

Seminar 2003 (as at 11 June 2003)

John de Mestre, Evelyn Lee, and Peter Thiel

John de Mestre & Co.

ABOUT THE PRESENTER

John de Mestre is the principal solicitor of John de Mestre & Co, which has acted in a number of sports related matters, such as the promoters of the Uncle Toby's Ironman Series, the St George Bank Triathlon Series, and for a number of athletes in various sports.

The firm has also represented a number of athletes in the Court of Arbitration of Sport. A number of these matters have received a large amount of publicity.

Case Study:

1. Katie, a 17 year old girl, is employed full time as a soccer player. She has recently been offered a contract to bend it like Beckham, full time, in the US. She comes to you for advice.
2. A dubious businessman called Terry McGuire has offered her a management agreement. How do you deal with it?
3. How do you advise on Katie's sponsorship arrangements?
4. A jealous parent of another team member writes a nasty letter to the local newspaper calling Katie "slow, uncoordinated and unsightly". She then organises for Katie to come before a disciplinary committee (or tribunal) and asks for her to be suspended for 5 years for wearing new technology fast-skin socks to a game.
5. In the interim, Katie trips over during a match and is badly injured. She will have to miss the entire season.

What are the issues?

1. Obtaining Instructions

As a minor who will give her instructions? Does she require her parents' consent to instruct you?

2. Guidelines for management agreements

It is a good idea to make the management agreement as tailored as possible, rather than allowing a generic standard form. However, it is also important that the contract is flexible enough to allow for the development of Katie's career as an athlete. Mention may be made to future possibilities or certain terms may be left open to allow change as Katie's career develops.

Matters to consider specifying in the agreement:

- a. the service the manager is to perform (consider whether specialised advice will be provided),
- b. whether the manager is to be the exclusive representative (or whether Katie will have a different Australian manager to an overseas manager),
- c. what fees the manager will receive (will they be paid a set amount per year or per hour, or a percentage of Katie's income, and consider non-monetary payments such as clothing and equipment),
- d. when the manager will receive the fees (in instalments, in line with Katie's own income, once a year, etc),

- e. whether the manager will be entitled to reimbursement of expenses (consider travel, meetings with potential sponsors, requirement for itemised accounts etc),
- f. length of the agreement and provisions for terminating the management relationship,
- g. what financial records the manager should be required to maintain,
- h. since Katie is a minor, who should be able to sign contracts on Katie's behalf (and whether the manager will be allowed a power of attorney),
- i. how Katie's name can be used for marketing etc,
- j. in the event of dispute, how will it be resolved.

3. Guidelines for sponsorship agreements

Conflicts often occur between the sponsorship arrangements of athletes, their clubs and governing bodies. When advising on sponsorship agreements consider the conflict where sponsors wish Katie to wear their brand of clothing, where Katie may also be required to wear a particular team outfit for competition. Therefore check on the sponsorship arrangements and administration at the club and national level.

Some athletes wish to sell their reputation or license the use of their names/images. It is important to consider when the sale/license may conflict and whether it is to be a mutually exclusive arrangement which prevents the athlete from selling/licensing to others.

4. Defamation

Does Katie have a claim in defamation because the nasty parent has damaged her reputation? In *Boyd v Mirror Newspapers Ltd [1980] 2 NSWLR 449* Les Boyd received \$15,000.00 in damages when a journalist described him as “fat, slow and unpredictable”.

Regarding the new technology fast-skin socks, if the accusation is false, Katie may have a claim in defamation.

5. Going before a Tribunal / Disciplinary Committee

Tribunals generally deal with 3 categories of hearings – disciplinary charges, appeals from earlier decisions and protests/disputes between competitors. Note that some tribunals do not allow lawyers to represent players, such as in AFL Tribunal hearings. It is also important to note that different Tribunals admit evidence in different ways. Some will only hear oral evidence while others conduct hearings with written submissions alone.

The chairperson for the tribunal hearing should be familiar with the rules and follow them closely. If there is any chance that a matter may be appealed to the courts, it is recommended that a lawyer should fill the role as chair.

The Court of Arbitration for Sport (CAS) was created in 1983 by the International Olympic Committee in Switzerland to assist parties in resolving sporting issues. A CAS decision is final and can be enforced in the same way as a court judgment. The parties can agree on which law to apply to an arbitration. If there is no agreement, the Swiss law applies.

The panel of arbitrators is made up of 1 or 3 arbitrators. If the parties do not agree on the number, then the CAS makes the decision bearing in mind the circumstances.

A sports-related dispute can be referred to CAS if:

1. there is an arbitration clause in the contract with the other party,
2. if the articles or association/constitution/regulations include an arbitration clause, or
3. a written agreement is made with the other party to submit the dispute to CAS after the dispute arises.

In 2000 the Court of Arbitration for Sport (CAS) heard the issue of the controversial Fastskin “Long John” bodysuits which Ian Thorpe, Michael Klim and Susie O’Neill were wearing.

6. Potential claims -

A. Common Law Claims (negligence)

against...

- 1.1. A.1 Team member who was in the way – note that Division 6 (Section 50) of the Civil Liability Amendment (Personal Responsibility) Act 2002 states that a professional does not incur a liability if he/she acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice. It does not have to be universally accepted but just one of differing peer professional opinions. Peer professional opinion cannot be relied on if the Court considers the opinion is irrational.

A.2 Opposition team member – was she tripped over by intentional/unintentional behaviour of another player? If it was intentional, was it assault? If unintentional, negligence?

A.3 Organiser/Promoter/Security at the game – was there insufficient security

A.4 Local council – were the sporting grounds poorly maintained? Windeyer J. in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 (at 90-91):

“A person who lets out property for public purposes is under a duty to the public to see that it is reasonably safe for the purpose”

In *Nowak v Waverley Municipal Council Aust. Torts Rep. 1984, 80-200* a rugby player broke his leg when he stubbed his foot on a projecting sprinkler during training.

A5. Coach – was a dangerous technique employed by the participants of the opposing team?

A6. Spectator – did a spectator throw litter onto the field for her to trip over?

B. Workers' Compensation Act (NSW) 1987

B1. If Katie is considered an employed soccer player, she may have a claim in Workers Compensation.

B2. The decisions of *Commissioner of Taxation v Maddalena [1971] 45 ALJR 426* and *Buckley v Tutty [1971] 125 CLR 353* confirmed

that professional footballers are considered employees employed by their club.

B3. It is important to consider whether Katie has the right to control or whether the club has the right to control. A distinction is drawn between “a contract for services” by independent contractors and a “contract of service” in an employed situation.

B4. The Workplace Injury Management and Workers Compensation Act 1998 contains a definition of worker, however there are some exceptions to the definition including registered players of a sporting organisation (Section 4(1)(d).

B5 Schedule 1, Clause 15 contains a list of certain persons deemed to be workers. Of particular interest to us is that boxers, wrestlers, referees and entertainers are all deemed to be workers under the Act.

B6 If Katie is covered under the Workers Compensation Act then she is entitled to receive various forms of compensation as follows:

Weekly Payments

Katie can obtain payments of weekly benefits on a partial or total incapacity basis. In the event that she is certified as fit for suitable duties, and his employer is not able to provide suitable duties, then she will be entitled to payment of weekly compensation at a higher rate for up to 1 year.

QUESTION: What is suitable other employment for a professional soccer player? Is this to include referee work, commentating, administration / office work? Should Katie go back to school instead?

Medical Treatment

Katie is entitled to receive payments for the cost of medical or hospital treatment, rehabilitation, as well as the related travel expenses as long as such treatment is deemed to be “reasonably necessary” (Section 60 of the Workers Compensation Act 1987).

Permanent Loss Compensation and Pain and Suffering

Under the Workers Compensation Act 1987 (Sections 66 and 67), it is possible for Katie to claim lump sum compensation in respect of any permanent injuries received by her in the accident.

Recent changes to the Workers Compensation Legislation in NSW mean that where Katie may have in the past been able to make claims for compensation in respect of each injured body part, he is now required to have an assessment of “whole person impairment” which takes into account the totality of all his injuries. The degree of compensation payable is determined on this basis.

Once the degree of permanent impairment has been agreed on by both parties, compensation is payable in accordance with a schedule. In the event that there is a dispute between the parties as to the degree of permanent impairment, the matter must be referred to an Approved Medical Specialist recognized by the Compensation Commission.

If the injuries sustained by the worker represent more than 10% of a whole person impairment, there is an entitlement to a further lump sum for pain and suffering. The maximum payable is \$50,000.00 for a most extreme case.

Compensation for Property Damage

Sections 74-78 of the Workers Compensation Act 1987 deal with property damage. Katie may be able to claim compensation for damaged crutches, artificial members, eyes or teeth, other artificial aids, or spectacles, as well as damaged clothing.

General Provisions

Section 155 of the Workers Compensation Act 1987 requires that all employees are covered by Workers' Compensation insurance.

Section 261(1) of the Workplace Injury Management Act 1998 requires claims for compensation to be made within 6 months of the injury. A WorkCover approved claim form should be served on either the employer or its insurer.

C. Sports Insurance

- C1. SportsCover sports insurance underwriters deal in accident, liability, contingency and property insurance for athletes. They mainly deal with amateur sports, but do cover a select range of professional sports also.

Insurance cover is through various insurance organisations such as WWSI (Worldwide Sport Insurance Pty Limited), Concord Sports Insurance Agencies Pty Limited (Soccer only), QBE, Insurance Advisernet Australia Pty Limited.

Further information on SportsCover can be found at

<http://www.sportscover.com>

C2. Sports Insurance can be obtained for amateur and professional sports.

Sports accident insurance for amateurs can cover the following:

- death
- temporary or permanent disablement
- medical expenses such as physiotherapy, chiropractic hospital and ambulance
- loss of income
- rehabilitation of sporting injuries
- repatriation of an injured athlete

Professional sports accident insurance can cover professional athletes for their loss of income from any source, including their sport, from injury or illness. Policies can also cover career ending injuries which results in the loss of future income (up to five times their current earnings from sport).

Policies can also be purchased by others (including managers and agents) whose income depends on an athlete.

C3. NSW Sporting Injuries Committee set up under the NSW Sporting Injuries Scheme (under the Sporting Injuries Insurance Act (NSW) 1978) under WorkCover is a government body which sporting organisations can elect to join. Amateur and professional sportspersons may be covered however professionals can only be covered if the organisation they belong to is largely amateur.

Premiums start at \$0.93 per adult up to \$17.38 per adult per year, depending on the risk involved with the particular sport. The total minimum organisation rate is \$165.00.

Its mission statement is to “reduce the personal and financial impact of serious injuries in sport and support sports injury prevention initiatives”.

The Organisation automatically covers all school children in NSW under its supplementary scheme (Consider that Katie is school aged). It provides cover for all amateur and professional sportspersons who are covered through their sporting organisation (again, Katie may be covered by her sporting organisation).

The Sporting Injuries Insurance Act (NSW) 1978 provides permanent loss compensation as set out in Schedule 1 of that Act. The threshold of injury required before benefits are payable for permanent loss are high, with a minimum of 33% loss of use in respect of arm and leg injuries, 11% for hearing loss injuries and 50% for all other specified injuries.

Claims under the Sporting Injuries Benefits Scheme go directly to the Committee staff and there is no provision for the payment of legal expenses if a solicitor acts for the injured sportsperson.

7. Civil Liability Amendment (Personal Responsibility) Act 2002 (CLAPRA)

- 7.1 Generally, the CLAPRA was designed to limit the ability of an injured person to sue for injuries sustained while involved in recreational activities.

7.2 This Act concerns a waiver of duty of care for recreational activities, and came into effect on 6 December 2002 amending the Civil Liability Act 2002 (CLA). Recreational Activities are defined to include:

- (a) any sport (whether or not the sport is an organised activity), and
- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and
- (c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

7.3 The CLAPRA deals with claims for harm resulting from negligence. The following references to sections are as they appear in the CLA following the amendment of that Act. Section 5 of the CLA contains definitions as follows:

5 Definitions

In this Part:

"harm" means harm of any kind, including the following:

- (a) personal injury or death,
- (b) damage to property,
- (c) economic loss.

"negligence" means failure to exercise reasonable care and skill.

"personal injury" includes:

- (a) pre-natal injury, and
- (b) impairment of a person's physical or mental condition, and
- (c) disease.

7.4 The CLA deals with the duty of care at Section 5B, which provides:

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
- (b) the risk was not insignificant, and
- (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

The section also provides guidance for the Courts in relation to relevant factors to be considered at 5B(2) and 5C.

- 7.5 Section 5D deals with causation, and provides that the plaintiff has the onus of proving factual causation (Section 5D(1) (a)) and the scope of liability (Section 5D(1) (b)).
- 7.6 Section 5F deals with the meaning of “obvious risk”, and states the following:
- (1) For the purposes of this Division, an "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
 - (2) Obvious risks include risks that are patent or a matter of common knowledge.
 - (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
 - (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.
- 7.7 Section 5G, 5H and 5I state that injured persons are presumed to be aware of obvious risks, that there is no necessity to provide a warning of an obvious risk and that there is no liability for the materialization of an inherent risk (inherent risk is defined as “a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill”.)
- 7.8 Sections 5J, 5K, 5L and 5M apply the changes to those participating in “recreational activities”. Section 5L specifically provides that there is no liability for harm suffered from obvious risks of dangerous recreational activities.
- 7.9 Section 5M potentially contains some of the strongest protection to organisers of recreational activities, with the section providing that there is no duty of care for recreational activity where there is a risk warning. The section contains an exception in the case of an “incapable person”

(defined as a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning). The provision states that the warning can be given orally or in writing, and can be a general warning of the risks.

7.10 The Act also contains a definition (at Division 6, Section 5O) of the standard of care owed by a person practicing a profession (a "professional"). The Act fails to define profession or professional. The professional is not considered to incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice. Peer professional opinion cannot be relied on if the Court considers the opinion is irrational.

7.11 The Act represents a major step towards a limitation of civil liability. The provisions of the Act appear to limit the number of claims that can be brought. This should in turn make the provision of insurance for public events easier to obtain, as well as cheaper. At this stage, however, there are no checks in place to ensure that any cost savings that arise from the implementation of the new legislation are passed on to the consumer by the insurance companies.

8. Changes to Sporting Injuries Insurance Scheme, to take effect from 1 July 2003

(taken from letter to Members of Scheme, 3 April 2003)

The legislation governing the operations of the Sporting Injuries Insurance Scheme has undergone some changes.

8.1 Changes to claims procedures

i) Medical Panels

It has been the Committee's practice for many years to utilise the expertise of the Compensation Court's Medical Division to provide medical panels of specialist practitioners to assess injuries and the degree of permanent disability suffered by applicants for benefits. From 31 December 2003 when the Compensation Court of NSW will be abolished this service will no longer be available and medical panels will be directly appointed and administered by the staff of the Sporting Injuries Committee. The medical specialists appointed to the panels will be specialists accredited by the Workers Compensation Commission.

(ii) Appeals against decisions of the Committee

Also as a result of abolition of the Compensation Court of NSW appeals against a decision of the Committee will from 1 January 2004 be heard in the District Court of NSW instead of the Compensation Court.

8.2 Changes to premiums procedures

From 1 July 2003 sporting organisations that have paid players or officials within their ranks who could be deemed to be workers under the Workplace Injury Management and Workers Compensation Act 1998 can have the option of:

- (1) Participating in the New South Wales Sporting Injuries Insurance Scheme,
- (2) Covering their paid players and officials with Workers Compensation, or
- (3) Covering their players and officials under a private insurance scheme in accordance with an exemption that is granted under Section 5A of the Sporting Injuries Insurance Act 1978

This last option is a change to the legislation that provides for a member sporting organisation declared under the NSW Sporting Injuries Insurance Act 1978 to be granted an exemption from the compulsory provisions of the Workplace Injury Management Act if their participants are insured with an approved private insurance scheme subject to the following conditions:

- (a) Any New South Wales organisation which chooses to participate in a approved private insurance scheme and take advantage of the exemption will be liable to pay to the New

South Wales Sporting Injuries Committee a levy equal to 10% of the premium that would otherwise be payable by the organisation as a participant in the New South Wales Sporting Injuries Insurance Scheme.

- (b) The benefits offered under the approved private insurance scheme must be equal to or better than those offered under the Sporting Injuries Insurance Scheme.
- (c) Any such exemption granted to a member organisation will be subject to annual renewal, and
- (d) the application for exemption will be determined by the Committee.

All funds raised by the levy imposed under (a) will be applied by the Committee to its sports injury prevention and reduction programs which include the Research and Injury Prevention Scheme and the New South Wales Sports Safety Awards Scheme.

9. How to get Involved

- 9.1 The Sporting Injuries Committee often runs sports injuries seminars in country areas of NSW, aimed at the sporting community. They are keen to hear from lawyers with an interest in the sports law field who are eager to present one of these seminars.

The Committee pays travel expenses for lawyers. Prior experience in the field is unnecessary.

Ms Linda Chapman, Claims Manager, can be contacted at the Sporting Injuries Committee at 4321 5394 or by email: lindachapman@workcover.nsw.gov.au.

- 9.2 Netball NSW has strong relationships with law firms who provide paid and voluntary services to them, including sitting on appeals committees.

There is a need for volunteer lawyers to sit on appeals committees and panels in the District Associations & Clubs.

Any interested lawyers can contact their local clubs or contact Mr Ian Harkness, General Manager, on 9646 5666 or by email: iharkness@netballnsw.com. Mr Harkness can collect contact details to refer on to local clubs.

- 9.3 Many local clubs appreciate the assistance of lawyers to offer advice on policy and to sit on panels and committees. Contact your local club to volunteer your time and expertise.

