# MODERN SPORTS LAW

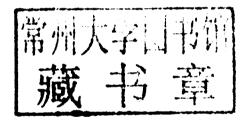
ATEXTBOOK

JACK ANDERSON

# Modern Sports Law

# A Textbook

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Published in the United Kingdom by Hart Publishing Ltd 16C Worcester Place, Oxford, OX1 2JW Telephone: +44 (0)1865 517530

Fax: +44 (0)1865 510710 E-mail: mail@hartpub.co.uk Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by Hart Publishing c/o International Specialized Book Services 920 NE 58th Avenue, Suite 300 Portland, OR 97213-3786 USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190 Fax: +1 503 280 8832 E-mail: orders@isbs.com Website: http://www.isbs.com

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British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-685-1

Typeset by Compuscript Ltd, Shannon Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

### MODERN SPORTS LAW

The aim of this book is to provide an account of how the law influences the operation, administration and playing of modern sports. Although the book focuses on legal doctrine it has been written bearing in mind sport's historical, cultural, social and economic context, including the drama and colour of sport's major events and leading personalities. And although it is inevitably very much concerned with elite professional sports it is not dominated by them, and seeks to cover the widest possible range of sports, professional and amateur.

Initially, the book addresses practical issues such as the structures of national and international sport, and examines the evolution of the body of law known as 'sports law'. Thereafter three main themes are identified: regulatory; participatory; and financial aspects of modern sport. The regulatory theme is dealt with in chapters considering the manner in which decisions of sports governing bodies may be challenged in the ordinary courts and the development of alternative dispute resolution mechanisms in sport. The participatory theme includes the legal regulation of doping and violence in sport, as well as the broader topic of tortious liability for sporting injuries. The financial theme, reflecting the enhanced commercialisation of sport at all levels, is developed in chapters concerning issues in applied contract and employment law for players and legal matters surrounding the organisation of major sports events. The conclusion summarises modern sport's experience of EU law, pointing the way to the future direction of sports law more generally.

While the book is aimed primarily at students, and is designed to cover fundamental and topical areas of sports law (sports law in general; sports bodies and the courts; arbitration in sport; corruption; doping; violence; civil liability; discrimination; the commodification of modern sport; and the likely future of sports law), it should also prove of wider interest to practitioners, sports administrators and governing bodies; and though focused primarily on UK law it will also appeal to readers in Australia, Canada, New Zealand and the USA.

To Teresa, Daniel and Katherine

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It may be that sports are silly; but then so are humans.

Robert Lynd

Nearly everything possible has been done to spoil this game: the heavy financial interests, the absurd transfer and player-selling system, the lack of any birth or residential qualification for the players, the betting and coupon competitions, the absurd publicity given to every feature of it by the Press, the monstrous partisanship of the crowds; but the fact remains that it is not yet spoilt, and it has gone out and conquered the world.

J B Priestley, 1933

Virtually every single one of our international sports were invented or codified by the British. And I say this respectfully to our Chinese hosts, who have excelled so magnificently at Ping-pong. Ping-pong was invented on the dining tables of England in the 19th century, and it was called Wiff-waff! And there, I think, you have the difference between us and the rest of the world. Other nations, the French, looked at a dining table and saw an opportunity to have dinner; we looked at it and saw an opportunity to play Wiff-waff. And I say to the Chinese, and I say to the world, that ping pong is coming home!

Mayor of London, Boris Johnson, at the handover of the Olympic flag in Beijing in 2008

Hopefully I can prove to the other companies going forward that I am a worthy investment; that I can help their company, help their company grow and represent them well.

Tiger Woods, 2010

## **PREFACE**

Although the drama and colour of major sports events, individual sports and their leading personalities is diverting, the emphasis in this book is on the manner in which the operation of modern sport must come to terms with applied aspects of the law, notably, administrative law, contract, torts, criminal and commercial law, as well as facets of EU law. At its narrowest therefore, this text presents a concise doctrinal analysis of the law's impact on sport in England and Wales. This approach prompts three points of note. First, a feature of this text is its careful legal analysis of relevant case law and applicable legislation to sportsrelated disputes, including the identification of generic principles of sports law. Second, the text is also informed by a socio-legal approach given that the law's application to sport cannot properly be discussed other than against the backdrop of sport's social, cultural, economic and, at times, strongly political context. In short, the 'specificity' of sport—that is, the manner in which sport both as a leisure activity and as an industry seeks inter alia by way of its social utility to minimise its exposure to the general law—is not underestimated by this text. Third, the jurisdictional focus of the text is on England and Wales; nonetheless, frequent reference is made to the nascent sports law jurisprudence of Australia, Canada, Ireland, New Zealand, Scotland and South Africa. More importantly, the established and sophisticated tradition of the teaching, research and practice of sports law within the United States is alluded to, and particularly the manner in which developments there might be indicative of forthcoming trends in Europe.

The book is written primarily for final year law students who have already undertaken the study of core law subjects and now seek to apply that knowledge to sport. This prerequisite is reflected in the text's structure and analytical style. For instance, although presented thematically with reference to the individual professional sports participant—the generic term 'athlete' will be used from now on—the book's eight chapters have also been written in a self-contained manner for ease of dedicated study. Cross-referencing within and between chapters is kept to a minimum with the footnotes generally reserved for a brief review of applicable first principles or a more detailed secondary commentary on the point at hand. In line with these pedagogical objectives, the body of the text frequently gives a comprehensive analysis of seminal case law and principle. Each chapter concludes with suggestions for further reading and, in summary, posits questions as to possible future developments, thus provoking and sustaining debate on the topic at issue. The accessible nature of this presentation means that the book

viii Preface

should appeal to practitioners seeking an introduction to this burgeoning area of practice, and it should also appeal to those interested in the deepening academic discourses on sport in fields such as sociology, economics, history and medicine.

The book is divided into eight chapters, which range across the historical development of sports law: issues relating to the operation and administration of sport both nationally and internationally; matters pertaining to the playing of, and participation in, sport; and, finally, the manner in which the commercialisation of sport and the evolution of the professional sports industry has attracted dedicated legal attention.

Chapter one-What is Sports Law?-addresses the eponymous question directly by way of an historical review of the relationship between sport and the law and includes a more contemporary theoretical analysis. In brief, the modern view is that the law (and lawyers) became interested in sport only in the last quarter of the twentieth century owing to the intense commercialisation or 'industrification' of sport during that period. The chapter makes the point however that law and sport have a much longer (and colourful) history. In Ancient Greece and Rome, issues of violence were prevalent, as were more complex issues relating to the socio-political role of sport. Subsequently, in late medieval England, the socio-political role of participation in sports such as archery and fencing, which were seen to prepare men for war, thus facilitating 'the defence of the realm', prompted legislation promoting such activities to the detriment of riotous, folk-based events such as football. Later still, the great writers on the early common law such as Blackstone, East and Foster wrote about the need to regulate fighting-based sports, particularly those associated with secondary criminality such as gambling and alcohol. With typical Victorian earnestness, the mid-nineteenth century heralded the official end of many traditional, agrarian-based sports especially those involving animal cruelty such as cock-fighting, badger, bear and dog fighting and their replacement with socially acceptable pursuits, such as greyhound racing, that could (literally) fit into the emerging urban landscape. Similarly, the codification of many of today's leading sports took place in the public schools of the period where the privileged elite sought to sanitise the ritualistic and sometimes gratuitously violent pursuits of previous eras. Simultaneously, but across the Atlantic, a more commercialised form of sport was emerging with first baseball and later American football, basketball and ice hockey leading to the development of 'major league' sport and complex matters of labour and antitrust law. With this historical background in mind, chapter one concludes by assessing the current status of 'sports law', and the contrasting perspectives as to whether it is a discrete, if still emerging, area of the law; or whether it is simply an applied, if engaging, amalgam of more established areas of the law.

<sup>&</sup>lt;sup>1</sup> See generally the lively introduction by I Hewitt, Sporting Justice (Cambridge, SportsBoooks, 2008).

Preface ix

Chapter two—Challenging Decisions of Sports Governing Bodies—picks up on a point made towards the end of the previous chapter. The most salient example of the law's influence on sport is in the reaction of sports bodies which are increasingly forced to defend decisions, particularly those within their disciplinary remit, in the ordinary courts.<sup>2</sup> The chapter is premised on four points. First, the ordinary courts are generally reluctant to interfere with the decisionmaking competencies of private associations such as sports organisations. For good social policy reasons, it is recognised that sports governing bodies are in a better position than the ordinary courts to determine how their affairs are to be run or, to paraphrase Lord Denning MR in Enderby Town FC v Football Association, justice in a domestic sports tribunal can 'often be done better by a good layman than a bad lawyer.'3 Nevertheless, and as Lord Denning's remarks continued, where, for example, a sports organisation has acted contrary to natural justice, the ordinary courts can, and should, intervene. The second point in chapter two is that intervention by the ordinary courts is usually predicated on a claim for breach of a private or contractual right, given that the relationship between a sports governing body and its members is most likely to be of that nature. The third point is that this private-rights approach appears to preclude judicial review of the competency of sports bodies. Chapter two considers the sustainability of this preclusion of public law and the practical implications of a finding that sports bodies might be considered 'hybrid' public authorities pursuant to section 6 of the Human Rights Act 1998. Finally, chapter two observes that where on the rare occasion a decision of a sports tribunal is subjected to judicial scrutiny, it appears clear that the review will amount to no more than an assessment of whether the disciplinary process ended in what was once neatly referred to as 'a fair result'4; thus if it is one that a tribunal properly instructing itself as to the facts and the law could have reasonably reached, it will probably not be set aside by the ordinary courts.

Chapter three—Arbitration and Alternative Dispute Resolution in Sport—compliments the previous chapter in the sense that on the grounds of basic fairness to its members, efficacy of administration and the avoidance of hefty litigation-related costs, national and international sports organisations have sought to enhance their internal disciplinary tribunals. These tribunals often take the form of quasi-independent, arbitral-based mechanisms. Alternative dispute resolution (ADR) in sport is dealt with in two ways. First, and on examining the benefits of ADR over formal litigation, the chapter gives a brief history and assessment of the Court of Arbitration for Sport (CAS), including the reasons

<sup>4</sup> Calvin v Carr [1980] AC 574, 593, Lord Wilberforce.

<sup>&</sup>lt;sup>2</sup> The chapter is based on previous research by the author. See J Anderson, 'An Accident of History: Why Decisions of Sports Governing Bodies are not Amenable to Judicial Review' (2006) 35 *Common Law World Review* 173.

<sup>&</sup>lt;sup>3</sup> Enderby Town FC v Football Association [1971] Ch 591, 605. See also McInnes v Onslow-Fane [1978] 1 WLR 1520, 1535, Megarry VC.

x Preface

underpinning its establishment and its present, increasingly influential, role in the governance of international sport. Second, and using an example of an existing arbitral mechanism associated with a national sports body, the typical disputes, the practical functioning and procedural framework in which such a body operates (including the guidelines set by Article 6 ECHR) will be outlined.

Chapter four—The Legal Regulation of Drugs in Sport—makes three fundamental points in its discussion on the use of performance enhancing substances in sport. First, the manner in which sport as a whole has reacted to doping, in terms of governance, is outlined. This includes an examination of the World Anti-Doping Agency. Second, three legal facets of the disciplining of athletes found to have engaged in doping are reviewed: the principle of strict liability; the proportionality of sanctioning; and issues of privacy. The chapter concludes by engaging in a debate, somewhat philosophical in nature, as to why sport seeks to proscribe the use of performance enhancing substances.

Chapter five—Criminal Violence in Sport—asks when, as a matter of policy and legal certainty, and on what basis, criminal liability might attach to a violent incident on the sports field? The chapter suggests that the answer in located in the principle of 'implied sporting consent' and discusses the critical level at which such an implied consent ordinarily ceases to be an answer to a prosecution for inflicting harm during the course of a game. Overall, the chapter reviews the current status of the 'law of sporting assault', mainly in the context of the English Court of Appeal's decision in *R v Barnes*.<sup>5</sup> The analysis is informed by a comparative approach whereby reference is made to the sophisticated approach of the Canadian courts to violence in sport, principally in the context of ice hockey. The chapter ends by reflecting upon the suitability of the ordinary law of violence in addressing unnecessarily aggressive behaviour in sport, and the specific influence it might have on the 'playing culture' of contact sports.<sup>6</sup>

Chapter six—Civil Liability in Sport—begins by considering personal injury liability for injuries inflicted by a participant upon an opponent during a sports pursuit. The sporting emphasis of the chapter is on competitive, body contact games. The legal emphasis is on the tort of negligence. Analogous to the law of criminal assault, breach of 'implied sporting consent' or the *volenti* of the claimant is seen as central in application, as assessed through a number of objective criteria, including the skill level of the injuring party and whether that defendant was acting in 'reckless disregard' of the claimant's safety. The chapter also has a broader focus beyond the litigating of sports injuries. It assesses practical matters relating to vicarious liability, insurance and the measure of damages for 'lost sporting opportunity'. It also refers to the underlying policy-related issue of sport's social utility. Moreover, the chapter demonstrates that sports-related personal injury claims now extend to a consideration of the duties of coaches, referees, sports

<sup>&</sup>lt;sup>5</sup> R v Barnes [2004] EWCA Crim 3246, [2005] 1WLR 910.

<sup>&</sup>lt;sup>6</sup> The chapter is based on previous research by the author. See J Anderson, 'No Licence for Thuggery: Violence, Sport and the Criminal Law' [2008] *Crim LR* 751.

governing bodies and schools. These duties are discussed in depth and with particular respect to the safety and welfare of minors and children. Finally, chapter six is set against the backdrop of an apparently spiralling 'compensation culture' and the threat that this 'blame culture' poses for the future promotion, operation and administration of sport.<sup>7</sup>

Chapter seven—Sports-related Contracts of Employment—seeks to locate professional sports contracts, and particularly those involving elite professional footballers, in the context of the abridged, precarious but lucrative nature of a professional career in sport. The chapter has two overlapping parts. First, and with principal reference to professional football, standard contractual issues relating to capacity, formation, standard terms and performance are outlined. This part of the chapter reflects on individual matters such as remuneration and image rights and also addresses briefly the role of player agents, and the manner in which the power of player agents, again in football, has led to attempts to regulate this aspect of the modern professional sports industry. A second aspect of the chapter equates professional sports persons to 'workers' and their right to avail of, and operate within, the norms of employment, labour and anti-discrimination law both domestically and at an EU level. This apparently straightforward premise will be seen as somewhat controversial when examined in the context of the premature and unilateral termination of a player's contract, which of itself forms part of a wider discourse involving the desire of football's various authorities to preserve some element of contractual stability and an EU law-driven demand for reasonable employee mobility within any professional services industry.

The concluding chapter speculates upon the future of sports law. The chapter observes that in the longer term the legal and regulatory structure of sport will, most likely, be shaped by the outcome of the debate on whether the special character or 'specificity' of sport should mean that a special legal status should attach to sport under EU law. On the one hand, many practices of the professional sports industry have economic implications and accordingly such activities must be subject to and reconciled with, for example, the various fundamental freedoms of the internal market. On the other hand, sport has characteristics that are not found in other sectors of the economy and thus sports organisations seek to exempt their practices from the full force of EU law. The concluding chapter, which seeks to serve as a conclusion to this text as whole, goes on to discuss matters of fundamental concern, including whether EU law has the capacity to go beyond an examination of sports-related rules that have an 'economic effect' and scrutinise rules of a 'purely sporting nature'. Given that a central aim of this book is to demonstrate that 'Law's Empire' stretches 'beyond the touchline' and that there is no blanket immunity for sport from the law, this book ends with an attempt to provide an intellectually durable

<sup>&</sup>lt;sup>7</sup> The chapter is based on previous research by the author. See J Anderson, 'Personal Injury Liability in Sport: Emerging Trends' [2008] 16 *Tort Law Review* 95.

xii Preface

rationale as to when and why the practices and governance of sport should or should not be deemed compatible with (EU) law.<sup>8</sup> In this, the book as a whole is partly guided by what can be called the Weatherill maxim: 'Sport is special but not that special'9; but also by a paraphrasing of that maxim—the European sports model is special but not that special. The latter refers to the fact that as the landscape of sports law in Europe emerges incrementally on a case by case basis, the picture that is emerging is very recognisable to US sports lawyers and thus the future of sports law may take us in a westward direction towards Boston rather than eastwards towards Brussels.

The layout and structure of the book apart, four further points need to be made as to its contents and substance in terms of accompanying and complimentary literature; its pedagogical and theoretical nature; the 'American' influence; and the use of the term 'sport'. On the first point, and as stated previously, the emphasis in this text is on doctrinal legal analysis within the England and Wales jurisdiction. It is admitted that without context, doctrinal analysis, particularly of a popular activity such as sport, would only partially explain the deepening relationship between sport and the law. When necessary, the book alludes to broader issues relating to sport's societal and cultural role, as well as its unique regulatory and economic framework, and including references to developments in other common law jurisdictions and the European Union. However, those who wish to delve deeper into socio-legal aspects of sports law;<sup>10</sup> law and the business of sport;<sup>11</sup> the practice of sports law;<sup>12</sup> sports law in jurisdictions such as Australia,<sup>13</sup> Canada,<sup>14</sup> Ireland,<sup>15</sup> New Zealand,<sup>16</sup> Scotland,<sup>17</sup> South Africa,<sup>18</sup> the United States,<sup>19</sup> including

<sup>8</sup> Note recently and generally R Parrish and S Miettinen, *The Sporting Exception in European Union Law* (The Hague, TMC Asser, 2008).

<sup>9</sup> See generally S Weatherill, European Sports Law: Collected Papers (The Hague, TMC Asser Press, 2007).

<sup>10</sup> S Gardiner et al, Sports Law, 3rd edn (London, Cavendish, 2006) and S Greenfield and G Osborn (eds), Law and Sport in Contemporary Society (London, Frank Cass, 2000).

- <sup>11</sup> D Griffith Jones, Law and the Business of Sport (London, Butterworths, 1997) and R Verow, C Lawrence and P McCormick, Sports Business: Law, Practice and Precedents, 2nd edn (Bristol, Jordans, 2005).
  - <sup>12</sup> A Lewis and J Taylor (eds), Sport: Law and Practice, 2nd edn (London, Tottel Publishing, 2008).
- <sup>13</sup> D Thorpe et al, Sports Law (Melbourne, Oxford University Press, 2009) and D Healey, Sport and the Law, 4th edn (Sydney, UNSW Press, 2009).
  - <sup>14</sup> J Barnes, Sport and the Law in Canada, 3rd edn (Toronto, Butterworths, 1993).
  - 15 N Cox and A Schuster, Sport and the Law (Dublin, FirstLaw, 2004).
- <sup>16</sup> E Toomey (ed), Keeping the Score: Essays in Law and Sports (Christchurch, University of Canterbury Press, 2005).
  - <sup>17</sup> W Stewart, Sport and the Law—A Scots Perspective (Edinburgh, Tottel Publishing, 2003).
- <sup>18</sup> R Cloete and S Cornelius (eds), *Introduction to Sports Law in South Africa* (Durban, LexisNexis Butterworths, 2005).
- <sup>19</sup> For instance, M Cozzillo et al (eds), Sports Law: Cases and Materials, 2nd edn (Durham NC, Carolina Academic Press, 2007); M Mitten et al (eds), Sports Law and Regulation: Cases, Materials and Problems, 2nd edn (New York, Aspen, 2009); J Spengler et al, Introduction to Sport Law (Champaign; Ill, Human Kinetics, 2009); P Weiler and G Roberts, Sports and the Law: Text, Cases and Problems, 3rd edn (Westport Conn, Thomson West, 2004); and G Wong, Essentials of Sports Law, 4th edn (Westport Conn, Praeger, 2009).

Preface xiii

the EU<sup>20</sup> and at an international level;<sup>21</sup> or those who simply wish to obtain a broader perspective on contemporary issues in sport and the law<sup>22</sup>—should consult the expanding body of literature that critiques an area of law that has recently attracted the rather grand title of *lex sportiva*.<sup>23</sup>

Second, the reluctance to broaden the debate beyond strict legal analysis might be said to reflect a certain defensiveness with respect to engaging more fully with sports-related issues and popular culture more generally. Admittedly, the study of sports law remains at an early stage in its development and still tends to be deemed, even dismissed as, a rather niche or esoteric area of interest. Often its popularity among students as an elective part of their studies—and sports law is a popular choice—is seen as being in some way detrimental to more worthy or serious areas of special interest.<sup>24</sup> More importantly however, it is argued that sports law as a corpus of law is fundamentally weakened by not being underpinned with a unifying theoretical coherency. This debate is dealt with more fully in chapter one; for now, it suffices to state that this book attempts to highlight that the application of established areas of the law—commercial, contract, employment etc—to sport can not only teach us something about those discrete legal areas but it might also, in time, lead to a distinct area of the law befitting the term 'sports law'. In sum, it is argued that the evolution of sports law is continuing at a satisfactory pace, as reflected, it is hoped, in the complexity and sophistication of the issues highlighted in this book and others, to the point that there is no real need to attach any hyperbole to the existence of sports law.

In this regard, this book is influenced by an article published a decade ago by Lawrence Lessig in the *Harvard Law Review*.<sup>25</sup> Lessig's commentary is a critique of the practice and study of the law of cyberspace. The analysis had an unusual

<sup>21</sup> J Nafziger, International Sports Law, 2nd edn (New York, Transnational Publishers, 2004).

<sup>23</sup> See M Beloff, 'Is There a Lex Sportiva?' [2005] International Sports Law Review 49.

<sup>25</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harvard Law Review

501.

<sup>&</sup>lt;sup>20</sup> R Blanpain, M Colucci, F Hendrickx (eds), The Future of Sports Law in the European Union (London, Kluwer, 2008); B Bogusz, A Cygan and E Szyszczak (eds), The Regulation of Sport in the European Union (London, Edward Elgar, 2007); A Caiger and S Gardiner (eds), Professional Sport in the EU: Regulation and Re-regulation (The Hague, TMC Asser, 2005); S Gardiner, R Parrish and R Siekmann (eds), EU, Sport, Law and Policy: Regulation, Re-regulation and Representation (The Hague, TMC Asser, 2009); R Parrish, Sports Law and Policy in the European Union (Manchester, Manchester University Press, 2003); and R Siekmann and J Soek, The European Union and Sport: Legal and Policy Developments (The Hague, TMC Asser, 2005).

M Beloff, T Kerr and M Demetriou, Sports Law (Oxford, Hart Publishing, 1999); E Grayson Sport and the Law, 3rd edn (London, Butterworths, 2000); and H Hartley, Sport, Physical Recreation and the Law, New ed (London, Routledge, 2009). Leading periodicals include: Entertainment and Sports Law Journal; International Sports Law Journal; International Sports Law Review; Journal of Legal Aspects of Sport; Marquette Sports Law Review; Seton Hall Journal of Sports and Entertainment Law; Villanova Sport and Entertainment Law Journal; and Sport and the Law Journal.

<sup>&</sup>lt;sup>24</sup> For an interesting American perspective on this point see generally J Standen, *Taking Sports Seriously: Law and Sports in Contemporary American Culture* (Durham NC, Carolina Academic Press, 2008). For a lighter English perspective on sport and society see S Barnes, *The Meaning of Sport* (London, Short Books, 2007) and E Smith, *What Sport Tells us about Life* (London, Penguin, 2009).

xiv Preface

premise—an American federal court judge's disparaging quip that there was no more a 'law of cyberspace' than there was a 'law of the horse'. More fully, the judge in question remarked that the best way to learn the law applicable to specialised endeavours was to study general rules and principles. Numerous cases, the judge observed, dealt with sales of horses; others dealt with people kicked by horses; still more dealt with the licensing and racing of horses; but any effort to collect those strands into a course entitled 'The Law of the Horse' was doomed to be shallow and to miss unifying principles.<sup>26</sup> Lessig countered that the distillation of tort in cyberspace, contract in cyberspace, property law issues in cyberspace etc into a 'law of cyberspace' would not lead to the cross-sterilisation of topics and issues because, by illustrating the regulatory and geographical limits of traditional legal principles, cyberspace law 'illuminated the entire law'. In sum, Lessig went on to suggest reasons to study cyberspace law for reasons beyond the particulars of cyberspace. This book proceeds on similar lines: providing a justification for the study of sports law beyond the peculiarities of sport as a social phenomenon with a view towards demonstrating that in analysing the legal regulation of sport we might learn something about the general law that other more established areas of the law might not reveal.

The third point, which follows from the above, is a comment on the American influence on sports law. Although the birth of modern sport is often traced to the public schools and Victorian social values of mid-nineteenth century Britain, thereafter the commercial heart of modern sport was transplanted to the United States where, football apart, it remains. Europeans often, and sometimes rightly, accuse Americans of an insular appreciation of sport, as limited to American football, baseball and basketball.<sup>27</sup> That insularity is however often reciprocated by Europeans' ignorance of the fact that the structure of major league sport, the commodification of sport and the study and practice of sports law is at its most sophisticated and advanced in the United States to the point that lawyers have long had a central role in the operation of contemporary sport in America as administrators, agents or in pursuing employment and antitrust-related lawsuits that have changed fundamentally the structure of major leagues. The national sport of baseball is a case in point, with the legal status of that sport's commercial framework coming to the attention of the US Supreme Court as early as the 1920s.28

<sup>&</sup>lt;sup>26</sup> See F Easterbrook, 'Cyberspace and the Law of the Horse' (1996) University of Chicago Legal Forum 207, 207.

<sup>&</sup>lt;sup>27</sup> See M Dyreson and J Mangan (eds), Sport and American Society: Exceptionalism, Insularity and Imperialism (London, Routledge, 2007) where the contributors outline the story of American sport as premised historically on a symbolic rejection of British rule and British sports.

<sup>&</sup>lt;sup>28</sup> Federal Baseball Club of Baltimore, Inc v National League of Professional Baseball Clubs (1922) 259 US 200 (US Supreme Court upholding professional baseball's immunity from federal antitrust laws). For an introduction to some of the legal and commercial complexities surrounding Major League Baseball, see M Nagel et al, 'Major League Baseball Anti-Trust Immunity: Examining the Legal and Financial Implications of Relocation Rules' (2006) 4 Entertainment and Sports Law Journal available online at www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number3/nagel.

Preface xv

In short, and as the concluding chapter of this book argues, there is much to learn from the United States, and in particular the manner in which the law, principally in the form of labour law, assists in maintaining the 'competitive balance' that is the hallmark of major league sport in the United States.<sup>29</sup> In the major league sports of North America—Major League Baseball, the NBA in basketball, the NFL in American Football, and the NHL in ice hockey—a highly regulated system, which includes team franchising, player drafts, salary caps and collective bargaining agreements between key stakeholders in the sport, strives to ensure some element of equality of opportunity for all members of the league. The underlying idea is that if a select number of clubs through private investment, or other advantage, gain a monopoly on winning, the league in question will slowly lose its competitiveness and attractiveness to the commercial detriment of all. At first glance, this approach appears to work and is demonstrated by comparing the winners of the Super Bowl (American football) against the Premier League (English football) since the inception of the latter in 1992/1993:

Season Ending	Super Bowl	Premier League
2010	New Orleans Saints	Chelsea
2009	Pittsburgh Steelers	Manchester United
2008	New York Giants	Manchester United
2007	Indianapolis Colts	Manchester United
2006	Pittsburgh Steelers	Chelsea
2005	New England Patriots	Chelsea
2004	New England Patriots	Arsenal
2003	Tampa Bay Buccaneers	Manchester United
2002	New England Patriots	Arsenal
2001	Baltimore Ravens	Manchester United
2000	St Louis Rams	Manchester United
1999	Denver Broncos	Manchester United
1998	Denver Broncos	Arsenal
1997	Green Bay Packers	Manchester United
1996	Dallas Cowboys	Manchester United
1995	San Francisco 49ers	Blackburn Rovers
1994	Dallas Cowboys	Manchester United
1993	Dallas Cowboys	Manchester United
18 seasons	12 clubs	4 clubs

<sup>&</sup>lt;sup>29</sup> See the though-provoking review by P Weiler, *Leveling the Playing Field: How the Law Can Make Sports Better for Fans* (Cambridge; Mass, Harvard University Press, 2000).

xvi Preface

This competitive balance notwithstanding, it must be reiterated that the governance of sport in Europe and the United Kingdom differs appreciably, in terms of history and structure, from the 'American Sports Model'.30 For example, the American model is very much closed to new entrants and thus the system of promotion/relegation, which is fundamental to the English and European understanding of league sport, is unknown. It follows that, given the historical and domestic allegiances of English and European football clubs including their commercial freedom to attract outside investment and hire playing staff, any proposals to develop the current UEFA Champions' League in football into, say, a 32-club franchised model such as the NFL, would be unlikely to succeed. In any event, such a tightly regulated system would probably encounter legal difficulties in reconciling itself with the fundamental freedoms underpinning the European Union's internal market. Nevertheless, the American experience of the economic and legal regulation of sport is a useful resource because trends established there may be indicative of that which will be experienced here in the near future. Consequently, where relevant, and with due caution, some specific analogies are made to the situation pertaining in the United States.

The fourth point that needs to be made is that there is a tendency in the United Kingdom to equate sport generally with male pursuits and specifically with professional football.<sup>31</sup> It is hoped that where possible this inclination can be avoided to draw on as broad a range of sports as possible, and to discuss sport in all its guises—male, female, amateur, professional, recreational and elite; and thus, where appropriate, the word 'athlete' is used as a gender neutral reference for all sports-persons. That being said, elite professional football often best illustrates individual topics within the umbrella of sports law. Moreover, professional football also demonstrates the more general evolution and emerging sophistication of sports law. For instance, it can be argued that standing outside a Premiership football ground is now every much an experience of law in action, as it is sport at play.

The ticket the spectator holds is a licence to enter the ground and is quasicontractual in nature. The merchandising and advertising that the spectator encounters on entering the stadium is subject to significant legal protections such as trademark, copyright legislation and the tort of passing-off. The spectator will sit (and be monitored by CCTV) in an all-seater stadium designed and operating within the raft of health and safety and public order legislation that followed the Hillsborough stadium disaster of 1989. The players on the

<sup>&</sup>lt;sup>30</sup> See the account by S Weatherill, 'Resisting the Pressures of "Americanization": The Influence of European Community Law on the "European Sport Model" in S Greenfield and G Osborn (eds), *Law and Sport in Contemporary Society* (London, Frank Cass, 2000).

<sup>&</sup>lt;sup>31</sup> The participation of women in sport, and the surrounding legal issues, is complex in nature. If discussed properly, the topic of women in sport would need to be located in its broader context of gender studies, cultural theory and economic development, similar to the approach taken by J Williams, A Game for Rough Girls? A History of Women's Football in Britain (London, Routledge, 2003).

pitch are as much commercial entities as they are athletes. Their contracts are complicated documents including provision for insurance and image rights, and reflecting the precarious and abridged nature of any professional career in sport. Elite players will now more likely be employed not by football clubs but by a public limited company quoted and traded daily on the stock exchange. If players commit playing offences, their hearings and appeals will be heard by sophisticated arbitral tribunals that seek to adhere to the principles of natural justice and even the European Convention on Human Rights. If the injury inflicted is sufficiently serious and is outside that which is ordinary and incidental to the game of football, the culprit might be sued in negligence by the injured player or even face criminal liability. On completion of the game, a number of players will be chosen randomly for routine tests for performance enhancing drugs—tests that flirt with the very boundaries of personal privacy. When the spectator returns home, they will in all likelihood look at the highlights of the other Premiership matches of the day. The contest for these broadcasting rights will have been every bit as (anti-)competitive as the game itself and they will also have, in large part, funded events on the field, thus are in need of advanced legal protections.

In this light, when faced with an industry, such as professional football, which is becoming ever more complex and diverse, and in a society that has become more litigious and risk averse, the involvement of the law and lawyers in sport is likely to become ever more prevalent. This involvement does not necessarily always have to be seen in a negative, opportunistic or adversarial light. It is hoped that immutable principles of the law such as certainty and fairness, and more general attributes associated with the law such as deterring violence, eliminating corruption, ensuring equality of opportunity and promoting inclusivity, will compliment and ultimately benefit sport as a whole. Admittedly, this perspective may be somewhat idealistic; at best the expectation is that the law might operate in a manner similar to a good referee. It should be firm but unobtrusive. It should, where possible, fade into the background and not unduly influence matters on the pitch or in the arena. In sum, it should act primarily to enhance the enjoyment of games, and to facilitate participation in, rather than the litigation of, sport.

Finally, and as with most academic projects, the finishing of this book has been accompanied with some regret. Certain matters have had to be dealt with briefly or not at all. This occasional abruptness is not because of an overly demanding editor (all at Hart Publishing have been more than accommodating). It has more to do with my attempt not to be overly self-indulgent and let my enthusiasm for this subject divert me from analysis to punditry and thus into what Umberto Eco once disparagingly referred to as sport's endless and empty 'chatter'. My principal regrets (which hopefully and without being overly presumptuous, might feature in future editions of this text) are threefold. First, I would have liked to dedicate more to the (corporate) social responsibility of sports clubs, national associations and international federations as conduits for policies promoting anti-racism,