sports Law education, especially in respect of the rights of athletes, including the Trinidad and

163 CAS 2008/A/1641 *Netherlands Antilles Olympic Committee (NAOC) v International Association of Athletics Federations (IAAF) & United States Olympic Committee (USOC)*, award of 6 March 2009 [37].

164 Mark James and Guy Osborn, 'The Olympic Laws and the Contradictions of Promoting and Preserving the Olympic Ideal' in Vassil Girginov (ed), *Handbook of the London* 2012 *Olympic and Paralympic Games: Volume One: Making the Games* (Routledge, 2012) chapter 2.

165 The authors of this text have had the distinct privilege of introducing and teaching Sports Law at the University of the West Indies, Mona Campus, Jamaica, and St Augustine Campus, Trinidad and Tobago, respectively.

166 In the past, the University of the West Indies has commented that, 'there remains a significant void with respect to the body of Caribbean-oriented sport research and scholarship which connects to both the development of sports and the use of sport for development.' See 'Filling the void in Caribbean sport and development' (*UWI*, 26 August 2013) *http://sta.uwi.edu/news/releases/release.asp?id=1139*.

Tobago Association for Sport and Law. This is, indeed, a positive development that will likely result in the favourable expansion of the number of students who choose sports as an academic discipline and career path, as well as the number of lawyers and, by extension, ordinary citizens who have a greater appreciation of the application of legal principles to the sporting arena in the region.

## CONCLUSION

This chapter demonstrated that the practice of sports is rapidly evolving, and is becoming increasingly dynamic, in the process raising fundamental questions of law, policy and ethics. Indeed, the foregoing discussion on the 'no disrepute' clause illustrates that with the increasing commercial value of players and the extraordinary investment in sports on a whole, clubs and leagues have become more and more wary of players' off-field conduct tarnishing the integrity of sports. The increasing policing of players' lives, both on and off the field, however, raises questions about the wide margin of appreciation afforded clubs and leagues to sanction players who are deemed to bring the sport into disrepute, and the negative externalities related thereto, including circumvention of their right to privacy. The chapter addressed the important question of the role of human rights in sports and demonstrated some of the main ways in which human rights have been compromised in the sporting arena. Finally, the chapter addressed the controversial question of the right to free movement of sportspersons, which has become increasingly 'juridified' in recent years, largely through the ground-breaking jurisprudence of supranational courts, such as the CJEU.

Overall, the chapter places various 'emerging' issues in a Caribbean light, thereby providing a nuanced understanding of the law and practice in this important area of Sports Law.

# CHAPTER 9

# CONCLUSION

This book reminds us that sport remains one of the few institutions today that seamlessly permeates the ethos of every society. Sport, in its various forms, has a transformative potential, which is manifested in its unrivalled ability to break down long-established barriers, whilst fostering a culture of tolerance, respect, diversity, fairness and a holistic approach to physical and mental health. From time immemorial, sport has played, and continues to play, an unparalleled role in the development of the human spirit, and, indeed, in the maturation of societies.

In the Caribbean, as illustrated throughout this book, the impact of sport has been nothing short of extraordinary. At an elementary level, sport in the Caribbean remains one of only a few regional institutions that invites social cohesion and is a driver of our unique cultural identity, often expressed as our 'West Indian-ness'. Track and field and West Indies cricket, in particular, have had the uncanny ability to bring Caribbean peoples together in support of their favourite regional superstars. In this context, our athletes have not disappointed; they have proven to be powerful drivers in this process of regional cohesion and societal maturation, and are, indeed, an expression of our unique cultural identity as a Caribbean people – people who, despite having citizenship or residence in disparate islands – nonetheless identify with the successes of all Caribbean athletes.

As this book repeatedly illustrated, despite the current turmoil and travail, West Indies cricket is a fine example of the distinct manner in which sport has served to not only foster social cohesion, but also drive our cultural identity as a 'West Indian' people in our collective fight against hegemony, racism and oppression. Indeed, it should come as no surprise that West Indies cricket, and, in particular, the successes of the team of the 1970s and 1980s, has been a strong political and ideological tool against the now axiomatic ills of colonialism, authoritarianism and fascism. Notwithstanding the fact that cricket was thrust upon the Caribbean people shortly after the emancipation period by the colonial elite as a subtle instrument aimed at reaffirming colonial influence and domination, Caribbean people have used this very instrument to demonstrate not only their physical prowess, but also their unscathed spirit of excellence as a people even in the face of hostility and humiliation. Through iconic sporting figures and performances, as well as sheer stoicism in the face of adversity, Caribbean people have managed, through sport, to create a Caribbean identity that is blemished, but exceptional in its contribution to various fields of human endeavour, including world peace and security, justice and equal opportunity for all. Through sport, Caribbean peoples have sought to negative the racist tenor of the twentieth century, and its attendant negative corollaries. Our ability to withstand these externalities was most evident in the period of the 1970s when our cricketers demonstrated exceptional sportsmanship by not only participating in difficult tours abroad but also winning in emphatic fashion, even amidst the glorious uncertainties of the day.

This book has demonstrated that, today, sport in the Caribbean, and, indeed, further afield, plays a slightly different, though no less important role of driving social mobility. For many Caribbean, and, indeed, international sportsmen and women, sport offers the most attractive opportunity to escape the cruelty of poverty and social and economic disenfranchisement. Because sport has become increasingly commercialized and players have become increasingly commodified, sport remains one of the few ways in which talented individuals from all across the world could achieve recognizable dominance and, in so doing, achieve upward social mobility. The stories demonstrative of this fact are all too numerous to mention. Importantly, when

these sportspersons succeed, not only do they personally benefit, but also their families and wider communities, illustrative of the transformative potential of sport in practice.

At a macro-economic level, this book has made it clear that sport continues to play an important role in the diversification of economies and, indeed, in bolstering economic development, especially in poorer parts of the world. The hosting of World Cup matches, such as the Caribbean's hosting of the ICC World Cup in 2007, as well as competitive regional/domestic league matches, such as the Caribbean Premier League (CPL), are the obvious illustrations of how sport has in fact contributed to economic development both in the Caribbean and wider-afield. Sport, in addition, has the potential to attract foreign investment, increase foreign reserves through the influx of international spectators, and enhance national infrastructure and communications systems whilst also improving economic prospects for small businesses. In Jamaica, for example, although the economic impact of sport is wholly under-researched, conservative estimates appear to suggest that sport contributes approximately 2% to Jamaica's GDP,[1] which augurs well for the diversification of that economy, which is so vulnerable to external shocks and natural and man-made disasters.

Among other things, the book has also demonstrated that sport plays an important role in measuring and confirming athletic prowess. Through competitions such as the Olympic Games, the ICC Cricket World Cups in their various formats, and, to a lesser extent, the FIFA World Cup, Caribbean athletes have had the opportunity not only to display their remarkable athletic capabilities, but, in many respects, have been successful in competing, and in some instances winning, against the very best athletes worldwide – a remarkable feat for islands whose populations range from a couple hundreds to a few million. In short, while our sphere of influence in international geo-politics remains limited, if not non-existent, it is sport that has given the world the opportunity to see our excellence of mind, body and spirit.

Substantively, this book makes an important contribution to the existing literature by providing in-depth, critical and original analyses of how sport has over the last few decades experienced a steady process of juridification.

To briefly recap, the book began by introducing 'Commonwealth Caribbean Sports Law', placing this dynamic area of law in its proper social and legal context. Among other things, this book highlighted some of the unique challenges associated with defining 'sport' in law by reference to 'non-negligible physical activity', as articulated in *The English Bridge Union Ltd v Commissioners for Her Majesty's Revenue & Custom*[2] and *The English Bridge Union Ltd v The English Sports Council*,[3] pointing to the problematic nature of this approach, particularly in the Commonwealth Caribbean where non-physical games, such as chess, dominoes and various card games, are frequently engaged in from the lowest to the highest echelons of society. The book also considered the distinct relationship between law and sport, and questioned whether the age-old debate about 'sport and the law' and 'Sports Law' continues to have any practical significance in reality.

The book then proceeded to address the contentious issue of governance in sport, highlighting, in particular, some of the key challenges and complexities that currently arise in the Caribbean regarding the management and administration of various sporting disciplines. In particular, the book examined, in considerable detail, the fight for autonomy by various sporting bodies, and discussed the legal and political implications of governmental intervention in the governance of the private affairs of sporting bodies, including Cricket West Indies. The

1 Sofia Azzedine, 'Sport to rescue the Jamaican economy' (*Le Journal International*, 19 June 2013) *www.lejournalinternational.fr/Sport-to-rescue-the-Jamaican-economy_a934.html.*
2 Case C-90/16.
3 [2015] EWHC 2875.

book, while conscious of the need to ensure that integrity, transparency and accountability are maintained by sporting bodies, considered it important, as a matter of law and policy, that these bodies continue to be self-regulated, though the argument was advanced that the courts, in particular, have a significant role to play in regulating aberrant conduct on the part of these bodies. On the broader theme of judicial review, the book considered that while, in principle, courts have maintained that judicial review is not available in sporting disputes given the private character of sporting bodies, the same principles applicable in judicial review cases have evidently been applied in sports-related disputes, though on a contractual/supervisory jurisdiction basis. The book also considered the role of alternative methods of dispute resolution in the sporting context, pointing, in particular, to the indomitable role of the CAS in the resolution of sporting disputes, and the challenges that continue to plague its operation in practice.

The book then moved on to consider the application of contract law principles to the resolution of sporting disputes, pointing to the challenges of interpreting complex sporting contracts in this modern dispensation of sporting justice where 'money talks'. Among other things, the book critically addressed the concept of contractual capacity in the sporting context, which has been given new life in recent years in light of a growing number of decided cases between minor players and clubs/agents with regard to the capacity of minors to enter into, and extricate themselves from, binding contractual obligations, some of which amount to an unlawful restraint of trade. The book also considered the role and importance of sports agents in advancing the commercial interests of players across various disciplines, and the attendant challenges of using common law rules to regulate the activities of these agents, especially in view of the increasing commercialization of sport, which has led to a growing reality that fiduciary duties are being breached by agents in practice.

On the issue of the commercialization of sport, the book provided a robust analysis of the role of IP and other commercial platforms in sport. More particularly, the book considered the important role played by IP rights (copyright, trademarks and, to a lesser extent, patents) in advancing the marketability, goodwill and monetary returns of regional athletes, clubs and broadcasters. As demonstrated, however, new threats to monetizing IP rights in sport, such as ambush marketing and the appropriation of personality rights, have increasingly been brought into the limelight, which challenge academics and policy-makers to find innovative solutions to the myriad issues and concerns raised.

More generally, the book addressed in considerable detail issues of civil liability, criminal liability, ethics and integrity in sport. Among other things, the book clearly demonstrated that, although for a long time, injuries sustained on field as a result of negligent, intentional or reckless conduct were regarded as falling within the privatized disciplinary platforms created by clubs, there is an increasing momentum towards litigation both in the civil and criminal courts. Civil liability, in particular, raises a number of important questions surrounding not only the appropriate threshold for establishing liability in negligence and assault/battery, but also in respect of the difficult task of assessing damages, especially in respect of players who claim damages in the millions, at times covering future, and arguably speculative, events. In the criminal domain, similar challenges were demonstrated, with a particular focus being placed on the law's increasing intervention, perhaps unavoidably so, to tackle intentional/reckless conduct that previously went unnoticed, though the defence of consent remains strongly oppositional to such intervention.

On the question of ethics and integrity in sport, the book considered a number of recent developments in this field, both at the international and regional levels, but expressed concern over continued incidents of irregular conduct that taint the integrity of sport, including match/spot-fixing and ball tampering. The book also addressed the under-researched question of the legality of sports betting from a comparative perspective, effectively providing nuanced

analyses that will hopefully inform law and policy in jurisdictions that do not currently countenance a robust approach to this intriguing development.

A significant portion of this book was, understandably, dedicated to the important issue of doping in sport. Among other things, this book demonstrated the development of the international anti-doping regime, and the challenges to its effective operationalization in practice. In this connection, it presented oppositional views with regard to the regulation of doping, by reference to many cases from all over the globe. The intricacies and vagaries of disputes surrounding anti-doping rule violations were also addressed in considerable detail, with nuanced, independent and original analyses provided on some of the main cases to have been decided upon to date.

Finally, the book concluded with a discussion of 'emerging issues' in the current dispensation of Sports Law, pointing, in particular, to the challenges associated with invoking the 'no disrepute clause', the problematic application of the restraint of trade doctrine in practice, as well as issues related to human rights in sports, most notably the hyperandrogenism regulations, which challenge how we conceptualize the proper role of law in sport.

All in all, this book represents both our passion for sport and the law and our pride in our unique West Indian identity. We hope that this book serves as a tremendously important resource for scholars, students and practitioners in this increasingly dynamic area of law.

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