
Sports Injuries and the Right to Compensation

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Abstract

This article discusses issues relating to workers compensation and alternatives to compensation for sporting injuries. The rationale for the exclusion of sportspeople from most statutory compensation schemes is also evaluated. Section 11 of the *Workers Compensation and Rehabilitation Act 1981* (WA) and the *Sporting Injuries Insurance Act 1978* (NSW) are considered.

Introduction

The payment of workers compensation in Western Australia is governed by the *Workers Compensation and Rehabilitation Act 1981* (WA) (The WA Act). This Act, like similar legislation in other states, provides compensation to disabled workers in the form of weekly payments, medical expenses, rehabilitation allowances and lump sums for permanent disabilities. Under the WA Act, however, there are specific exclusions of certain persons who are contestants in sports or athletic activities. Section 11 of the WA Act provides that:

Notwithstanding anything in section 5 and subject to section 11A, a person is deemed not to be a worker within the meaning of this Act while he is, pursuant to a contract:

- a) participating as a contestant in any sporting or athletic activity;
- b) engaged in training or preparing himself with a view to his so participating; or
- (ba) engaged in promotional activities in accordance with the contract pursuant to which he so participates; ...

if, under that contract, he is not entitled to any remuneration other than remuneration for the doing of those things.

The exclusion of professional sportspeople from the WA Act has existed since 1977. Sportspeople were excluded essentially on the grounds that there was a significant likelihood that claims could be made by them against unincorporated sporting bodies with few resources or insurance cover. Some Parliamentarians also opined that compensation was meant for the 'purpose of subsistence and not one for sport or play despite the remuneration which today is attached to it'.¹ The WA Act does not cover amateur sportspeople because they do not receive payment and therefore are not engaged under a contract of employment that is a pre-requisite requirement of the WA Act.

Claims for injuries sustained during employment not by professional sportspeople

Sport *per se* is not, however, excluded from coverage under the WA Act and other state compensation

¹ Western Australia, *Parliamentary Debates*, Legislative Council 1 November 1977, 2788 and Legislative Assembly 8 November 1977, 3161.

legislation. The WA Act excludes particular categories of persons from claiming compensation but does not prevent particular sporting activities, which give rise to disabilities, from attracting compensation. There have been numerous cases where workers (not professional sportspeople) have been entitled to claim compensation where they have sustained injury during sporting activities. This occurs usually at employer sponsored social events, sporting activities or employer provided gymnasiums, swimming pools and fitness equipment.²

The WA Act provides that compensation is payable if the disability is sustained in the course of the employment or when the employment is a significant contributing factor to the disability. Where the courts have held that the sporting activity sponsored, encouraged, or provided for by the employer are incidental to the employment the injury sustained by the worker in those sporting activities are compensable.³ Consequently, a professional cricket player would not be entitled to compensation were they to sustain an injury in the course of a professional game but, ironically, a clerical worker may be entitled to compensation where they sustain injury in an office cricket match.

Compensation Options Available to Professional Sportspeople

Unlike New South Wales, Western Australia has not specifically legislated to provide compensation for injured sportspersons. Given that sportspeople are likely to require some kind of coverage for injuries sustained, there are a number of available options by which mechanisms could be put in place for coverage.

In relation to individual sporting contracts, it is possible to include a clause which provides for compensation to be payable under the contract of engagement rather than as a statutory right. A simple means of achieving this is to provide that, notwithstanding the provisions of the WA Act, an injured sports person is entitled to benefits equivalent to those under the Act. If the sportsperson is injured, the employer is then required to pay compensation equivalent to the WA Act, not as a statutory obligation but as a contractual obligation.

A similar result can be achieved by incorporating a clause covering the payment of compensation for injuries under workplace agreements, or other forms of registered agreements now available in most states and the Commonwealth under their industrial laws. There seems little doubt that such agreements are capable of registration given that, as noted, professional sports persons are likely to be employees and therefore entitled to the protection of industrial laws. In the event that a clause providing for insurance coverage for injuries is inserted into a workplace agreement or other form of industrial agreement, the agreement could be enforced through the Industrial Commissions.⁴ Interestingly, if the clause did not provide for adequate compensation, it is possible in some jurisdictions for the contract to be challenged on the basis that it is unfair. In New South Wales, for example, unfair employment contracts may be challenged, and to some extent rewritten, by Industrial Commissions to provide for fair terms of employment. It follows that if an employer includes insurance protection (or an equivalent benefits clauses) for injuries for sporting injuries in a workplace agreement they should be

² *Commonwealth v Oliver* (1962) 107 CLR 353.

³ *Wolmar v Travelodge Australia Ltd* (1975) 26 FLR 249 and *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 475.

⁴ That a footballer can seek a remedy from the Industrial Commission is beyond doubt; see *Bartlett v Indian Pacific Limited* (1988) 68 WAIG 2508, where a claim was made for unfair dismissal against the West Coast Eagles AFL Club. See also *Levitzke v Western Australian Football Commission* (1997) WAIR 99, claim by WAFL umpire for unfair dismissal.

aware of the potential for those agreements to be challenged.⁵

Whether a professional player can negotiate a clause into a contract or agreement that provides for compensation for injuries sustained in sporting activities is a question of their bargaining power. It is unlikely that individuals in small clubs would be able to achieve this. On the other hand, collective agreements between players and clubs are well known in major sporting competitions of Australian Rules football and soccer.⁶ In other words, players at elite level may be able to achieve collectively a level of protection, which is not available to other individual players.

The implementation of a similar scheme to that which covers sportspersons in New South Wales. The *Sporting Injuries Insurance Act 1978* (NSW) (the NSW Act) provides compensation for certain sporting injuries in New South Wales. The NSW Act does not prevent an injured person from suing for damages in trespass and negligence, but it does exclude double recovery. The NSW Act is a 'no fault' scheme meaning that the injured person does not have to show negligence or intention on the part of any other person for a claim to be successful. It covers both amateur and professional players and is funded by premiums paid by the participating sporting organisations.

⁵ See, for example, *Allen v Penrith District Rugby League Football Club*. Unreported Industrial Court of New South Wales 4 December 1995 where Marks J varied a provision in a players contract to provide increased benefits for injuries sustained in game, due the contract not providing adequate provision for income loss and medical expenses. This decision was overturned by the Full Bench on appeal who held that Marks J had failed to properly take into account the intention of the *Sporting Injuries Insurance Act 1978* (NSW) under which the player was to benefit. (29 September 1997). Where other jurisdictions do not have similar statutory sports injury protection, there is a greater likelihood of finding that the contract is unfair.

⁶ As noted in E Buckley, (1996) Athlete or Employee? Is the different treatment accorded to professional team athletes under Workers Compensation legislation

Eligibility under the NSW Act

Compensation is available to a registered participant⁷ or an enrolled student participant of a prescribed organisation, injured in the course of an authorised activity.⁸ A 'prescribed organisation' means a 'sporting organisation, a school or the Department' and a 'sporting organisation' means 'an individual, a body corporate or an unincorporated association declared under s 5(1) to be a sporting organisation for the purposes of this Act'.⁹

Section 4(1) of the NSW Act defines 'injury' as 'personal injury arising out of or in the course of an authorised activity of a prescribed organisation'. It includes a disease 'contracted in the course of any such activity, and ... to which the activity was a contributing factor, but does not include the aggravation, acceleration, exacerbation of, or deterioration resulting from, a disease.' Persons who may apply for compensation under the NSW Act are the injured party, or in the case of the injured party dying, the legal representative of that person.¹⁰

Once satisfied that the requirements have been met, the applicant is entitled payment in accordance with benefit tables set out in schedule 1 of the NSW Act which specify the maximum amounts payable for various injuries. The benefits are paid as lump sums after an assessment of injury is made to establish the extent of any permanent injury. No provision is made for income maintenance support or medical expenses. Payments of benefits for the death of an eligible person are set out in s 26. The section defines 'child' and 'dependant', the parties to whom such payments

justified? *Queensland Law Society Journal* 26 (6) 523 at page 533.

⁷ *Sporting Injuries Insurance Rule 1997* (NSW), s8 (2).

⁸ *Ibid* s7.

⁹ *Ibid* s4 (1).

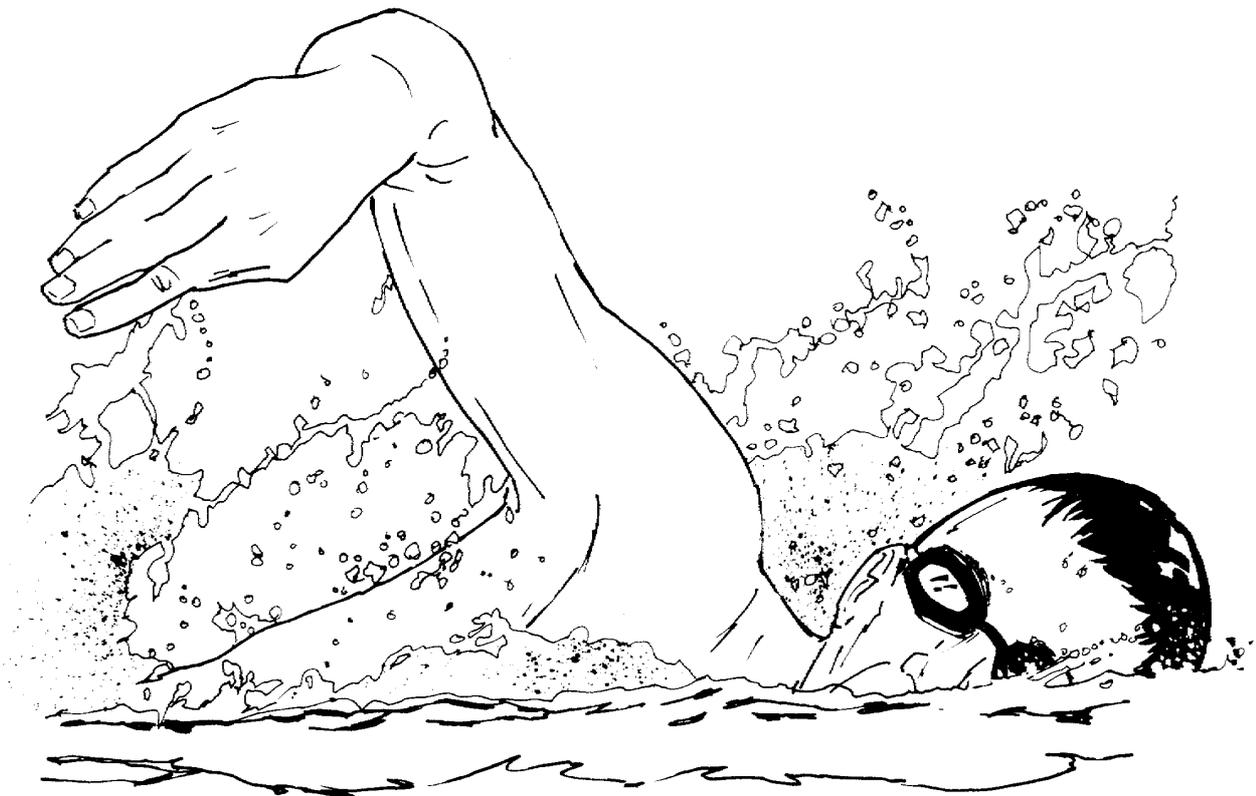
¹⁰ *Ibid* s19.

may be made. Certain funeral expenses are also payable.¹¹

Revisiting the rationale for the exclusion of Sportspeople from Compensation Schemes

The rationale for excluding sports persons from compensation coverage was the high likelihood that employers would be unable to meet the cost of such

law to insure against compensation liability and who are otherwise personally liable for the payment of compensation. A point of distinction may be that sole traders and partnerships relate to business activities the substance of which is guard against loses and make profits whereas a committee member of an amateur sporting club may not have the same control or duties in relation to the club as a business person might have in relation to a small business.



claims, together with the great possibility that sporting clubs (except professional bodies) would be uninsured. Other fears were, that in the case on unincorporated bodies, the individual committee members might be personally liable to pay compensation to injured professional players.¹² It can be observed that a similar rationale already applies to sole traders and partnerships who in business may have few resources, but who are required as a matter of

A more palatable rationale for excluding sporting clubs from liability is that the vast number of amateur sporting clubs who might engage a particular player on a professional basis are run by informal committee structures often not well informed in relation to issues of legal liability. Such clubs however, are, as a matter of course, connected with competitions, associations and organisations that do have structures allowing them to organise fixtures, award, trophies and

¹¹ *Sporting Injuries Insurance Act 1978* (NSW), s27.

¹² Noted in *Peckham v Moore* [1975] 1 NSWLR 353 and referred to in the 1977 Parliamentary debates referred to above as reason for the exclusion of professional sportspeople from the WA Act.

pennants. This is the basis upon which the NSW Act provides for the collection of premiums for the Sporting Injuries Fund under that Act, although it should be noted that the NSW Act extends benefits to non-professional players and is therefore broader in scope. Whilst many amateur clubs are run as fluid organisations, the basic structure of sporting competitions allows for those clubs to be informed and organised in such a way as would make it possible to institute a system requiring that no club would be entitled to enter a competition unless it held compensation insurance for any of its players. The fact that the club was unincorporated would be irrelevant where it was insured.¹³ The organisation of such a scheme would be no more difficult than the administration of compensation schemes, which currently require the insurance coverage of partnerships and sole traders.

A reading of the Western Australian Parliamentary Debates of 1977¹⁴ shows an additional rationale for the exclusion of sports people. The debates indicate that the exclusion of sportspersons from the workers compensation scheme was based the high potential for injury in sport. Again, this rationale is hard to justify given the historical reasons for the establishment of compensation schemes, namely for the payment of compensation to workers in dangerous industries. Historically, the West Australian system of compensation was established specifically for that purpose: namely, protecting forestry and mine workers. Incidentally, these industries continue to be the most dangerous, but it has never been argued that protection of employers and workers under compensation schemes should be excluded on the basis of the potential liability of the employer. The

matter is governed instead by the payment of appropriate premiums. If it is the case that sporting activities create high liabilities, then it is a matter for adjustment through a premium rating system.

At the moment employers of sportspersons may escape liability to pay compensation unlike most other employers. It should be remembered that in many cases large sporting clubs are incorporated, have significant resources and managerial skills and be well able to contribute to compulsory compensation schemes. Any claims that highly paid sportsperson would drain the system is counterbalanced by the fact that all state compensation systems have maximum levels of benefits and require those eligible to prove incapacity for work. An inability to pursue a sporting career may not equate to an incapacity to work so as entitle a sportsperson to ongoing income maintenance, medical and rehabilitation expenses would however be payable and would provide a minimum level of support. In other words if sportspersons were protected under the *Workers Compensation and Rehabilitation Act 1981* (WA), the claims would most likely be limited to medical and like expenses. Claims for weekly payments for incapacity would be difficult to substantiate where the sportsperson was not unfit for work. Alternatively should it be considered politically risky or unsuitable to include sportspersons under that Act, the option of broadening coverage to amateur and professional sportspeople is available under the New South Wales model.

Conclusion

For a person injured in Western Australia while participating in a sporting activity the main avenue for obtaining compensation is through a common law

¹³ It has been held in *Bailey v Victorian Soccer Federation* [1976] VR 13 that an unincorporated association could be sued in the name of the corporation.

¹⁴ Western Australia, *Parliamentary Debates*, Legislative Council 1 November 1977, 2788 and Legislative Assembly 8 November 1977, 3161.

claim.¹⁵ The advantage of suing for common law damages in either negligence or trespass or both is that, if successful, the compensation is not usually affected by any statutory limits. Because of the way that damages are assessed, the amount awarded would most closely reflect the actual loss suffered by the injured party. The disadvantages are that the plaintiff has to prove either negligence, for a negligence action, or intention in a trespass action, and also has to counter issues of consent raised by the defendant. In addition it is notorious that such actions involve disputes as to factual issues and their litigation is often prolonged and costly.

The statutory compensation scheme in New South Wales has the advantage of being no fault and, compared with taking a case through the court system, is comparatively cheap, quick and less stressful. It also extends to cover amateur sportspeople. The disadvantage, of course, is that compensation is limited by statute. It seems anomalous that people playing sport professionally are excluded from the operation of workers compensation legislation in Western Australia.

¹⁵ See the article by the same authors in this journal 'Sports Injuries and the Right to Damages'.