

SPORT IN DISREPUTE

Patrick George*

It is becoming common to see sportsmen on the front page of the daily newspapers – not for their sporting achievements on the field but for their conduct off the field. The bad publicity this generates can be damaging to the reputations of them individually, their teams and their sports. For this reason sporting bodies usually require a disrepute clause in a sportsman's contract. These clauses are now under close scrutiny because of the serious consequences that may follow breach and because of the difficult circumstances that exist to make a decision when the conduct gives rise to criminal charges. This article examines the issues arising under the disrepute clause and the conduct required to demonstrate breach.

Introduction

Those who play sport and engage in misconduct may cause damage not only to their own reputations but the image and reputation of the sport they represent as well. That can jeopardise the interests of the team, team mates, sponsors and fans.

Sports related contracts generally contain a disrepute clause, or as they are sometimes known, a morals clause to manage this risk. Sportsmen¹ who 'bring themselves into disrepute' may suffer the penalties that apply for breach of contract in addition to the humiliation and embarrassment caused by loss of reputation. The penalties may include a fine or suspension or even termination of the contract.

Disrepute clauses may be expressed in broad terms requiring a sportsman 'not to engage in conduct which brings or would be likely to bring him into disrepute'.

Disrepute clauses of varying kinds are found in most Australian sporting bodies' contracts (or codes of conduct) such as the Australian Olympic Committee, the National Rugby League, the Australian Rugby Union, the Football Federation of Australia and the Australian Football League.

While variations exist between different disrepute clauses, there are some common issues arising. These include:

* Patrick George, BA (Syd) LLB (UNSW).

¹ The term 'Sportsman' is used instead of 'sportsperson' in this article and is to be taken as gender neutral.

- (1) what conduct is disreputable;
- (2) whose reputation must be damaged by the conduct;
- (3) whether the conduct needs to be publicly known;
- (4) to what degree does the conduct have to be shown to have occurred.

Some clauses specify the disreputable conduct in detail while others leave it to the general term, conduct that brings the sportsman into disrepute. Some clauses are limited to the effect on the reputation of the sportsman alone while others extend to the sport, the sporting body and/or team. Some clauses limit the effect on reputation to actual damage while others broaden it to actual and potential damage to reputation.

It is therefore of fundamental importance to interpret the actual wording of the disrepute clause in any given case to ensure that a decision that breach has occurred is made in accordance with contract law.

The disrepute clause should be interpreted in accordance with the usual principles of construction under contract law,² that is, the parties are bound to what they have agreed, determined objectively from the words the parties have used in the contract.

Sporting Reputation

It may generally be assumed that a sportsman has a good reputation on entry into the sports contract. That reputation provides a contractual value for the sportsman's services or performance. It will be enhanced or diminished by performance in the particular sport 'on the field'. It may also be enhanced or diminished by conduct off the field.

Sport reflects the highs and lows of the human condition. At its height, the values of courage, discipline, the pursuit of excellence and the common good bring out what is great and noble about sport.

Don Bradman reached the heights of his sport and had the greatest of sporting reputations. As he walked onto the Oval for his last Test innings, the Don was given a standing ovation by the crowd all the way to the wicket. The English captain shook his hand and the English team gave him three cheers. Bradman was bowled for a duck. It is often said that Bradman was affected by a tear in the eye as he faced up to the first few balls. He denied it but such is the stuff of legend and reputation, ending his career with a near perfect batting average of 99.94.

² See *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2002) 210 CLR 181 at [11]; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912.

He also maintained his reputation off the field, as observed by the great BBC commentator, John Arlott:

From late April until September 1948, in England, Donald George Bradman played cricket, captained a cricket team, made speeches, was polite to bores, ignored the spite of those who begrudged him what he had earned, kept his temper and consolidated a great public reputation.³

Sport itself and the bodies that administer it have their own reputations.

The Olympics were dedicated to the glory of the gods in Ancient Greece. Nowadays the Olympics are dedicated to the ideals of mankind:

1. Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in the effort, the educational value of good example and respect for the universal fundamental ethical principles.
2. The goal of Olympism is to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity ...⁴

With such aspirations and ideals, the Olympics' image and reputation are jealously guarded by the International Olympic Committee and its National Olympic Committees.

Some sports are held in similar high regard in Australia such as cricket, the football codes and swimming. The achievements and traditions of those sports are passed down through generations. The skill and success of the Australian team is a matter of national pride and marks the reputation of the Australian people as a nation of distinction in the world.

This sporting reputation is also now connected to large sums of money invested by sponsors and sporting bodies which fund and maintain a successful product and image which in turn provides healthy profits through the entertainment of the public and public support.

³ R. Perry, 'The Don' (1995) Pan Macmillan, Sydney, p 526.

⁴ Olympic Charter, International Olympic Committee, 7 July 2007 'Fundamental Principles of Olympism'.

Fame

Those who excel in sport at the elite level can experience both the exhilaration and the trappings of fame. The initial public recognition of a player's skill and ability may grow to admiration, and then grow more, and at the pinnacle of success, to adulation. For those that achieve this status the rewards of wealth, power and celebrity are great. So too, the generous opportunities and freedom of choice that become available.

The price however that they must pay in return is not simply meeting the physical and mental demands of continuing to perform at that level. It is also in accepting the restrictions imposed by a demanding public and media on their time, space and privacy which can outweigh the rewards.

Fame can be ephemeral or illusory. The esteem in which one is held by the general public can be just as easily lost as gained. The rewards of fame and good reputation may depend on the whim of public opinion. The subtleties and complexities of fame and celebrity may make it difficult for some sportsmen, who are often only equipped with their physical talent and skill, not with the wisdom and discretion required to avoid situations which encourage or tempt them to engage in misconduct.

Famous sportsmen face the risk of having their failings, indiscretions and misconduct publicised, often in flagrant disregard of their reasonable expectations of privacy. The media is a willing messenger, and these sportsmen need to be conscious of the media's willingness to sacrifice their reputations for the sake of news and the public's willingness to be entertained by their misconduct at the same time as being appalled by it.

... the inquisitiveness and invasiveness that their fame invites from a press eager to satisfy the punters ... is a self induced, self gorging, self destructive enterprise, a monster eating its own entrails – in public.⁵

In this atmosphere, sports officials and sporting bodies take much care to protect the image and reputation of the sport and the sportsmen who participate in it lest a bad name for any one of them drives money, fans and youngsters away, or damages the public esteem in which the sport and those sportsmen are held.

Competing Interests

The stimulus for exposure of a sportsman's misconduct is not simply the interests of the media or the public at large. There are many interests that compete to convert a private whisper about a sportsman's misconduct into front page news.

⁵ AC Grayling 'The Heart of Things' (2009) Phoenix, London, p 73.

There are:

- the interests of the sportsman to preserve his reputation;
- the interests of the sport to preserve its traditions and ideals;
- the interests of the team in which the sportsman plays, not to be associated with or be seen to endorse or approve of the scandalous behaviour;
- the commercial interests of the sponsors to protect their money, image and brand;
- the administrative interests of the sporting body to uphold standards and apply them fairly and consistently;
- the fans' interests in supporting their team and sportsmen;
- the media's interest in news and information of public interest and the competition within the media to be the first to publish;
- the self interest of 'talent' who sell their stories exposing the sportsman's misconduct to the media;
- the interest of passersby, random or possibly deliberately set up, who sell footage/photos to the media of the misconduct;
- the schadenfreude of rivals, other celebrities, and power brokers who may use the fall from grace to their advantage;
- the interest of opposing fans who desire the destruction of an opposing player's reputation and removal from the team; and
- the interests of those who may be called upon to substitute for or replace the sportsman concerned in the team.

With such competing interests, it is not surprising that gossip about a sportsman is a valuable commodity and grows in intensity to infect and influence the behaviour of the competing interests, to expand into fully blown scandal, fuelled and spread by blogs, internet networks, search engines and websites.

Disreputable Conduct

The nature of the conduct which may bring a sportsman into disrepute is very similar to the conduct that is considered defamatory, that is, tending to lower a person's reputation in the estimation of right thinking members of society generally.⁶

In *D'Arcy v AOC*⁷, the Court of Arbitration for Sport ('CAS') defined the

⁶ *Sim v Stretch* [1936] 2 All ER 1237 at 1240.

⁷ [2008] CAS 2008/A/1539.

concept by stating that ‘bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to **a significant extent**’⁸.

Nick D’Arcy was selected to represent Australia at the 2008 Beijing Olympic Games in the 200m Men’s Butterfly. The Team Membership Agreement provided that D’Arcy’s selection and continued membership of the Team was conditional upon him [not engaging or participating in] ‘conduct which, if publicly known, would be likely to bring the person, the person’s sport or the AOC into disrepute or censure ...’⁹

A few hours after selection, D’Arcy struck a former Commonwealth Games swimmer, Simon Cowley in the face with his elbow causing serious facial injuries. D’Arcy was charged with recklessly causing grievous bodily harm. Cowley informed the police that when he raised his hand in an effort to shake hands with D’Arcy and introduce himself, D’Arcy reacted by elbowing him in the face at full force. D’Arcy admitted hitting Cowley but said it was after he had been slapped in the face by Cowley.¹⁰ The AOC terminated D’Arcy’s membership of the Australian Olympic Team. Despite appeals to the CAS, he did not go to Beijing.

CAS was satisfied that D’Arcy’s conduct was likely to and did bring himself into disrepute. It was of the opinion that D’Arcy’s conduct was such that, when reported by the media, it could not help but be likely to bring him into disrepute. Members of the public learnt that a member of the Olympic Team had been out at a public bar in the early hours of the morning, intoxicated and had become involved in a fracas with another former athlete, which led to that person being very seriously injured and taken to hospital. Members of the public were also told that his conduct was such as to cause members of the NSW Police to reasonably believe that he was guilty of a serious criminal charge arising out of the incident.¹¹

CAS considered that the question was not quite the same as that arising in defamation cases, but consideration of similar issues that arise in that field were of assistance. Significantly, CAS concluded that a reasonable member of the public would think considerably less of D’Arcy on account of his conduct, albeit realising that he may have a defence to the criminal proceedings and might be acquitted at trial.¹² CAS determined that he had breached the disrepute clause and determined, in a separate decision, that the AOC was entitled to

⁸ [2008] CAS 2008/A/1539 at [7.1].

⁹ Clause 2.2(6) AOC Ethical Behaviour By-law, Condition 2(8) of the 2008 Australian Olympic Team Membership Agreement – Athletes.

¹⁰ [2008] CAS 2008/A/1539 at [6.2]–[6.3].

¹¹ [2008] CAS 2008/A/1539 at [7.1].

¹² [2008] CAS 2008/A/1539 at [7.1].

terminate his contract.¹³ D'Arcy later pleaded guilty to the offence and received a suspended sentence.

Community Standards

Misconduct sufficient to bring a person into disrepute may take many forms and depends upon community standards. If the nature of the conduct is not specified in the disrepute clause, the sportsman's contract or the sport's code of conduct, the general test of disreputable conduct formulated by CAS, that conduct bringing a person into disrepute must lower the reputation of the person in the eyes of ordinary members of the public to a significant extent, may apply.¹⁴

Criminal conduct involving physical violence, theft or sexual assault is commonly punished in the criminal courts, in more serious cases by imprisoning those convicted and excluding them from participating in society. It is clear that engaging in serious criminal conduct is likely to result in damage to reputation and be disreputable. Crimes involving excessive alcohol, illicit drugs or sexual misconduct, or possibly any offence punishable by imprisonment, are likely to be disreputable in the eyes of ordinary members of the public 'to a significant extent'.

In the context of sport, cheating by the use of drugs will usually be a breach of the relevant Anti-Doping Codes but is also clearly disreputable conduct. Drug or alcohol abuse or addiction is less clear. The contract of the AFL footballer, Ben Cousins, was terminated by the West Coast Eagles after drug charges were laid against him (but later dropped). Cousins admitted to his club that he had a cocaine addiction and sought treatment. He was suspended by the AFL for 12 months 'for bringing the game into disrepute'. At the end of 2008 he was given the opportunity to re-start his career and resumed his career with Richmond Football Club.

Aggression, public drunkenness and other antisocial behaviour, even if not criminal, may be disreputable. Statements attacking other players, coaches or officials may also be disreputable.

Ricky Stuart was the coach of the Australian Rugby League Team which lost the 2008 World Cup final for the first time in 30 years. The next day he was in the hotel foyer when the referee was checking out. Stuart was reported to have said 'You're the c... who cost us the World Cup ... You're a fucking cheat'. He also reportedly shoulder charged the English match officials' director who was present.

¹³ D'Arcy v AOC [2008] CAS 2008/A/1574.

¹⁴ D'Arcy v AOC [2008] CAS 2008/A/1539 at [7.1].

The ARL conducted an investigation into Stuart's conduct and imposed a \$20,000 fine on him, to be donated to the National Breast Cancer Foundation. Stuart apologised for his conduct and said:

I am fully aware of the importance of protecting the game's image and reputation from the grass roots level to the international arena. The penalty that has been handed down has been accepted by me as fair and reasonable.

He also announced he would not seek reappointment as Australian coach.

On the same day, Andrew Symonds, the Australian cricketer, went to a hotel in Brisbane with several members of the Australian Rugby League Team. The Australian Cricket Team had just won the First Test at the Gabba against New Zealand. While Symonds was at the hotel, he became involved in a physical altercation with a member of the public. Cricket Australia investigated the incident and subsequently cleared him of any wrongdoing but for a time his contract was in jeopardy as he had just returned to the Team from suspension for misconduct prior to the Test.

In early 2009, Symonds referred to a New Zealand cricketer during a radio interview as a 'lump of shit' and was fined \$4000 for breaching the Australian cricket players' code of conduct. He was later sent home from England at the start of the World Cup Twenty 20 for reportedly drinking beer in public while watching the Rugby League State of Origin in breach of the Australian Cricket team's curfew.

Other kinds of conduct peculiarly related to sport which may be disreputable include acts involving dishonesty, such as drug cheating, lying to obtain a benefit in the sport concerned, and gambling to fix the outcome of a game. Likewise corruption, bribery, intimidation, racial or sexual discrimination are likely to be considered to be disreputable acts. These acts may be governed in the contract by more specific clauses prohibiting such conduct.

It is possible that the negligence of a sportsman, by carelessly causing personal injury or death to another, may in certain circumstances amount to disreputable conduct.¹⁵ Ultimately, it is a question of whether the conduct in the eyes of ordinary members of the public would lower the sportsman's reputation to a significant degree.¹⁶

¹⁵ See *Jongewaard v AOC* [2008] CAS 2008/A/1605.

¹⁶ *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.1].

Double Standards

If the sportsman holds himself out or is held out by his sporting body to the public as a role model, the hypocrisy of double standards could make the conduct disreputable in the eyes of the public to the requisite degree.

In early 2009, footballers and cricketers signed up to the National Alcohol Code of Conduct which requires players to 'behave in a dignified and professional manner' when drinking alcohol and to uphold standards of 'integrity, dignity and professionalism'. The Code requires them to act as role models and 'not put themselves, team mates or the general public at risk of serious physical and social harm'. Players are asked to accept the consequences of their drinking, take 'reasonable action' to prevent alcohol problems and address related issues. The Code of Conduct was adopted by the NRL, ARU, AFL, FFA, Cricket Australia and Netball Australia.

The background to the Code was that Australian sportsmen were increasingly being seen to indulge in sports related and social binge drinking. The Code applies to elite professionals, amateur sporting clubs, registered players of clubs, accredited coaches and assistant coaches, support personnel, umpires, referees and other officials involved in these sports.

Brett Stewart, a Manly rugby league player, was engaged to be the star of the NRL's advertising campaign for the opening of the 2009 season. Manly, the 2008 NRL Premiers, launched the club's season and Stewart became intoxicated at the function. The NRL suspended Stewart for the first four rounds of the competition taking into account the privilege he had abused as the role model for league and fined Manly \$100,000 for failing to manage the function properly.

However, Stewart had also been charged with the sexual assault of a 17 year old girl arising from events later the same evening. He denied the allegations but the media called for him to be stood down pending the outcome of the criminal process. The NRL and Manly did not seek to rely upon the applicable disrepute clause in relation to this alleged conduct, pending the outcome of the criminal process in which they considered Stewart was entitled to the presumption of innocence.

In contrast, Sebastian Ryall, a promising young soccer player, was suspended by the FFA for breaching the disrepute clause when he was charged with having sex with a 13 year old girl under the age of consent. The disrepute clause provided that a criminal charge was deemed to be disreputable conduct.

A sportsman's sexual immorality which offends community standards may be considered to be disreputable. In 2002, New Zealand police had investigated a complaint by a 19 year old girl who claimed that a group of Cronulla Sharks Rugby League players, including then star player, Matthew Johns, had had group

sex with her without her consent. Charges were not laid and the allegations were not publicised at the time. Johns went on to a highly successful career as a television presenter and football commentator on Channel 9. However, when the ABC Four Corners programme, 'Code of Silence', was broadcast in 2009 with an interview of the traumatised woman, the public reaction was general condemnation of those involved. The only player clearly identified by the woman was Johns. Even though no charges were laid and Johns apologised to his wife for his infidelity and to the woman for the trauma that she had suffered, it did not save him from being stood down by Channel 9 under his contract of employment for his part in it. None of the Sharks players who were still currently playing under sports contracts were penalised for bringing the game or themselves into disrepute possibly because none of them was publicly identified as involved. This combined with other scandals, however, resulted in sponsors of the club terminating their association.

Infidelity by itself may not be disreputable 'to a significant extent' in this day and age. One sportsman who achieved legendary status in his sport was never penalised for the widely publicised infidelity to his wife. Shane Warne was penalised a number of times for other reasons, which seemed to coincide each time with the Cricket World Cup. During the World Cup in Sri Lanka in 1994, Warne passed on information to a bookmaker about selections in the Australian cricket team and the state of the pitch in return for payment of \$5,000. The Australian Cricket Board fined him for this conduct. On the eve of the next World Cup in England, Warne wrote a newspaper article commenting upon the Sri Lankan captain, Arjuna Ranatunga, saying 'I don't like him and I am not in a club of one.' The ICC fined him for being in breach of the disrepute clause in the ICC Code of Conduct and suspended him for two matches. On the eve of the next World Cup in South Africa, Warne tested positive for a banned substance, was sent home and was suspended for playing for one year under the Anti Doping Rules.

Specific Conduct

Some disrepute clauses are specific about the nature of the conduct that brings the game into disrepute. The Football Federation of Australia Code of Conduct (clause 2) is a good example:

2. BRINGING THE GAME INTO DISREPUTE
 - 2.1 A Member must not bring FFA or the game of football into Disrepute.
 - 2.2 Without limiting the generality of clause 2.1, a Member will be taken as having brought football into Disrepute if any of the following occurs:

- (a) discriminatory behaviour, including public disparagement of, discrimination against, or vilification of, a person on account of an Attribute;
 - (b) harassment, including sexual harassment or any unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated where that reaction is reasonable in the circumstances;
 - (c) offensive behaviour, including offensive, obscene, provocative or insulting gestures, language or chanting;
 - (d) provocation or incitement of hatred or violence;
 - (e) spectator or crowd violence;
 - (f) intimidation of Match Officials, which may take the form of (but is not restricted to) derogatory or abusive words or gestures toward a Match Official or the use of violence or threats to pressure a Match Official to take or omit to take certain action regardless of where such action is taken;
 - (g) forgery and falsification, including creation of a false document, forgery of a document or signature, the making of a false claim or providing inaccurate or false information on a prescribed form;
 - (h) corruption, including offering a Benefit or an advantage to a Player or an Official in an attempt to incite him or her to violate FIFA Statutes or FFA Statutes;
 - (i) abuse of position to obtain personal benefit;
 - (j) commission or charge of a criminal offence; or
 - (k) any other conduct, behaviour or statement that materially injures the reputation and goodwill of FFA or football generally.
- 2.3 A Club is deemed to have committed an offence under this section where its crowd or its spectators have engaged in any of the conduct outlined in clause 2.2.
- 4.4 Players and Officials are entitled to have their privacy respected and this Code is not intended to apply to private activities engaged in by a Player or an Official that are not in the public domain.

...

Disrepute means any conduct, statement or appearance in public that is damaging to reputation.

Clause 2.2 deems certain specific conduct as bringing the game of football into disrepute, leaving little room for argument about whether the conduct is disreputable or not. A difficult issue may arise however where a player is charged with a criminal offence, as the charge under clause 2.2(j) is deemed to be disreputable conduct, and the player may dispute that he engaged in the conduct the subject of the charge. The clause deems the laying of the charge as sufficient to bring the player into disrepute irrespective of whether he has engaged in the conduct in fact.

Effect on Reputation

The disrepute clause will usually identify whose reputation is to be affected by the disreputable conduct for there to be a breach. For example, the clause may refer to the sportsman, the sport, the sporting body or the team.

In general, the conduct is likely to have a damaging effect on the sportsman concerned. Whether it does so in fact is difficult to measure or demonstrate.

In defamation law, damage to reputation is presumed to flow from the defamatory publication.¹⁷ It is the 'tendency' or effect of the defamatory publication that proves that damage was caused or was likely to be caused to the plaintiff, for which the plaintiff is entitled to be compensated. It is something which one cannot identify with precision in quantifiable or monetary terms. Accordingly, damages are at large in defamation cases because they are not limited to the pecuniary loss that can be specifically proved.¹⁸

In *D'Arcy v AOC*¹⁹, the extent of the disrepute that D'Arcy's behaviour had brought upon himself was shown and highlighted by the voluminous number of media reports that accompanied his misconduct, which were tendered in evidence at the hearing. CAS considered that the contents of the media reports, while noting that many of the allegations contained within the media reports were unproven and sensationalist, included a considerable number of statements which were substantiated by the admitted facts and amplified the conclusion that they could not help but be likely to bring D'Arcy into disrepute.²⁰ It is important

¹⁷ *Ratcliffe v Evans* [1892] 2 QBE 524 at 528; *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507.

¹⁸ *Rookes v Barnard* [1964] AC1129 at 1221; *Coyne v Citizen Finance Limited* (1991) 172 CLR 211 at 222.

¹⁹ [2008] CAS 2008/A/1574.

²⁰ *D'Arcy v AOC* [2008] CAS 2008/A/1574 at [83].

to observe that while media reports may reflect the effect on reputation or the extent of damage to reputation to the sportsman and indeed exacerbate that damage, they do not necessarily prove the underlying facts or the conduct on which the reports are based.

If the disrepute clause is expressed in terms that ‘the sportsman, the sport or the sporting body’ must be brought into disrepute, it will be difficult to establish that the sport or the sporting body were each in fact brought into disrepute, without sufficient evidence or information of actual damage to reputation of each of them. In the absence of evidence of actual financial loss such as lost sponsorships, income or reduced participation by others in the sport as a result of the conduct, it will be difficult to show that there has been the necessary effect on reputation.

As a result the wording of disrepute clauses is often broadened to whether the conduct was ‘likely to have’ the effect on reputation or would ‘have the tendency’ rather than the narrower form requiring proof that the conduct did in fact have that effect.

Sport in Disrepute

In some cases, the clause is expressed that the sportsman’s conduct bring the ‘sport into disrepute’ without more. In such cases it is necessary to show that the misconduct has caused damage to the sport rather than just the individual who engaged in the conduct. It must be shown that public opinion of the sport has been diminished as a result of the conduct in question.²¹

Mikhailo Zubkov was a swimming coach for the Ukrainian swimming team at the FINA World Championships in Melbourne in 2007. Zubkov was caught on a security camera in an altercation with his daughter who was a swimmer in the team. There was a heated argument with physical pushing and shoving. The video clip of the incident was broadcast on television news that evening and the next day Melbourne police served an interim intervention order on Zubkov which prevented him from coming within 100 metres of his daughter.

FINA charged Zubkov with ‘bringing the sport of swimming into disrepute’ pursuant to of the FINA constitution. A FINA Disciplinary Panel expelled Zubkov from his position as coach and recommended to FINA that he be barred from applying for readmission for six years, a virtual life sentence.

On appeal to CAS, the panel decided that although Zubkov’s conduct was aggressive and violent to such a degree that it constituted an act of misbehaviour, his conduct had not actually brought the sport of swimming into disrepute. CAS

²¹ *Zubkov v FINA* [2007] CAS 2007/A/1291 at [60].

accepted Zubkov's submission that to warrant the imposition of the sanction, FINA had to prove to the appropriate standard, ie to the 'comfortable satisfaction' of the panel, that his conduct actually (not potentially) had caused the general public to think less or poorly of the sport of swimming (as opposed to Zubkov who committed the act) thereby diminishing the public reputation of the sport of swimming. In other words, the act need adversely affect the promotion and encouragement of the development of swimming in all possible manifestations throughout the world.²² CAS concluded there was no evidence to establish actual disrepute of the sport of swimming, demonstrating that public opinion of the sport had been diminished as a result of Zubkov's conduct.

In *D'Arcy v AOC*²³, CAS found that D'Arcy's conduct had brought 'him' into disrepute but the question of whether it had or would be likely to bring the 'sport of swimming' or the 'AOC' into disrepute was a more difficult issue that it did not need to resolve in the circumstances.

Continued Association

In many cases where misconduct has occurred, it is the continued association of the sportsman with the sport or the team that is likely to produce the damaging effect on reputation of the sport or the sporting body. Once a sportsman is reported to be involved in a scandal which brings him into disrepute, the public may infer from the continued association of the player with the sporting body or the sport itself that the disreputable conduct is tolerated or even accepted by the sporting body or the sport, which may be damaging to their reputation. Similarly, if the public has an expectation that the sporting body or the sport will impose sanctions upon the sportsman for engaging in disreputable conduct and that expectation is not met, the effect may be damaging to the reputation of the sporting body or the sport.

In other words, the effect on the reputation of the sporting body or the sport does not arise directly from the conduct of the sportsman but indirectly through the conduct of continuing association with the sportsman when disreputable conduct has been engaged in and publicised. The stigma of disrepute infects those who continue to associate with the person who has engaged in the conduct and that stigma damages their reputation, perhaps unfairly, through association. However the other side of the issue is the positive effect of enhancement by association where sponsors seek to attract custom through a sportsman's endorsement of a brand or product.

In the wake of a number of scandals involving players and officials of the Cronulla Sharks Rugby League team in 2009, sponsors of the club terminated their association. Sponsors considered that those players who had engaged in

²² *Zubkov v FINA* (2007) CAS 2007/A/1291 at [18] and [58].

²³ [2008] CAS 2008/A/1539 at [7.2].

group sex referred to in the ABC Four Corners programme 'Code of Silence' had offended women and families and public decency more generally, while the perceived protection provided by the club to the identity of the players involved led the public to believe that there was a cultural problem at the club, calling for the sacking of the Board and the CEO for endorsing or permitting such a culture to exist and go unchallenged. In the circumstances sponsors did not want their brand damaged by their continued association with a team and sporting body whose reputations had already been damaged.

Michael Phelps, the legendary US swimming gold medallist, found that Kellogg's was prepared to terminate its association with him notwithstanding his fame when a photograph of him smoking marijuana from a bong at a private party was publicised some months after the Beijing Games. Other sponsors were prepared to continue their association with him.

Public Exposure

The effect on reputation may be limited if the misconduct is not publicly exposed. Disrepute clauses often require that the disreputable conduct be 'publicly known'. If the conduct is seen in public, there can be little argument that it is a matter of public knowledge.²⁴ For example, most conduct on the field of play will be public.

'Public knowledge' suggests a wide awareness of the conduct. Public knowledge will obviously exist where the conduct is reported in the media or there is mass circulation of a report of the conduct in a similar forum. The requirement of 'public knowledge' is a higher threshold than publication at law in the context of defamation law. In that context publication at law may be made to only one person other than the plaintiff, and may be made to a small group in private, which would not meet the test of public knowledge required by the wording of such a disrepute clause.

In defamation cases, the circulation is sometimes alleged to occur through 'the grapevine effect'. This is the publication of material by word of mouth. This phrase is used to describe how information can be passed quickly and informally through the community without trace to become public knowledge. It also explains why in defamation law general damages are awarded.

It is precisely because the "real" damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will

²⁴ *Woodward v Hutchins* [1977] 2 All ER 751.

recompense a man or a woman for the insult offered or the pain of a false accusation.²⁵

Public knowledge does not exist where knowledge of the conduct remains confidential. For example, if the knowledge is confined to the sporting body, it may be suggested that that remains within the confines of the organisation itself and is not relevantly 'public'. If information is not confidential but in the public domain, the term 'public domain' requires 'that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential.'²⁶

In *Australian Football League v The Age Company*²⁷, the *Age* newspaper was enjoined from publishing the names of AFL players who it was alleged had taken illicit drugs. The names were known to Media Monitors. It had supplied the names to the Australian Institute of Sport, the Australian Customs Service, the Office of the Prime Minister, the Office of the Commonwealth Games, the Office of the Senate and the AFL. After an interim injunction was granted to restrain further publication, these recipients agreed to destroy the record of the players' names. Kellam J held that the names had not entered the public domain and therefore the newspapers were restrained from publishing the names in the newspapers.

In contrast, a criminal charge is not a private matter but a matter of public record and by its nature and the open system of criminal justice in Australia, a matter in the public domain.

Where the information is not publicly known, the damage to reputation is likely to be limited and the consequences of the misconduct may also be limited under the sportsman's contract.

Similar issues arise in relation to privacy. At this time there is not a clearly recognised common law or statutory cause of action for breach of privacy in Australia. That may change in the future.²⁸

Due to the availability of media technology, mobile phones for example, a player's actions can be filmed or photographed even in private places. These images can be quickly disseminated by email or internet. While there may be arguments about whether such disclosures are in breach of privacy or in the public interest, the sportsman is at risk that once disclosed and the misconduct is public knowledge, damage to reputation will be substantial.

²⁵ *Ley v Hamilton* (1935) 153 LT 384.

²⁶ *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109 at 282.

²⁷ [2006] VSC 308.

²⁸ *Giller v Procopets* [2008] VSCA 236; *Mosley v News Group Newspapers Limited* [2008] EWHC 1777; ALRC Report 108, 'Australian Privacy Law and Practice' May 2008; NSWLRC Report 120, 'Invasion of Privacy' April 2009.

There will be some types of misconduct such as drug cheating which will be damaging to reputation even if known only within the confines of the sporting body and not publicly known.

In times gone by, it might have been possible to deal with misconduct quietly and confidentially. However the risk for a sporting body now is that an attempt to prevent disreputable conduct from becoming public knowledge may be seen as covering it up and therefore a form of misconduct in itself. Indeed it is said that some sporting bodies have had a culture of covering up misconduct, in some instances paying complainants to hush it up. The sporting body may now feel compelled to disclose the conduct.

The actual wording of the disrepute clause determines whether public knowledge is relevant. Some clauses eliminate this issue by providing a breach for disreputable conduct whether 'publicly known or not'. The FFA Code of Conduct clause 2.4 provides that players are entitled to have their privacy respected and the code is not intended to apply to conduct 'not in the public domain'.

Connection to Sport

The disrepute clause is often applied to conduct off the field, unconnected with the sport in which the player participates.

The player may argue that the conduct did not take place in the course of playing sport or at a sporting venue or was not directly associated with the playing of sport. Although the conduct may have occurred in a public place, the player may argue that he was not attending the venue in any official capacity associated with the sport or the sporting body. However, off-field conduct is seen as part of the contractual responsibility of professional sportsmen as the conduct has the potential to damage not only their reputation but also the sports and the sporting bodies they represent.

As players become more professional and their selection establishes their livelihoods and careers, it may be no excuse to say that there was no connection between the conduct and the sport, as a player may be expected to be on best behaviour all of the time. There are some who argue that such conditions are too onerous or unconscionable, for example under section 51AA of the *Trade Practices Act 1974*, but in the context of proven disreputable conduct, it will be difficult for a player to obtain a sympathetic hearing on this issue. The argument also runs counter to the aspirations and ideals of sport and the role model status recognised by codes of conduct for off-field conduct.

One case which has been argued to support the distinction between one's professional life and one's personal life is *Ziems v The Prothonotary of the*

*Supreme Court of New South Wales*²⁹. In that case, the High Court was asked to consider the circumstances of a barrister who had been disbarred as unfit to be a member of the profession after being convicted of manslaughter for killing another driver in a car accident while intoxicated, and sentenced to imprisonment for two years.

The majority of the High Court held that the conviction was not conduct that made the barrister unfit to continue to be a member of his profession. They considered it was an isolated incident and did not warrant a conclusion that his general behaviour or inherent qualities were evident by the conviction. Moreover, the conviction was not of a premeditated crime and did not indicate a tendency to vice or violence or any lack of probity. They held that the conviction had neither connection with nor significance for any professional functions as a barrister.

The question is whether drink driving, particularly where another motorist is killed, is conduct that would make a barrister unfit to practice, or in the case of a sportsman disreputable conduct, and in either case whether it is sufficiently connected to their profession or sport. The Chief Justice, Sir Owen Dixon, who was in the minority in this case, considered there was a close connection between the conduct and the practice of the profession:

He was held guilty of a grave crime deserving of severe and degrading punishment. There can be no doubt of the moral blameworthiness of the conduct of the man who drives a motor car while under the influence of liquor, a consideration brought home by the fact that he caused the death of a fellow creature ... If counsel is adequately to perform his functions and serve the interests of his clients, he should be able to command the confidence and respect of the court, of his fellow counsel and of his professional and lay clients. When a barrister is justly convicted of a serious crime and imprisoned, the law has pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public which, as it seems to me, should belong to those to whom are entrusted the privileges, duties and responsibilities of an advocate.³⁰

A similar question arose in relation to the decision not to select the cyclist, Chris Jongewaard, for the Australian Olympic Team for the Beijing Olympics in 2008. He was charged (and subsequently convicted) with aggravated driving without due care and leaving the scene of an accident. CAS upheld the view that his conduct was disreputable and sufficiently connected with his sport.³¹

²⁹ (1957) 97 CLR 279 (argued in *Jongewaard v AOC* (2008) CAS 2008/A/1605).

³⁰ *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 285-286.

³¹ *Jongewaard v AOC* [2008] CAS 2008/A/1605.

Engaged in Conduct

Where the sportsman disputes that he has engaged in the alleged or publicised conduct, the sporting body has an obligation to satisfy itself whether the sportsman has engaged in the conduct or not.³²

Subject to the terms of the sportsman's contract, the proof of the conduct requires some evidence that it occurred.

However, the sporting body in making its decision is not a court of law and is not bound by the laws of evidence. It may consider all relevant information, not merely admissible evidence. If the contract is silent about the standard of proof, the sporting body may only need to be 'satisfied' of the truth based on the information available to it.³³

If the contract requires it expressly or by implication, or it is necessary to prove the misconduct in a civil court, and the standard applicable is the balance of probabilities, the following is a useful guide as to whether conduct has occurred on the balance of probabilities:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is less likely to have repeatedly raped and had non-consensual oral sex with his under aged stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.³⁴

There is a view that if the conduct alleged is serious (such as a doping case), the sporting body must be satisfied, more than the balance of probability but less than beyond reasonable doubt³⁵, that the sportsman has engaged in the conduct.

³² *Jongewaard v AOC* [2008] CAS 2008/A/1605 at [27].

³³ *Australian Workers Union v Bowen (No.2)* (1948) 77 CLR 601 at 628; *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546.

³⁴ *Re H (Minors)* [1996] AC 563 at 586 (Lord Nicholls).

³⁵ *Dos Santos v International Association of Athletic Federations* [2003] CAS/2002/A/383 at [82]-[84].

Harbhajan Singh, an Indian cricketer appealed a finding that he was guilty of racial vilification under the ICC Code of Conduct. The ICC Code of Conduct was silent as to the applicable standard of proof. The Code of Conduct Commissioner, took into account the seriousness of the offence (of racial vilification) and possible penalty and decided to apply a standard of clear or cogent proof on the balance of probabilities ie the *Briginshaw* standard³⁶, and found that the offence was not proved.

In many cases the truth about whether the sportsman has engaged in the alleged conduct is elusive. Where the sportsman disputes that he has engaged in the conduct alleged, or elects to remain silent about whether he did so, the sporting body must still form a view rationally about whether the information it has satisfies it. Those cases involving one person's word against the other are particularly difficult for a sporting body to determine. The sporting body must form a view about whom to believe to the standard of proof required. In cases where the sportsman admits the conduct but seeks to excuse it, it will not be difficult to determine that it has occurred but the sporting body may still need to be satisfied about the precise nature of the conduct and the excuse offered which may be relevant to whether the conduct was disreputable and to penalty.

Media reporting of allegations, particularly with sensational headlines, may not be sufficient information on which to make a rational decision or satisfy the applicable standard. Where the sportsman is asked to explain his position to his sporting body, he will need to be careful to be truthful. Otherwise the sporting body may rely upon any dishonesty as a basis for finding conduct bringing him into disrepute.³⁷

Procedural Fairness

The rules of natural justice, to the extent they apply, require the following principles to be applied:

- (a) The sportsman must be informed of the nature of the alleged conduct;
- (b) The sportsman must be given an opportunity to put his case or be heard in relation to the decision to be made;
- (c) The decision-maker must make the decision without bias and must act in good faith;
- (d) The decision-maker must make a rational decision based on the information available. The decision may be challenged if it is

³⁶ *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362.

³⁷ *Dajka v AOC* (2004) CAS, 12 August 2004.

so unreasonable that it is 'irrational' or so unreasonable that no reasonable person could have come to it.³⁸

The provisions of the disrepute clause are of fundamental importance in determining the scope of the duty to provide procedural fairness.

In the absence of express contractual terms expanding the duty, the scope of the duty is limited. A disciplinary tribunal is in contrast duty bound to provide procedural fairness unless the contract expressly excludes it.³⁹

Sanctions

Once it is decided that there has been disreputable conduct and that it has the necessary effect on reputation within the terms of the disrepute clause, then the sanctions available will again depend upon the wording of the contract.

For example the sporting body may be entitled to terminate the contract, impose a fine, suspend or exclude the sportsman for a period of time. The sporting body may even have a right to damages for lost sponsorship or actual loss arising from the breach of contract.

The decision that there has been a breach of the disrepute clause does not automatically give rise to a sanction under the contract if the sporting body is given a discretion. This must be exercised 'with regard to what, as between the parties, is fair and reasonable in the circumstances, with due weight given to the consequences ... for the member.'⁴⁰

Reasonableness

In making a decision about a breach of the disrepute clause and sanctions, and subject to the wording of the contract expanding the duty, the sporting body must act in good faith, reasonably and in an unbiased fashion.⁴¹ It is not relevant that the decision maker has taken into consideration matters which he should not have taken into account or has failed to take into account matters which he should have taken into account.⁴²

³⁸ *Associated Provincial Picture House Limited v Wednesbury Corporation* (1948) 1 KB 223 at 230, 233-234; *D'Arcy v AOC* [2008] CAS 2008/A/1574 at [27] and [65]; *Jongewaard v AOC* [2008] CAS 2008/A/1605 at [25].

³⁹ *Macqueen v Frackelton* (1909) 8 CLR 673 at 700-701; *Dickason v Edwards* (1910) 10 CLR 243 at 250, 255, 261-262; *Cains v Jenkins* (1979) 28 ALR 219 at 230.

⁴⁰ *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.5]; see also *Zubkov v FINA* [2007] CAS 2007/A/1291 at [64]-[68].

⁴¹ *Aerial Taxi Cabs Co-Operative Society Limited v Lee* (2000) 178 ALR 73 at 76.

⁴² *Legal & General Life of Australia Limited v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335-336; *WMC Resources Limited v Leighton Contractors Pty Ltd* (1999) 20 WAR 489 at [34]-[47].

As to whether the decision was unreasonable, it must be shown to be 'irrational' or so unreasonable that no reasonable person could have come to it.⁴³

If the decision of the sporting body was challenged in a court under New South Wales law, and again subject to the wording of the contract, the court has a strictly limited role when reviewing the exercise of an administrative discretion. The limited grounds of review are those set out above. It is not the function of a court to substitute its own decision for that of the sporting body by exercising a discretion which the parties have given by contract to the sporting body.

If the parties to the contract have not agreed to give a discretion in making the decision under the dispute clause or agreed a process for decision such as a disciplinary tribunal, the sporting body may be required to prove the breach of contract in a court of law.

Contempt of Court

The sporting body is in a difficult practical position to make a decision about misconduct where a person has been charged with a serious criminal offence awaiting trial. Traditionally, as evidenced by the AOC selection of Peter Wakefield for the Athens Olympics and more recently by the NRL decision not to deal with the allegations of sexual assault against Brett Stewart, it had been thought that the sporting body could not act because the sportsman was entitled to the presumption of innocence until proven guilty and that a decision penalising the sportsman or terminating the sportsman's contract as a result of the conduct would be in contempt of court.

That view is not strictly correct.⁴⁴ The conduct is governed by the terms of the contractual arrangements between the sportsman and the sporting body. The charges by contrast are to be determined by the criminal process pursuant to which the sportsman is entitled to the presumption of innocence and the right to silence. There are no such rights expressed in the contract and no requirement in the dispute clause that the conduct of the sportsman must be proved beyond reasonable doubt, or that a conviction must be entered, before the clause operates. A dispute clause is generally directed to the issue of reputation, not to whether a criminal offence has occurred. In many cases 'damage to reputation' will already have taken effect as a result of the charge being laid.

The sportsman may seek to justify or otherwise defend the conduct concerned. For example, if the sportsman was provoked or acted in self-defence, the law would say that he has a defence and was entitled to use reasonable force to

⁴³ *Associated Provincial Picture House Limited v Wednesbury Corporation* (1948) 1 KB 223 at 230, 233-234; *Minister for Aboriginal Affairs v Peko Wallsend Limited* (1986) 162 CLR 24 at 40-42.

⁴⁴ *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.2]; *Jongewaard v AOC* [2008] CAS 2008/A/1605 at [35] and [38].

respond, and that such a matter should be determined at the criminal trial and is a matter for the jury. Accordingly, the sportsman may claim he is entitled to the presumption of innocence and there should be no pre-judgment about the conduct alleged if there is a lawful defence to the conduct alleged. However in those circumstances it will be easier to determine that the conduct has had the necessary effect on reputation notwithstanding a lawful defence to the charge.⁴⁵

It is possible, however, that there will be a contempt if there is a real risk that there would be an interference with the due administration of justice by the sporting body proceeding to make a decision, if it were to do so, on the same issues about the alleged conduct as those to be decided in the criminal proceedings, before the outcome of the criminal proceedings.⁴⁶

The conduct the subject of the criminal proceedings will often be the same alleged disreputable conduct the subject of review by the sporting body. In these cases the sporting body must be careful not to act in contempt.

While the standard of proof in the criminal case will be conclusive as to whether the conduct occurred, being beyond reasonable doubt, the decision of the sporting body that it did occur in its opinion, on a much lower standard, may risk interfering with the criminal process by prejudicing the fair trial in due course. The courts however take a robust view these days of the risk to jurors being prejudiced and countenance the risk by appropriate warnings that they should only take into account the evidence before them at the trial.

Presumption of Innocence

The AOC did not act prior to the 2004 Olympic Games when it discovered that a boxer, Peter Wakefield, nominated for the Australian Olympic Team had been charged with a serious criminal assault and had been granted bail in order to compete at the Athens Games. The AOC selected him to compete at the Games and the AOC media director issued a press release in the following terms:

Wakefield has pleaded not guilty, and the court has various bail conditions to allow him to train in France and then go on to Athens for the Games. There is a presumption of innocence until proven guilty and on that basis he has been allowed to join the team in France and he will move into the (Athletes) Village in a few weeks.

However, on Wakefield's return to Australia, he was tried and convicted of the assault and sentenced to four years imprisonment.

⁴⁵ *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.1].

⁴⁶ *Hammond v Commonwealth of Australia* (1982) 152 CLR 188 at 206.

Another two athletes found themselves in a similar position, charged with criminal offences, prior to the 2008 Beijing Games – Nick D’Arcy and Christopher Jongewaard.

The facts of D’Arcy’s case are referred to earlier. D’Arcy complained that the AOC’s decision that he was in breach of the disrepute clause and that his membership of the Team be terminated was made before the prosecution evidence had been tested in court, on a committal hearing or at a trial. He asserted that he would defend the prosecution case on the ground of self-defence and that the only evidence the AOC had to determine the issue of conduct was D’Arcy’s first hand and unchallenged account of the incident, as the police did not release any evidence to the AOC. However, D’Arcy did provide the AOC, in addition to his own explanation of the events in question, the Police Facts Sheet setting out the information available to the police from the complainant and witnesses which led them to form the belief, before laying the charge, that he had committed the offence.

The charge was found to be sufficient for a reasonable member of the public to think considerably less of D’Arcy, albeit realising that he may have a defence to the criminal proceedings and might be acquitted at trial.⁴⁷ D’Arcy was subsequently convicted of the offence and given a suspended two year sentence.

Right of Silence

When a sportsman is asked to explain his conduct, he may refuse to provide a statement on the basis that he is entitled to exercise his right of silence and being required to explain his conduct may have the tendency to interfere with the due administration of justice.

Chris Jongewaard was nominated for selection to the Australian Olympic Team for the Beijing Olympics in the cycling team. Approximately twelve months earlier, he had been driving a car which had struck a friend and fellow cyclist causing him serious injuries. As a result Jongewaard faced charges for aggravated serious harm by dangerous driving and for leaving the scene of an accident after causing harm. The aggravated element to the first charge was the allegation that Jongewaard had committed the offence of dangerous driving while he had present in his blood a concentration of .08 grams or more of alcohol in 100 millilitres of blood.

The AOC did not have, and could not obtain, witness statements or even the Police Fact Sheet from the prosecuting authority or from Jongewaard. Consequently, the AOC was not equipped to engage in a detailed analysis of the evidence, and could not in any event determine whether Jongewaard had engaged in the conduct the subject of the charges while he was awaiting trial and entitled to

⁴⁷ *D’Arcy v AOC* [2008] CAS/2008/A/1539 at [7.1].

the presumption of innocence. However, Jongewaard admitted to the AOC that he had driven the car which struck the cyclist and that he had been drinking during some part of the day prior to the accident. The AOC gave Jongewaard the opportunity to respond to the public reports of his conduct which included the allegation that he had a very significant degree of alcohol recorded in his blood after the accident, namely .094. Jongewaard did not directly respond to or dispute the public reports of the extent of alcohol he had allegedly consumed. Indeed, he elected not to provide relevant material requested by the AOC.

The AOC decided not to select him in the Australian Olympic Team for Beijing. Jongewaard challenged the non-selection in CAS.

The AOC argued that in exercising his right to silence, Jongewaard was not entitled, on appeal from the AOC decision to CAS, to complain of a lack of evidence to support the AOC's decision because it arose from his failure or refusal to produce that evidence or contradict it when given the opportunity to do so. The AOC decided not to select him on the basis of the information available in relation to his conduct which had had or was likely to have an effect on his reputation and that decision was upheld as reasonable by CAS.⁴⁸ Jongewaard was subsequently convicted for aggravated driving without due care and leaving the scene of an accident, and was sentenced to two years gaol with a nine month non-parole period.

Another relevant example involved Greg Bird, a member of the 2008 Cronulla Sharks Rugby League Team, who was charged with reckless criminal assault by police on belief that he had 'glassed' his girlfriend in the face. She had gone to hospital with eye and facial injuries and as a result of what she said to nursing staff, the police were called. The only persons who could say what caused the injuries were Bird and his girlfriend. She did not provide a statement to the police and remained supportive of him, despite the police obtaining an AVO against Bird on her behalf.

The Sharks moved swiftly to sideline him pending further investigation and he sat out the NRL final series that year. Bird argued that this penalty ran contrary to his right to the presumption of innocence in the criminal proceedings pending trial. The dispute between Bird and the Sharks was ultimately resolved and he departed the Sharks under a confidential settlement. Bird was later convicted of the charge on the strength of the statements made by his girlfriend to nurses and the lie he admitted he had told the police that his flatmate had caused the injury.

He was sentenced to 16 months gaol, with an eight month non-parole period, but granted bail pending appeal.

⁴⁸ *Jongewaard v AOC* [2008] CAS 2008/A/1605.

In these cases the AOC and the Cronulla Sharks Board were each under pressure, given the weight of public opinion and media scrutiny, to make a decision about the sportsman's alleged conduct when that conduct was not yet proved pursuant to the criminal process and law.

It may seem a contradiction but the more serious the charge and the more important the presumption of innocence, the more the sporting body may need or be compelled to act for the sake of the team or the sport. For example if a sportsman has been charged with murder, rape or drug dealing, the sporting body may wish to make a decision that the sportsman not be part of the team while the matter awaits trial. Otherwise it may be detrimental to the interests of the team, the sporting body and the sport for the sportsman to continue playing in the circumstances. However, a decision that the sportsman has actually engaged in the conduct may be a clear contempt of court.

Shades of Truth

Defamation law provides assistance to find a way through this dilemma.

In defamation law it is recognised that there are three levels of criminal related conduct that may cause damage to a person's reputation to different degrees.

The first is that the person is guilty of the offence namely that the conduct has been proved in a criminal court beyond reasonable doubt. That is damaging to the most degree.

The second is that the person has been charged with a criminal offence. A reasonable member of the public knowing that a person has been arrested and charged with a crime would realise the charges are allegations to be proven at trial and that the person may have a defence to the charge and may be acquitted at trial. Nevertheless, the reasonable member of the public, though withholding final judgment, would attach importance to the fact that the police have concluded that there are grounds to support the charge and would accordingly view the person with suspicion as a person who may be found guilty of the crime charged. This is sufficient to make a reasonable member of the public to think considerably less of the person on account of the conduct.⁴⁹

A newspaper or media report of the fact of an arrest and a charge is capable of conveying this knowledge to the public.⁵⁰

⁴⁹ *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 299, 300-302; *Chase v Newsgroup Newspapers Limited* [2003] EMLR 11 at 45; *Jameel v Wall Street Journal Europe* [2005] EWCA 74 at [38]; *Favell v Queensland Newspapers Pty Ltd* [2005] 221 ALR 186; *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.1]; *Jongewaard v AOC* [2008] CAS 2008/A/1605 at [32]-[34].

⁵⁰ *Jongewaard v AOC* [2008] CAS 2008/A/1605 at [32].

A third level, and lesser in effect than guilt or reasonable suspicion, is an investigation into a person's conduct where charges have not been laid. This can still be damaging to the reputation of the person concerned in the context of the publication but query whether it satisfies the test of damage to reputation 'to a significant extent'. This is a question of degree.

In D'Arcy's case and Jongewaard's case, CAS accepted that the laying of charges occurred because the alleged conduct of each of them was such as to cause members of the police or prosecuting authority to reasonably believe that they were guilty of the charges.

In Jongewaard's case, the prosecuting authority was the DPP. Under its guidelines, the DPP was required to proceed to prosecute a charge only where there was a reasonable prospect of a conviction being secured. In fact, the case against Jongewaard had proceeded through the committal process after a magistrate had reviewed the police brief. He formed the view that Jongewaard should be sent to trial because a reasonable jury could convict him of the charges on the standard of proof required, beyond reasonable doubt.

Accordingly, the respective panels of CAS held that a reasonable member of the public, with the knowledge of the charges laid against D'Arcy and Jongewaard, would think considerably less of each of the athletes on account of their conduct, albeit realising that they may have a defence to the criminal proceedings and might be acquitted at trial.⁵¹

The presumption of innocence was no answer to a determination by the AOC that the athletes had by particular conduct brought themselves into disrepute in breach of the contractual obligations they owed.⁵²

In contrast there was, at the time of AOC selection for the Beijing Games, an Australian athlete who it was publicly known was under police investigation in relation to an allegation of date rape. However, it was also publicly known that the athlete had not been charged with any offence and that he completely denied the allegations. He claimed that the woman had consented. It was her word against his. In the circumstances, the AOC considered that there was no basis for determining that the athlete had engaged in disreputable conduct or was believed on reasonable grounds to have done so. This athlete went to the Games and was never charged.

Such circumstances come within the third level of defamatory conduct. The fact that there is an investigation may cause damage to a person's reputation even though charges have not been laid. There will be circumstances where the

⁵¹ *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.1]; *Jongewaard v AOC* [2008] CAS 2008/A1605 at [33]–[34].

⁵² *D'Arcy v AOC* [2008] CAS 2008/A/1539 at [7.1]; *Jongewaard v AOC* [2008] CAS 2008/A1605 at [38].

investigation is so notorious that the public reaction to the sportsman's conduct is likely to bring the person into disrepute to a significant degree. That may be because the conduct itself is disreputable even if the investigation does not lead to criminal charges but it may also be because the investigation gives rise to a reasonable suspicion based on the conduct alleged. This emphasises the importance of the standard of proof required by the sporting body as it would not ordinarily be reasonable to act on suspicion.

Belief in Guilt

In defamation law, the three levels of criminal related conduct that may cause damage to a person's reputation were developed by the Courts to deal with the defence of justification to a defamatory allegation which falls short of the direct allegation of guilt. In that event, the question arises as to the extent to which the defendant must prove the plaintiff's conduct to justify reasonable belief in guilt or reasonable suspicion.

The English Court of Appeal⁵³ has identified 'principles' by which a defendant is required to particularise (and prove) the alleged conduct of the plaintiff in these circumstances.

The first principle is known as the 'Conduct Rule' which requires the defence to show that there was some conduct on the plaintiff's part that gave rise to the grounds for belief/suspicion. This requires actual evidence of the conduct concerned, not mere circumstantial evidence. However, sometimes 'strong circumstantial evidence' contributing to reasonable grounds for suspicion of the plaintiff can be shown even if it arises apparently through no fault of the plaintiff.

The second principle is that the burden of proof should not be transferred to the plaintiff of making a positive case to disprove the allegations against him. This could arise where the defendant might have evidence about the plaintiff's conduct as providing a basis for reasonable grounds to suspect when the effect of that evidence is to reverse the burden of proof and require the plaintiff to explain his conduct. That is considered unfair but the burden of proof may not be relevant to a sporting body in the course of making a decision.

The third principle is that it is necessary to show primary facts which give rise to a reasonable belief/suspicion against the claimant when objectively judged ('the Repetition Rule').⁵⁴ Accordingly, under this principle, it is not sufficient to prove the suspicions or beliefs of a third party such as the police, or the fact that

⁵³ *Musa King v Telegraph Group Limited* [2004] EWCA (Civ) 613 at [22]; *Fallon v MGN Limited* [2006] EWAC 783 at [19]. See also *West Australian Newspapers Limited v Elliott* [2008] WASC 172 at [49].

⁵⁴ *Fallon v MGN Limited* [2006] EWAC 783 at [20].

the police have issued a public announcement that the plaintiff has been arrested or is under suspicion to justify the imputation of reasonable suspicion. The test is whether or not there are solid grounds for belief/suspicion that are reasonable on the balance of probability and will require evidence of the plaintiff's conduct not merely reliance upon the police decision to charge.

These principles provide some guidance when a sportsman has been charged with a criminal offence. That fact may bring him into disrepute but the sporting body must, subject to the wording of the disrepute clause, still form a view about whether the sportsman has engaged in the conduct giving rise to the charge before it may conclude that there were reasonable grounds for the police to charge the sportsman for the conduct concerned. It may not be a simple exercise of relying on the fact that the police have laid a charge.

Conviction

A sportsman's conviction of a serious criminal offence would usually be sufficient to amount to disreputable conduct and breach of the disrepute clause. However, some white collar crimes may not be relevant to warrant exclusion from the sport, even if disrepute of the individual is found. Moreover, if at the time of decision the sportsman has served the punishment arising from conviction of the offence or through passage of time or good behaviour since conviction, the sportsman's reputation may have been restored or the damaging effect on reputation at least diminished, the sporting body may use its discretion not to sanction the sportsman for the misconduct.

There are instances of this in the United States and New Zealand where athletes have been selected to compete at the Olympic Games despite being convicted criminals. Michael Bennett was convicted of armed robbery and competed in Sydney in 2000 after he was released from jail. Nate Jones was convicted of numerous offences including armed robbery but was released and competed in Atlanta in 1996. Michael Phelps was sentenced to 18 months probation after pleading guilty to drink driving in 2004 but still competed in the 2008 Beijing Games. A curious exception to the issue of rehabilitation was Tammy Crow who was convicted of manslaughter but competed in the Athens Games in 2004 while awaiting sentence.

Similarly, a boxer selected for the New Zealand Olympic Team in 2004 had been convicted of the manslaughter of his baby daughter in 1995 and had served four years in prison. Soulan Pownceby was allowed to compete after the general feeling of the New Zealand public was that he had done his time and should be free to continue with his life. There was, however, criticism of the selection including by the then Prime Minister Helen Clark who called on Pownceby to apologise. He subsequently did so and went to the Athens Games.

A successful appeal from the conviction may enable the sportsman to return to the sport to redeem the damaged reputation caused by wrongful conviction.

Muhammad Ali was discredited, his reputation brought into disrepute, by his refusal to be conscripted – ‘drafted’ – to go to Vietnam due to his religious beliefs.

Ali was convicted in 1967 for wilfully refusing to submit to induction into the US Armed Forces and was sentenced to five years in prison. The New York State Athletic Commission suspended his boxing licence on the basis that his conviction was ‘detrimental to the best interests of boxing, or to the public interest, convenience or necessity’. He was also stripped of his WBA/WBC World Heavyweight Titles. His record showed he was undefeated in 31 professional bouts up to that time.

Some years later through the appeal process his conviction was overturned by the US Supreme Court, holding that he qualified as a conscientious objector – that his objection was based on religious training and belief and his objection was sincere.⁵⁵ The New York State Supreme Court also overturned the New York State Athletic Commission’s decision, holding that Ali had been unjustly denied a boxing licence.

Ali made his comeback having been out of the ring for 4 years. In the next few years, he slugged it out with Joe Frazier, both undefeated when they first met in 1971 in ‘The Fight of the Century’. Ali lost, but then won the rematch in 1974.

In his very next fight, Ali reclaimed the WBA/WBC World Heavyweight Boxing Title from George Foreman in ‘The Rumble in the Jungle’. He was once again the heavyweight boxing champion of the world and in his own words ‘the Greatest’. Ali went on to be named the ‘Sportsman of the Century’ by Sports Illustrated and the BBC.

Conclusion

There are many dimensions to the operation of the disrepute clause in sportsmen’s contracts. The nature of disreputable conduct falls within a general pattern observed under defamation law as does the consequential damage to reputation. It depends on community standards as a matter of general principle but will depend upon the specific terms of the disrepute clause in any given case. Whose reputation must be effected and whether the conduct must be public knowledge will also depend upon the terms of the disrepute clause.

⁵⁵ *Clay v United States* 403 US 698 (1971).

In forming its view as to whether the sportsman has engaged in the conduct, the sporting body is not a court of law and may only need to be satisfied on the information available to it.

There remains an uneasy tension between the criminal process, initiated by arrest and charge, and contract law, requiring a determination that the conduct has been engaged in before breach may be established. That tension will be dealt with on a case by case basis. It seems likely that there will be a case where under the weight of public pressure the decision of the sporting body will have the tendency to prejudice the criminal process.

That prospect emphasises the seriousness of the decision that sporting bodies are required to make in such circumstances and the caution that must be exercised in making a decision, where the sportsman's reputation has quite obviously been damaged by media reporting of the charge but the conduct itself remains only the subject of allegations to be proved in the criminal process.