

## RIGHTING A WRONG: DENNIS TUTTY AND HIS STRUGGLE AGAINST THE NEW SOUTH WALES RUGBY LEAGUE

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*Buckley v Tutty* is the leading Australian case dealing with the economic freedom of players of professional team sports. The High Court found the New South Wales Rugby League's ('NSWRL') retain and transfer system to be an unreasonable restraint of trade. This case, the only one of its type to be determined by the High Court, has been used as a precedent in other sports employment cases. It has enhanced the economic rights of players and has aided player associations in developing comprehensive collective bargaining deals with their respective leagues. This paper examines the background and circumstances associated with Dennis Tutty's challenge to the NSWRL's employment rules. Tutty was not supported in his action by a club desirous of obtaining his services or a player association. He fought and funded the action himself on the wages of an unskilled labourer. He did not receive financial or moral support from his fellow players. He was motivated in his action by a personal philosophy to right a wrong. He did not believe that others should be able to restrict his ability to play with clubs prepared to employ him.

There have been four seminal cases which have considered issues associated with the economic and employment freedom of the players of professional team sports. In 1963, in *Eastham*, English football's retain and transfer system was found to be an unreasonable restraint of trade.<sup>1</sup> Under the system, clubs prepared two lists at the end of the season. The retain list was of those players the club wished to retain for the next season. Being placed on this list did not guarantee employment and the derivation of income. This would only occur if a player entered into a contract with the club. The problem for players placed on the retain list was that it precluded them from seeking employment with other clubs. The transfer list comprised those players the club was prepared to release or transfer to other clubs. The club would specify the fees that it wanted to receive from other clubs prepared to purchase players on its transfer list. Players could appeal against the amount of the fee placed on them to a committee of the league.

\* Senior Fellow, Faculty of Law, University of Melbourne. Thanks are expressed to the National Archives of Australia for providing me with the Appeal Book to *Buckley v Tutty* (1971) 125 CLR 353. Thanks are also expressed to Dennis Tutty for his hospitality when I interviewed him and providing me with information and various documents associated with his career. I would also like to thank two anonymous referees for their helpful comments. I alone, of course, am responsible for the errors and omissions contained in this paper.

<sup>1</sup> *Eastham v Newcastle United Football Club* [1964] Ch 413. Also see *Walker v Crystal Palace Football Club* [1910] 1 KB 87; *Kingaby v Aston Villa Football Club*, *The Times*, 27 March 1912.

In 1969, Dennis Tutty became involved in a dispute with the New South Wales Rugby League ('NSWRL') over the operation of its retain and transfer system. It was similar to the system that operated in English soccer. Adopted in 1959, it was based on arrangements operating in English Rugby League. Both the Supreme Court of New South Wales and the High Court of Australia found the system to be an unreasonable restraint of trade.<sup>2</sup>

In 1966, the Major League Baseball Players' Association ('MLBPA') appointed Marvin Miller, a former official with the Steelworkers Union, as its executive director. His appointment heralded a transformation in the MLBPA from a passive to a pro-active organisation.<sup>3</sup> It ushered in dramatic changes to the nature of industrial relations, not only in baseball, but also in other American team sports. Whereas players had been traditionally subservient to clubs they now strongly asserted their rights and forced clubs and leagues to resolve issues across the bargaining table.<sup>4</sup> One of the earliest examples of this changed stance was the backing the MLBPA gave to Curt Flood, a 12 year veteran with the St Louis Cardinals, in a case against the employment rules of Major League Baseball ('MLB').

These rules included a reserve or option clause and clubs trading players to each other. Under the reserve clause, players signed a contract that contained a one-way option clause which could be renewed by clubs. This clause precluded players from obtaining employment with other clubs prepared to employ them. Flood objected to the St Louis Cardinals trading him to the Philadelphia Phillies. He claimed his trade violated the 1890 *Sherman Antitrust Act*.<sup>5</sup> The Supreme Court of America found against Flood on the basis of *stare decisis*, in that in earlier cases it had provided baseball with an exemption from the *Sherman*

<sup>2</sup> *Tutty v Buckley* [1970] 3 NSW 463; *Buckley v Tutty* (1971) 125 CLR 353. Also see *Hawick v Flegg* (1958), 75 WN (NSW) 255. In *Elford v Buckley* [1969] 2 NSW 170, at 177, Hardie J. found that even though that the Constitution and By-Laws, Standing Orders and Competition Rules of the New South Wales Rugby Football League, Printed 1961, required clubs to enter into signed contracts (Rules 29 and 30), they were not contracts of employment and that the NSWRL's employment rules fell outside the restraint of trade doctrine.

<sup>3</sup> For accounts of Miller's impact on MLB see Marvin Miller, *A Whole Different Ball Game: The Sport and Business of Baseball* (1991) A Birch Lane Press Book, New York; Charles P. Korr, "Marvin Miller and the New Unionism in Baseball", in Paul D. Staudohar and James A. Mangan (eds), *The Business of Professional Sports* (1991) University of Illinois Press, Urbana and Chicago, 115-34; Charles P. Korr, "From Judge Cannon to Marvin Miller: From Player Group to Player Union", in Paul D. Staudohar (ed), *Diamond Mines: Baseball and Labor* (2000) Syracuse University Press, New York, 1-20; Charles P. Korr, *The End of Baseball as we Knew It: The Players' Union, 1960-81* (2002) University of Illinois Press, Urbana and Chicago.

<sup>4</sup> See Robert C Berry, William B Gould IV and Paul D Staudohar, *Labor Relations in Professional Sports* (1986), Auburn House, Dover, Massachusetts; Paul D Staudohar *Playing for Dollars: Labor Relations and the Sports Business* (1996) ILR Press, Ithaca.

<sup>5</sup> The relevant sections of the Act state

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ...
2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour.

*Antitrust Act*, and that this was an ‘anomaly’ which was a responsibility of Congress to rectify, not it.<sup>6</sup>

Marvin Miller eventually used contract law and the grievance procedure in the collective bargaining agreement to defeat MLB’s employment rules.<sup>7</sup> He found two players who were prepared to play out the option (or second) year of their contracts, who then claimed they were free agents. An arbitrator, per the grievance procedure, concurred with the submissions of the players. With all players playing out their option year and due to become free agents, MLB felt it had nowhere to go other than to the bargaining table to negotiate a comprehensive deal with the MLBPA. A deal was reached where players could become free agents after six years of major league service.<sup>8</sup>

The final case occurred in European football. Jean Marc Bosman initiated action against the Union des Associations Europeennes de Football (‘UEFA’) and Federation Internationale de Football Association’s (‘FIFA’) employment rules which included ‘compensation’ payments for players who changed clubs at the end of their contracts, and restrictions on the number of non-nationals who could play in domestic/national leagues. In 1995, the European Court of Justice found such rules to be in conflict with freedom of movement of workers within the European Community, guaranteed by Article 39<sup>9</sup> (previously 48) of

<sup>6</sup> *Flood v Kuhn* 407 US 258 (1972). The earlier cases are *Federal Baseball Club of Baltimore v National League of Professional Baseball Clubs* 259 US 200 (1922); *Toolson v New York Yankees* 346 US 356 (1953). This exemption was not afforded to other professional sports in America. See *Hart v BF Keith Vaudeville Exchange* 262 US 271 (1923); *United States v Shubert* 348 US 222 (1955); *United States v International Boxing Club of New York* 348 US 236 (1955); *Radovich v National Football League* 352 US 445 (1957); *Haywood v National Basketball Association* 401 US 1204 (1971).

<sup>7</sup> Mitchell Nathanson, “The Irrelevance of Baseball’s Antitrust Exemption: A Historical Review” (2005) 58 *Rutgers Law Review* 1–44.

<sup>8</sup> See notes 4 and 5.

<sup>9</sup> This section states:

- 1 The free movement of workers shall be ensured within the community...
- 2 This shall involve the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions
- 3 It shall include the right, subject to limitations justified by reasons of public order, public safety and public health:
  - a to accept offers of employment actually made;
  - b to move about freely for this purpose within the territory of Member States;
  - c to stay in any Member State in order to carry on an employment in conformity with the legislative and administrative provisions governing the employment of workers of that State...

the European Treaty.<sup>10</sup>

George Eastham, Curt Flood and Jean Marc Bosman all shared something in common in their respective struggles, something which was not afforded to Dennis Tutty. They received support from player associations.<sup>11</sup> Eastham's action was backed by the Professional Footballers' Association;<sup>12</sup> Flood, as already mentioned, by the MLBPA;<sup>13</sup> and Bosman by the French Professional Footballers' Union, the Dutch Professional Footballers' Union and the International Federation of Professional Footballers' Associations, a confederation of national football (soccer) player associations.<sup>14</sup>

In Australia, in secular (non-football/sport) or general areas of employment individual grievances of workers have traditionally been pursued by unions on

<sup>10</sup> Case C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921. See also Case 13/76 *Dona v Mantero* [1976] ECR 1333; Case 36/74 *Walrave v Union Cycliste Internationale* [1974] ECR 1405; Case 222/86 *Union Nationale des Entraineurs et Cadres Techniques Professionals du Football v Georges Heylens* [1987] ECR 4097; Cases C-51/96 and C-191/97 *Deliege v Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549; Case C-176/96 *Lehtonen v Fédération Royale Belge des Sociétés de Basket-ball ASBL* [2000] ECR I-2681; Court Administrative d'Appel de Nancy, 3 Fevrier 2000, Lilia Malaja no.99NC00282. Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135; Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura* (Judgement of ECJ, 12 Apr. 2005) extend the protection of Article 48 (39) to persons from nations that have an Association Agreement and a Partnership Agreement, respectively, with the European Communities.

<sup>11</sup> More generally, especially prior to the formation of player associations, clubs and/or rival leagues desirous of obtaining their services funded actions. The best example of this would be the Super League war of the mid 1990s. See *Pay v Canterbury-Bankstown Rugby League Club Ltd* (1995) 72 IR 358; *Daley v New South Wales Rugby League Limited* (1995) 78 IR 257; *Penrith District Rugby League Football Club v Fittler* (unreported, NSW SC, 8 February 1996, BC9600163); *St George District Rugby League Football Club v Tallis* (unreported, NSW Sc, 28 June 1996 BC 9602844); *Australian Rugby League Ltd v Cross* (1997) 39 IPR 111; *Carter v New South Wales Rugby League Limited* (1997) 78 IR 369.

<sup>12</sup> See Braham Dabscheck, "‘Defensive Manchester’: A History of the Professional Footballers’ Association”, in Richard Cashman and Michael McKernan (eds), *Sport in History: The Making of Modern Sporting History* (1979) University of Queensland Press, St Lucia, 227-257; John Harding, *For the Good of the Game: The Official History of the Professional Footballers’ Association* (1991) Robson Books, London, especially 276-289. Eastham had a successful career as both a player and manager after this case. He represented England on 19 occasions and immigrated to South Africa and opened a sportswear business. See his entry in Wikipedia, accessed 24 March 2009.

<sup>13</sup> See note 4; Brad Snyder, *A Well-Paid Slave: Curt Flood’s Fight for Fee Agency in Professional Sports* (2006) Penguin, New York; and Braham Dabscheck, “An American Hero: Curt Flood and his Struggle against Organized Baseball” (2007) 26 *Australasian Journal of American Studies* 30-40. Flood spent the next two decades after the case as a down and out, struggling against the demons of alcohol and depression. Later in life he pulled himself together and received medical and other help from the MLBPA. He died in 1995 from throat cancer, a few days after turning 59.

<sup>14</sup> See Roger Blanpain and Rita Inston, *The Bosman Case: The End of the Transfer System?* (1996) Peeters, Leuven, especially 167,281 and 321. For information on FIFPro see its website <http://wwwfifpro.org> and Braham Dabscheck, “International Unionism’s Competitive Edge: FIFPro and the European Treaty” (2003) *Relations Industrielles/Industrial Relations* 85-108; and Braham Dabscheck, “‘At the Top Table’: Player Unions in Soccer”, in Wladimir Andreff and Stefan Szymanski (eds), *Handbook on the Economics of Sport* (2006) Edward Elgar, Cheltenham 661-667. It is well known in football, especially player association, circles that Bosman has experienced financial and other difficulties since the case. For a newspaper reference supporting this see Patrick Barclay, “Bosman’s life a far cry from world of wealth that he created,” *The Sydney Morning Herald*, 14 February 2005, 24.

their behalf in actions before Australia's system of industrial tribunals. Rugby league did not have a union/players' association at the time of Tutty's dispute with the NSWRL. One was subsequently formed in 1979.<sup>15</sup> Tutty financed his case himself, on the wages of an unskilled labourer; possibly a unique event in the annals of Australian jurisprudence. This article will provide information on the background to his claim and an account of his struggle with the NSWRL.

On 21 October 2008, I interviewed Dennis Tutty at his home in Forster, New South Wales and took handwritten notes. I also conducted a series of conversations with him over the phone to check on facts and clarify various issues. He also provided me with a file which contained various documents and assorted newspaper clippings, which will be referred to as the 'Scrap Book'. Attempts to obtain transcript from both the Supreme Court of New South Wales and High Court were unsuccessful. The *Tutty v Buckley*<sup>16</sup> vault with the Supreme Court is empty. The National Archives provided me with a copy of the Appeal Book of the High Court case affidavits, decisions of the two lower courts, documents and some of the transcript from *Elford v Buckley*,<sup>17</sup> but, other than for Tutty's brief testimony before the Supreme Court, no transcript from either hearing. Both sets of transcript are missing.

In my interview with him, Tutty made much use of the phrase 'righting a wrong' to explain the stance he took in taking on the NSWRL. Righting a wrong was a personal philosophy, a moral compass he developed in coping with the problems of life. Dennis Tutty was born on 29 December 1945, the second youngest of seven children; he had three older brothers and three sisters. His father was a motor mechanic who Tutty remembers as always being away from home, working, trying to make ends meet. The family grew their own vegetables to save on costs, and ate cheap lean meat, lamb chops. This modern diet was to serve Tutty well in both his career as an athlete and later life. His childhood was one of making do.

Tutty provided three examples of the meaning he attached to righting a wrong. During his period as a coach<sup>18</sup> he would instruct players on how to react to bad decisions of referees. He told them not to let such decisions worry them; to get on with the job at hand and do their best to win the game and right the wrong. As a schoolboy Tutty often represented his school in various sporting carnivals. Many of the children he competed against had the appropriate athletic equipment, such as running shoes with spikes. Tutty was one of the poorer children of that era who competed in bare feet. He told himself that although

<sup>15</sup> Braham Dabscheck, "Rugby League and the Union Game" (1993) 35 *The Journal of Industrial Relations* 242-273.

<sup>16</sup> The NSWRL was an unincorporated association at this time. Ken Buckley was the NSWRL's President. See *Buckley v Tutty* (1971) 125 CLR 353 at 355.

<sup>17</sup> *Elford v Buckley* [1969] 2 NSW 170.

<sup>18</sup> He retired as a player in 1977. He coached Balmain's second grade team for a few years and its first grade side in 1980.

he didn't have running shoes, he was just as good as those he competed against. He would right this wrong by competing at his best, and prove to himself that he was as good as his competitors. The final example was his legal battle with the NSWRL. In a newspaper article from 1989, contained in his Scrap Book, where he reflected on his stance against the NSWRL, he said:

I'm not bitter ... I didn't do it to be a martyr ... I did it because I had been wronged and I wasn't prepared to let it go at that ... That wasn't the way my parents brought me up ... I was taught to right a wrong. Someone had pointed their finger at me and said, "You either play by our rules or you don't play rugby league at all". It wasn't right and I set out to change it.<sup>19</sup>

His notion of righting a wrong operates at three levels. At its most basic it provides a means to cope with the disappointments of life. If something goes wrong, such as a poor refereeing decision, it is a waste of time feeling sorry for yourself. What you need to do is pick yourself up and get on with the game. Moving up the scale, by doing your best and competing as hard as you could, especially in circumstances when the playing field was not level, you not only demonstrated to others, but also to yourself, that you were as good as, or the equal, of others. Finally, and this is the harder level of its meaning, if you do the wrong thing by me I will endeavour to right that wrong.

Tutty's persona masks this determination, his strength of moral purpose. He is shy and quiet. He does not like speaking in public. It was through sport, competing hard and pushing himself to his limits, that he found a means of expressing himself. His quiet persona, it might be reasonable to surmise, was interpreted by those who dealt with him as someone who could easily be pushed around, would do as he was told, would crack and give in once he found himself involved in the long and drawn out processes of the legal system. But they were unaware of his moral code, of his determination to right a wrong.

Tutty's family lived in the inner-western suburbs of Sydney. He went to school at Ibrox Park in Leichhardt. He left school after obtaining his Intermediate Certificate (the fourth year of high school or Year 10). He played rugby league at school and was chosen as a schoolboy representative in a curtain raiser in 1962 between Great Britain and St George at the Sydney Cricket Ground.

His brother, Ian, was a rower with the Haberfield Rowing Club. Dennis used to hang around and in time took up rowing. Tutty was a member of the eight which won the King's Cup in Perth in 1965.<sup>20</sup> Rowing is a pastime that Tutty

<sup>19</sup> Mike Colman, "Tutty's legacy: a free market", *Sunday Telegraph*, 23 July 1989, p. 133.

<sup>20</sup> See Guerin-Foster History of Australian Rowing website, <http://rowinghistory-aus.info/interstate-championships/1965.html#M8>, accessed 26 March 2009.

has maintained throughout his life. In 1987 he was a member of the Haberfield/Drummoyne team which won the D Fours at the Australian Masters Regatta at Lake Burley Griffin in the Australian Capital Territory.<sup>21</sup>

Rowing, together with his healthy diet, gave him an important edge as a rugby league player. In the early stages of his career he maintained his overall fitness by rowing throughout the year. He was a fitness fanatic. He trained at the Balmain gymnasium, played squash, and used the local park for running. During the season he trained every day of the week.<sup>22</sup> When other players arrived for training and started the season overweight and unfit, Tutty was at peak fitness, raring to go. While he enjoyed a few beers, it was not something that he would let interfere with his commitment to fitness and being at his best on the field.<sup>23</sup>

As a schoolboy, Tutty became a Wests supporter and attended games at Pratten Park. He dreamed of one day playing first grade. After leaving school he played with the Leichhardt Wanderers Junior League Football Club in 1963 a junior team located in the district covered by the Balmain club.

He started playing with Balmain at the beginning of the 1964 season, as an amateur, aged 18. In achieving his schoolboy dream he was unaware of the implications of this decision. In the transcript of *Elford v Buckley*, a case decided in 1969, it was revealed that players did not receive copies of the Constitution and By-Laws, Standing Orders and Competition Rules of the NSWRL.<sup>24</sup> These rules granted complete authority to clubs in their dealings with players, as is made clear by the following two clauses from Rule 30:

- (c) A player who signs as a professional player should note carefully that he is in effect tied to his Club and cannot subsequently sign for any other club unless he is released—either by transfer or by the club agreeing to strike his name from their list of registered players.
- (f) Unless the Club agrees in writing that the player's name shall be removed from their list of registered players at a stated time then the Club is entitled to retain the player's name on its register indefinitely.<sup>25</sup>

<sup>21</sup> See Guerin-Foster History of Australian Rowing website, <http://rowinghistory-aus.info/masters-championships/1987.php#MD4>, accessed 26 March 2009.

<sup>22</sup> National Archives of Australia, Series A10071, Item 1970/84 (hereafter NAA), Affidavit, Dennis John Tutty, 10 April 1970.

<sup>23</sup> In CAS 2007/A/1298 *Wigan Athletic FC v Heart of Midlothian*; CAS 2007/A/ 1299 *Heart of Midlothian v Webster & Wigan Athletic FC*; CAS 2007/A/1300 *Webster v Heart of Midlothian*, 30 January 2008, the Court of Arbitration for Sport said there was no reason 'to believe that a player's value...owes more to training by the club than to a player's own efforts, discipline and natural talent.' A more accurate statement could not be made concerning Dennis Tutty in enhancing his skills as a rugby league player.

<sup>24</sup> NAA, Transcript, *Elford v Buckley*, Supreme Court of New South Wales, 2 July 1969, p. 157.

<sup>25</sup> Constitution and By-Laws, Standing Orders and Competition Rules of the New South Wales Rugby Football League, Rule 30.

Later on during the 1964 season, Tutty entered into a contract with Balmain with a specified scale of payments, depending on the grade he played and whether or not the team won or lost.<sup>26</sup> The most he could earn was £20, for a win with the first grade team.<sup>27</sup> During his first season he played in all three grades.<sup>28</sup> He was a member of the grand final team which lost to St George. He quickly developed a reputation as a hard tackling and highly competitive lock. His rugby league income for 1964 totalled £255.<sup>29</sup> In May 1964 the Commonwealth Conciliation and Arbitration Commission increased the Basic Wage – the minimum wage paid to an adult (21 year old) male unskilled worker – to £15 8 shillings a week.<sup>30</sup>

The practice in those days was for payments to be made to players at the end of the season. Amongst other things, this forced players, who were not undertaking education, to have secular employment to sustain themselves and their families.

The document that specified his payments was signed by K F Harmey, Balmain's Treasurer. At the bottom of the page there appears the word 'over', where the following handwritten note appeared:

Dennis

Would you sign the attached forms + return them to me.

Your bank book will be kept in the Strong Box inside the Strongroom of the Leagues Club.

Only the President [Harry Hannaford] and myself have the key and only the three of us know it is there.

Regards

K H

The reason for this secrecy was linked to Tutty's involvement with rowing. 1964 was an Olympic year and Tutty was a member of the eight which won the King's Cup in 1965. He did not obtain any of the payments he was entitled to under his contract during this period to preserve his amateur rowing status but also, and more importantly, to protect those that he rowed with from missing out on possible selection for representative Australian teams. At the end of the 1965

<sup>26</sup> The problem for players of payments being linked to selection and success on the pitch is that they were the ones who bear the burden of risk, rather than clubs. If they were injured and could not play, not selected and the team lost they would earn 'limited' income from their employment. For a fuller discussion of these issues see Braham Dabscheck, "The Wage Determination Process for Sportsmen" (1975) 51 *The Economic Record* 52-65.

<sup>27</sup> The Balmain District Rugby Football Club Match Payments-Season 1964.

<sup>28</sup> Nine third grade, seven second grade and eight first grade games.

<sup>29</sup> The Balmain District Rugby Football Club Match Payments-Season 1964.

<sup>30</sup> Basic Wage Inquiry, 1964 (1964) 106 CAR 629.

season, he openly acknowledged that he played rugby league as a professional and received the monies owing to him per his contractual arrangements with Balmain.

Late in 1964, Tutty entered into a three-year contract with Balmain. It was for a signing-on fee of £500 for each season, plus up to £25 to £30 for first grade team games. In all probability,<sup>31</sup> during the period 1965 to 1967 the income he earned ranged from £800 to £950 (\$1,600 to \$1,900) per season. By way of comparison, in July 1966 the male minimum wage was increased to \$36.37 per week; and in July 1967 to \$37.37 a week.<sup>32</sup>

If for no other reason than their secular employment, rugby league players traditionally trained for two hours, twice a week, with an expectation that they would do additional training themselves. In an affidavit, Tutty points to the increasing pressures Balmain (and presumably by implication, other clubs) were placing on players.<sup>33</sup> He makes it clear that he wanted to receive more income to be compensated for the extra demands from his club.

The years 1966 and 1967 were stellar seasons for Tutty. He won best and fairest awards at Balmain. He also received representative honours when he played for Australia in his only test match against New Zealand. Given his increasing status in the game, he believed he should receive a sizeable increase in his payments. This belief was further reinforced by a realisation that Dave Bolton,<sup>34</sup> a Great Britain half-back, who played with Balmain from 1965 to 1970, had received a signing-on fee, according to Tutty, of £12,000.<sup>35</sup>

Prior to the commencement of the 1968 season, Tutty sought a meeting with Kevin Humphries, the Secretary of Balmain to obtain a 'decent' signing-on fee. This is the same Kevin Humphries who was subsequently convicted for

<sup>31</sup> The income he earned during his career are estimates. The problem here is his memory concerning how many games he played, and more significantly, whether or not, they were with winning or losing teams.

<sup>32</sup> Basic Wage, Margins And Total Wage Cases Of 1966, (1966) 115 CAR 93; and National Wage Cases 1967 (1967) 118 CAR 655.

<sup>33</sup> NAA, Affidavit, Dennis John Tutty, 10 April 1970.

<sup>34</sup> For brief details of Dave Bolton's career in Australia see Alan Whitaker and Glen Hudson, *The (Australian) Encyclopedia of Rugby League Players* (1993) Gary Allen, Sydney, 28. Tutty also remembered Ken Noble, who toured with the British Lions rugby league team in 1962 and received a healthy sign-on fee when he joined Balmain in 1964, Tutty's first year with the club. Noble only played seven first grade games. For details of his career see Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 252.

<sup>35</sup> The fact of players outside the labour market strictly regulated and controlled by the league enjoying extra bargaining power and the ability to obtain higher incomes leading to agitation by players subject to such controls had an analogue in the Victorian Football League (VFL), at about the same time. Interstate players had a distinct advantage over players based in Melbourne and country Victorian areas. This 'anomaly' resulted in the players of the VFL forming a players' association in December 1973. See Dabscheck, "The Wage Determination Process for Sportsmen"; and Braham Dabscheck, "Industrial Relations and Professional team Sports in Australia" (1976) 18 *The Journal of Industrial Relations* 28-45.

defrauding the Balmain club of more than \$52,000.<sup>36</sup> Tutty was unsuccessful in this quest. On 5 March 1968 he wrote to Humphries requesting that he be removed from the club's retain list, so that he could seek employment elsewhere.<sup>37</sup> Humphries replied three days later, denying this request, informing him that he could appeal this decision to the NSWRL<sup>38</sup> which he duly did.<sup>39</sup>

Balmain coach and former player, Keith Barnes,<sup>40</sup> interceded and convinced Tutty to change his mind. The two had played together in the past and Barnes was someone Tutty held in high regard. Despite Rule 29 of the Constitution and By-Laws of the New South Wales Rugby Football League clearly stating, that 'All agreements between Clubs and Players must be in writing,' Balmain and Tutty entered into an oral agreement for the 1968 season where Tutty would receive match payments of \$200 a win and \$60 a loss in first grade matches.<sup>41</sup> His earnings for 1968 may have approximated \$2,400.

During the 1968 season, Tutty had a full-time job as a receiving clerk with the Egg Marketing Board. His take-home pay was \$45 to \$46 a week. On 25 October 1968, the male minimum wage was increased to \$38.72 a week.<sup>42</sup> He experienced a number of minor injuries during the early part of the season and took time off from his secular employment to rest his injuries, and be fit to maintain his place in the first grade team. This resulted in him leaving his job with the Egg Marketing Board. His desire to play at his best trumped the need to maintain his secular employment.

For the second half of the 1968 season he was mainly dependent on his income as a rugby league player. At the end of the season he was employed as a cleaner with the Balmain Leagues Club. His take-home pay was \$40.10 a week. In October 1969 he obtained work as a builder's labourer, with take-home pay of \$46 a week, and occasional overtime.<sup>43</sup> On 19 December 1969, the male minimum wage was increased to \$42.22 a week.<sup>44</sup>

At the end of the 1968 season, Balmain again placed Tutty on its retain list. On 14 October 1968, he wrote to Kevin Humphries requesting that he be placed on the transfer list.<sup>45</sup> This was refused. In his Scrap Book there is a newspaper

<sup>36</sup> Chris Masters, *Inside Story* (1992) Angus & Robertson, Sydney, 13-42.

<sup>37</sup> NAA, Letter, Dennis John Tutty to K E Humphries, 5 March 1968.

<sup>38</sup> NAA, Letter, K E Humphries to D J Tutty, 8 March 1968.

<sup>39</sup> Letter, Dennis Tutty to Bill Buckley, 15 March 1968. This letter was in the Scrap Book.

<sup>40</sup> For brief details of Keith Barnes' career see Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 14-15.

<sup>41</sup> NAA, Constitution and By-Laws, Standing Orders and Competition Rules of the New South Wales Rugby Football League, Rule 29; Statement of Agreed Facts, *Tutty v Buckley*, Supreme Court of New South Wales, 4.

<sup>42</sup> National Wage Case, 1968 (1968) 124 CAR 463.

<sup>43</sup> NAA, Affidavit, Dennis John Tutty, 10 April 1970.

<sup>44</sup> National Wage Case, 1969 (1969) 129 CAR 617.

<sup>45</sup> NAA, Letter, D Tutty to K E Humphries, 14 October 1968.

report where he is quoted as saying that he would play for Balmain for nothing in 1969, if the club agreed to let him transfer to another club next year, for a transfer fee less than \$1,000. He said:

I consider I have been unfairly treated by Balmain and am determined to get away ... They didn't offer me 5c more than I received last season ... When I asked for a clearance I asked to be present at the meeting but they refused ... They haven't spoken to me since, despite the fact that I work at the Leagues club ... I can make three times more than I have been offered by Balmain by playing elsewhere. I would be mad not to want to get away ... Balmain tell you they just can't pay you any more money then turn around and buy several players from the country and Queensland ... The fact is that Balmain does not look after players from its junior ranks.

When told of Tutty's offer, Kevin Humphries said:

We will treat Dennis Tutty as we treat every other player. He can play with us under our terms and request a clearance at the end of the season ... If Tutty makes himself available we'll decide what to do with him ... We can't have players making ultimatums to us. At the moment Tutty has no offer from us – we cancelled the original offer we made to him until he makes himself available.<sup>46</sup>

Tutty decided to sit out the 1969 season. He was not the only player at Balmain to embark on such a course of action. Arthur Beetson, Peter Jones and Laurie Moraschi were also in dispute with the club. Beetson, one of the game's legends, was talked into playing in 1969. In 1971, Balmain sold him to Eastern Suburbs for a transfer fee of \$15,000. Beetson estimated that in the five years he played with Balmain (also representing Australia in Test Matches in 1966, 1967 and 1968), he would have been lucky to have earned \$10,000.<sup>47</sup> Both Jones and Moraschi sat out the 1969 season. They reapplied to be placed on the transfer list at the beginning of 1970.<sup>48</sup> Jones, who was a former Wallaby, briefly returned to Balmain in 1970, but never played another first grade game.<sup>49</sup> In 1970, Balmain sold Moraschi to North Sydney for a fee of \$3,500.<sup>50</sup> His team mates did not

<sup>46</sup> Ken Laws, "Dennis Tutty's transfer offer: I'll play for nothing," *Daily Mirror*, 17 March 1969, 48.

<sup>47</sup> For details of Arthur Beetson's career see Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 20; Roy Masters, *Inside League* (1990) Pan Books, Sydney, 9-30; especially 18-19.

<sup>48</sup> This information is based on an undated newspaper cutting in Dennis Tutty's Scrap Book.

<sup>49</sup> For details of Ken Jones' career see Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 174.

<sup>50</sup> For details of Laurie Moraschi's career see Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 222. The figure for his transfer fee is based on an undated newspaper cutting in the Scrap Book.

join Tutty in his subsequent legal action.<sup>51</sup> Nor did he receive any financial or moral support from the players of other teams.

Brian Marsden managed the gym and sauna at the Balmain Leagues Club, where Tutty worked as a cleaner. Marsden was also the manager of the Australian weightlifting team. Marsden introduced Tutty to David McKenzie, manager of the Australian fencing team. McKenzie was a solicitor with the firm Parish, Patience & McIntyre. McKenzie advised Tutty that, in all probability, he would be successful in an action before the courts. Such advice was given prior to the decision in *Elford v Buckley*, handed down in August 1969, where Justice Hardie found the NSWRL's employment rules did not constitute an unreasonable restraint of trade.<sup>52</sup> Tutty decided to adopt such a course of action.

He had no idea what he was getting into, especially the length of time it takes for legal processes to work themselves out and the cost of running a case. He swore affidavits in May 1969.<sup>53</sup> The hearing of his Supreme Court case did not start until May 1970, with a decision on 2 October 1970.<sup>54</sup> His appeal before the High Court began in late April 1971. It was not decided until 13 December 1971.<sup>55</sup> On an income not much above the male minimum wage (see above), he soon found himself short of cash in meeting his lawyers demand for disbursements. Later in 1969 he went to Queensland looking for higher paying work. His Scrap Book contains a report of his despair when the High Court granted the NSWRL a right of appeal on the decision of the Supreme Court. Running out of money, he was forced to sell his car.<sup>56</sup> In his interview, he said that the pressures associated with the case led to a decline in his health; he developed an ulcer.

By the time the Supreme Court handed down its decision, in October 1970, Tutty had not played for two seasons and was desperately short of money. With the appeal pending before the High Court, he sought advice on whether or not resuming his playing career would prejudice his case. When he was advised that it would not, he played for Balmain in 1971. It was another handshake deal similar to the one he had had in 1968 – \$200 a win and \$60 a loss. His earnings

<sup>51</sup> Beetson played an important role in the formation of the Association of Rugby League Professionals in 1979. See Dabscheck, "Rugby League and the Union Game", 251.

<sup>52</sup> *Elford v Buckley* [1969] 2 NSW 170. These were the same rules that were challenged by Tutty. *Elford v Buckley* had the additional complication of determining the status of and veracity of claims concerning a verbal contract.

<sup>53</sup> NAA, Affidavit, Dennis John Tutty, 30 May 1969. There is a reference in this to an earlier Affidavit of 9 May 1969.

<sup>54</sup> *Tutty v Buckley* [1970] 3 NSW 463.

<sup>55</sup> *Buckley v Tutty* (1971) 125 CLR 353.

<sup>56</sup> John Blanch, "Tutty sad over ruling on transfer case," *Daily Mirror*, 10 December 1970, 94. He also told me that his legal team, of solicitor David McKenzie and barrister Ken Handley agreed to delays in payments, which together with their assurances and support helped him overcome his anxieties with the case.

for the 1971 season may have been in the order of \$2,000. At the beginning of 1971, the adult male minimum wage was increased to \$46.22 a week.<sup>57</sup>

The High Court dismissed the appeal of the Supreme Court's decision in December 1971.<sup>58</sup> It found the NSWRL's retain and transfer system to be an unreasonable restraint of trade. In particular, it objected to players who were out of contact with their club being placed on a retain list indefinitely, which restricted their ability to obtain employment; high transfer fees restricted the ability of players to earn income and, more importantly, obtain employment; and found that such a system was not mitigated by a League appeals committee, where a player, or players, had no input into its operation.<sup>59</sup>

Tutty was jubilant when he heard the High Court's decision. He said:

I have beaten them. I am free. There is no way they can hold me now...I know I was right. I had to do it. When a man gets up and says, 'You play under our terms or you don't play at all,' it is too much. They try to dictate your life.<sup>60</sup>

He remembers that after this decision, star players were able to obtain high signing-on fees in the range of \$16,000 to \$20,000. He was less fortunate. He signed a three-year deal with Penrith with a signing-on fee of \$6,000 for the three years, paid up front, and a sliding scale of payments depending on the number of games won (wins 1–4, \$100 each; wins 5 and 6, \$300 each; wins 7–10, \$750 each; wins 10 plus, \$500 each and \$30 a loss). Unfortunately for Tutty, Penrith won few games in these years; five each in 1972 and 1973 and nine in 1974. In addition, in 1972, it took him some time to recover from his ulcer and cement a regular place in the first grade team. He found it difficult to remember how many games he may have missed because of injury in these years. It is unlikely that he earnt more than \$600 from match fees in his first two years with Penrith; and possibly \$1,000 in 1974. In May 1972, the male minimum wage was increased to \$50.92 a week, in May 1973 to \$59.92, and in May 1974 to \$68.10.<sup>61</sup>

In 1975, Tutty signed a two year deal with Eastern Suburbs with a signing-on fee for each year of \$3,500 plus match fees (his memory is a little rusty here) of \$200 a win and (possibly) \$100 a loss. Eastern Suburbs were premiers in 1975.

<sup>57</sup> National Wage Case, 1970 (1970) 135 CAR 244.

<sup>58</sup> *Buckley v Tutty* (1971) 125 CLR 353.

<sup>59</sup> For a more comprehensive examination of the decision see Braham Dabscheck, "The Tutty Case", in Andrew Moore and Andy Carr (eds) *Centenary Reflections: 100 Years of Rugby League in Australia* (2008) Australian Society for Sports History, Melbourne, 157–167.

<sup>60</sup> An undated newspaper cutting, the identity of which is difficult to determine, contained in the Scrap Book. In all probability, it appeared on 14 December 1971.

<sup>61</sup> National Wage Case, 1971–1972 (1972) 143 CAR 290; National Wage Case, 1972–1973 (1973) 149 CAR 75; National Wage Case, 1974 (1974) 157 CAR 293.

Tutty broke his arm and only played 10 games. In 1975, it might be reasonable to surmise that he earnt \$900 to \$1,000 from match fees. The adult minimum weekly wage was increased to \$82.90 in September 1975.<sup>62</sup>

At the end of the 1975 season, Tutty fell out with Eastern Suburbs coach Jack Gibson. Eastern Suburbs paid him his signing-on fee, per his contract, and Gibson helped Tutty in finding alternative employment with his old club Balmain. His memory tells him that he received a signing-on fee of \$3,500 and match fees of \$200 a win and \$50 a loss. Balmain won twelve games in 1976. His earnings from match fees were possibly in the vicinity of \$2,600. The National Wage Case of November 1976 increased the minimum adult weekly wage to \$100.70.<sup>63</sup>

In 1977, Tutty signed a new contract with Balmain. He received a signing-on fee of \$6,500, plus a superannuation payment of \$2,500 and match fees of \$200 a win and \$50 a loss.<sup>64</sup> He regards this as the only year in his career where he 'earnt any decent money.' His earnings from match fees in 1977 may have approached \$3,000. In December 1977 the adult minimum weekly wage was increased to \$112.50.<sup>65</sup> He finished his playing career in 1977 and took up coaching. He coached Balmain's first grade team in 1980, for a fee of \$10,000. In July 1980 the adult minimum weekly wage was increased to \$134.90.<sup>66</sup>

When I interviewed Dennis Tutty in October 2008, I showed him the text of a paper I had written on his case to be presented at a conference celebrating the centenary of rugby league in Australia.<sup>67</sup> Amongst other things, it provided examples of where other courts had applied principles, developed in *Buckley v Tutty*, in overturning different rules developed by a variety of leagues in Australia, which had restricted the economic rights/employment freedom of

<sup>62</sup> National Wage Case, September 1975 (1975) C Nos 1933 and 1978 of 1974.

<sup>63</sup> National Wage Case, November 1976 (1976) C Nos 3923, 3933, 3394 and 3938 of 1976.

<sup>64</sup> Agreement between Balmain District Rugby League Football Club and Dennis John Tutty for 1977, signed 8 December 1976. It was 'registered' with the NSWRL on 17 February 1977, Registration Number 6631. Wikipedia and the entry in Whitaker and Hudson, *The (Australian) Encyclopedia of Rugby League Players*, 348 incorrectly state that his playing career ended in 1976.

<sup>65</sup> National Wage Case, November 1977 (1977) C Nos 1733, 1735, 1741 and 1755 of 1977.

<sup>66</sup> National Wage Case, December 1979 and March 1980 Quarters (1980) 241 CAR 258.

<sup>67</sup> See Dabscheck, "The Tutty Case", in Moore and Carr (eds) *Centenary Reflections: 100 Years of Rugby League in Australia*.

players.<sup>68</sup> The paper also argued that such cases had strengthened the hand of player associations in Australian professional team sports.<sup>69</sup> Leagues can seek to protect their employment rules from possible legal attack by having them endorsed by organisations representing players. This, in turn, enhanced the ability of player associations to negotiate comprehensive collective bargaining agreements, which have not only substantially increased the income of players compared to when Tutty played (depending on the sport, the average annual income of players in 2008 ranged from more than \$100,000 to well over \$200,000 – in June 2008 the Australian Fair Pay Commission increased the Federal Minimum Wage to \$543.78 a week; approximately \$28,270 per annum)<sup>70</sup>, but have also provided grievance procedures to resolve disputes and various welfare benefits including further education and training for second careers when their playing days come to an end.<sup>71</sup> Being someone who does not read legal reports, he was unaware that the action he commenced nearly three decades ago had had such broad ramifications.<sup>72</sup>

It might not be unreasonable to suggest that *Buckley v Tutty* should be regarded as one of the more important human rights decisions of the High Court; protecting the rights of the individual over those of the collective; against the tyranny of old men sitting in committee controlling the lives and income earning potential

<sup>68</sup> These cases were *Hall v Victorian Football League* [1982] VR 64; *Nobes v Australian Cricket Board*, Supreme Court of Victoria, no. 13613 of 1991 (unreported); *Avelino v All Australia Netball Association* [2004] SASC 56 (zoning and residential qualifications); *Foschini v Victorian Football League*, Supreme Court of Victoria, no. 9868 of 1982 (unreported), *Walsh v Victorian Football League* (1983) 74 FLR 207, *Carfino v Australian Basketball Federation* (1988) ATPR 40-985; *Media, Entertainment and Arts Alliance v Marconi Fairfield Soccer Club*, Australian Industrial Relations Commission, Dec 1285/95 S Print M2565 (transfers within a league) (Also see *Buckenara v Hawthorn Football Club* [1988] VR 39; and *Harding v Hawthorn Football Club* [1988] VR 49); *Adamson v West Perth Football Club* (1979) 27 ALR 475 (transfers between leagues); *Greig v Insole* (1978) 1 WLR 302 (an English decision involving World Series Cricket); *Hughes v Western Australian Cricket Association* (1986) ATPR 40-676; *McCarthy v Australian Rough Riders* (1988) ATPR 40-836; *Barnard v Australian Soccer Federation* (1988) ATPR 40-862; cases in note 12 (disputes involving new leagues/competitions); *Adamson v New South Wales Rugby League* (1991) 31 FCR 242. Also see (1990) 27 FCR 535 (the internal draft). For cases which have gone against this trend see *Wickham v Canberra District Rugby League Football Club* (1998) ATPR 41-664; *Goutzioulos v Victorian Soccer Federation* [2004] VSC 173.

<sup>69</sup> In November 2008, the Rugby League Players' Association honoured Tutty by calling its best clubman award, for the player who has contributed the most to fellow players, the Dennis Tutty Award. See its website; [http://www.myfooty.com.au/newsdetail.asp?News\\_ID=467](http://www.myfooty.com.au/newsdetail.asp?News_ID=467), accessed 1 April 2009.

<sup>70</sup> Australian Fair Pay Commission, Wage-Setting and Reasons for Decision (2008) July.

<sup>71</sup> See Australian Football League and Australian Football League Players' Association Collective Bargaining Agreement [2007-2011]; Rugby League Players' Association website, My Footy-CBA News, [http://www.myfooty.com.au/content.asp?page\\_id=62](http://www.myfooty.com.au/content.asp?page_id=62), accessed 4 April 2008; Australian Rugby Collective Bargaining Agreement Mark III [2005-2008]; Memorandum of Understanding Between Cricket Australia and Australian Cricketers' Association [2005-2009]; and Football Federation of Australia and Australian Professional Footballers' Association Memorandum of Understanding, 6 July 2007; Professional Footballers' Association website, Player Relations, Collective Bargaining, <http://www.pfa.net.au/index.php?id=57&sid=60>, accessed 7 April 2008.

<sup>72</sup> Its impact has not been confined to the world of sport. It has been broad as indicated by the numerous cases contained in the entry for *Buckley v Tutty* (1971) 125 CLR 353 in LawCite, <http://www.lawcite.org/>, accessed 1 April 2009.

of others, or, as Dennis Tutty once said, 'dictat[ing]' to those who fall into their web.

Dennis Tutty says that if it had not been him, someone else would have mounted a case and brought down the rules which restricted the employment rights of players. Fate decreed, however, that he should be the one to perform this function in Australia. He was the one who shook the tree and enabled its bounty to fall to others. He received neither financial nor moral support from other rugby league players of his generation, apart from three colleagues at Balmain. He was not backed by a club desirous of obtaining his services or a players' association in a test case on behalf of all players, as occurred in *Eastham*,<sup>73</sup> *Flood*<sup>74</sup> and *Bosman*.<sup>75</sup> The long and drawn out nature of his legal action, and the financial and emotional pressure it placed him under resulted in the deterioration of his health. Dennis Tutty, a person with limited formal education, an unskilled worker with a limited income, objected to employment rules which restricted his rights and freedoms, and guided by a personal philosophy which he developed in responding to the circumstances of his life, took on the NSWRL and righted a wrong.

<sup>73</sup> *Eastham v Newcastle United Football Club* [1964] Ch 413.

<sup>74</sup> *Flood v Kuhn* 407 US 228 (1972).

<sup>75</sup> *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921.