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Abstract

Sean Carolan and Mark French, both launched defamation proceedings in relation to comments made in the print media about their alleged involvement in doping in sport. The comments made about Carolan was in relation to his position as personal trainer with the Sydney Roosters while the comments about French were about his alleged taking of banned substances as a professional Olympic cyclist. Both were successful in their actions, highlighting the fact that defamation law can help restore the reputation of those accused in the media of being involved in doping. It is suggested these doping cases and other sport defamation cases indicate that defamation law in Australia does provide the right balance between protecting someone's reputation and preserving a right to freedom of speech.

Keywords

Sydney Roosters, Olympic, supplement, banned

Disciplines

Law

DOPING IN SPORT AND THE ISSUE OF DEFAMATION IN AUSTRALIA: THE SUCCESSFUL ACTIONS

CHRIS DAVIES*

Sean Carolan and Mark French, both launched defamation proceedings in relation to comments made in the print media about their alleged involvement in doping in sport. The comments made about Carolan was in relation to his position as personal trainer with the Sydney Roosters while the comments about French were about his alleged taking of banned substances as a professional Olympic cyclist. Both were successful in their actions, highlighting the fact that defamation law can help restore the reputation of those accused in the media of being involved in doping. It is suggested these doping cases and other sport defamation cases indicate that defamation law in Australia does provide the right balance between protecting someone's reputation and preserving a right to freedom of speech.

I INTRODUCTION

Sean Carolan had been engaged by National Rugby League (NRL) team, the Sydney Roosters, to provide a supplement and testing program. He took legal action after media reports suggested he had given players banned substances as part of this program.¹ This, however, was not the first defamation case relating to doping in Australian sport, as Olympic cyclist, Mark French, had taken similar action against the Herald and Weekly Times,² while Stephen Dank was in the midst of a number of proceedings against various parties. Thus, as these cases indicate, allegations of either providing or taking banned substances may harm the reputation of a person, and can lead to defamation action.

This paper will examine these cases to establish the basis of these claims, the judicial reasoning behind the decisions and their relevance to Australian sport. It will also examine these and other sport related defamation cases in the context of the broader question as to whether Australian defamation law provides an appropriate balance between protecting a person's reputation and preserving the freedom of speech. First, however, it will give an overview of the law of defamation and how it has been applied to the sporting context.

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¹ *Carolan v Fairfax Media Publications Pty Ltd* [2016] NSWSC 1091.

² *French v The Herald and Weekly Times Pty Ltd* [2010] VSC 127; *French v The Herald and Weekly Times Pty Ltd (No 2)* [2010] VSC 155.

II DEFAMATION, SPORT AND THE LAW

Defamation involves communications of material, by words, photographs, video, illustrations or other means, that may affect the reputation of another. It involves a number of elements, and the subject matter must, firstly, contain a defamatory imputation, or have a defamatory meaning, and to be a defamatory statement it needs to lower the plaintiff's reputation. It must therefore relate to the plaintiff and be published with no lawful excuse, namely truth, honest opinion, fair comment or qualified privilege.³ Thus, defamation law needs to strike a balance between the need to protect a person's reputation, and allowing for the freedom of speech. While defamation was originally a common law area, it is now covered by statutes in all Australian jurisdictions.⁴

Defamation cases involving sport, while not all that common, do arise from time to time.⁵ An early case was that of *Tolley v J S Fry & Sons Ltd*⁶ where a leading amateur golfer had been depicted in a cartoon advertising Fry's Chocolates, the defamatory imputation being that the image suggested that he had been involved in the advertisement for reward which impacted on his amateur status. The advertisement was held as being capable of a defamatory meaning.⁷

Other successful cases include *Ettingshausen v Australian Consolidated Press*⁸ where Australian rugby league player, Andrew Ettingshausen, successfully sued HQ magazine for the publication of a photograph taken in the showers after a match. In *Hall v Gould*,⁹ criticisms made by commentator Phil Gould in *The Sun-Herald* newspaper and on radio 2GB, that the rugby league judiciary had acted 'perversely', 'corruptly', 'unfairly', had 'conspired together' in finding Craig Smith guilty of striking another player¹⁰ were all held as being capable of being defamatory.¹¹ In another case involving rugby league, Peter Holmes à Court was sued by Tony Papaconstuntinos, a strong supporter of a no vote in regard to the private takeover of South Sydney, after Holmes à Court had written and sent to Andrew Ferguson, State Secretary of the Construction, Forestry, Mining and

³ David Thorpe, Antonio Buti, Chris Davies, Saul Fridman and Paul Jonson, *Sports Law*, Oxford University Press, Second Edition, 2013, 212-214.

⁴ *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

⁵ For further discussion of these and other sports defamation cases see Chris Davies, 'A Storm Drifting By? Defamation and Sport in Australia and New Zealand', (2009) 40 *Victoria University of Wellington Law Review* 669.

⁶ [1930] 1 KB 467.

⁷ *Ibid.*

⁸ (1991) 23 NSWLR 443.

⁹ [2002] NSWSC 359.

¹⁰ *Ibid* [3] – [5].

¹¹ *Ibid* [31].

Energy Union (CFMEU). In the letter Holmes à Court had complained about the behaviour of Papaconstuntinos, an official of the CFMEU, about him spreading ‘misinformation about the proposal.’ Holmes à Court also raised his concerns about Papaconstuntinos using the club ‘for his own advancement’.¹² Justice McCallum held that the letter conveyed imputation,¹³ and was ‘not satisfied that the letter was published on an occasion of qualified privilege’.¹⁴ Damages of \$25,000 were then awarded.¹⁵

Perhaps the highest profile defamation case involving sport in Australia, however, was *Coates v Harbour Radio Pty Ltd*¹⁶ where John Coates, President of the Australian Olympic Committee (AOC) sued radio broadcaster, Alan Jones, for defamation. This was in relation to comments that Jones had made during his radio program on 2UE criticising Coates’ handling of the situation at the 2004 Athens Olympic Games where rower, Sally Robbins, had stopped rowing half-way during the final of the Women’s Eights. Jones had stated that the story raised ‘significant questions...over the leadership of the Australian Olympic movement’ and that ‘they had practised a cover up from the moment something happened to Sally Robbins’.¹⁷ These were held to be defamatory, with the defences of truth and fair comment being unsuccessful.¹⁸ Coates was awarded \$360 000 in damages.¹⁹

However, not all defamation actions by those involved in sport have been successful. Rugby league player, Les Boyd, was unsuccessful in his action in regard to a newspaper headline that had read ‘Boyd is fat, slow and predictable’ as it was held there was nothing in such a description that would tend to make people shun or avoid him, and the imputation could not be said to be disparaging.²⁰ More recently Stephen Dank, ‘instituted multiple proceedings for defamation arising out of widespread reports in the media suggesting he had administered performance enhancing drugs to footballers at Cronulla-Sutherland’.²¹ These involved legal action against the Cronulla-Sutherland club itself,²² and also Nationwide News²³ and Channel Nine²⁴ in regard to what had been reported in the media. These actions, however, were spectacularly

¹² Ibid [6].

¹³ Ibid [30].

¹⁴ Ibid [72].

¹⁵ Ibid [116]. Note that an appeal was made to the High Court but this was dismissed: *Papaconstuntinos v Holmes à Court* (2012) 249 CLR 534.

¹⁶ [2002] NSWSC 359.

¹⁷ Ibid [1].

¹⁸ Ibid [170].

¹⁹ Ibid [201].

²⁰ Ibid [456].

²¹ *Dank v Carroll; Dank v Nationwide News Pty Ltd* [2013] NSWSC 1122, [1] per McCallum J.

²² *Dank v Cronulla-Sutherland District Rugby League Football Club* [2013] NSWSC 1101.

²³ *Dank v Nationwide News Pty Ltd* [2016] NSWSC 156.

²⁴ *Dank v Nine Network Australia Pty Ltd* [2014] NSWSC 1728.

unsuccessful, Dank's problem being that the allegations were held to be true, or at least substantially true. This is stark contrast to the action taken by Sean Carolan, who, like Dank, can be best described as support personnel in regard to his working relationship with the club that was employing him.

III CAROLAN V FAIRFAX

A *Background Facts*

Sean Carolan was a personal trainer who ran a fitness and weight-loss business called Nubodi.²⁵ One of his clients was Martyn Kennedy, a rugby league player with the Sydney Roosters, who introduced him to the club, with Carolan having meetings with Lachlan Penfold, the club's sport scientist, and Keegan Smith, the club's conditioning coach.²⁶ He outlined the services he could provide to the club, namely blood 'testing for cortisole, thyroid, growth hormone, IGF, oestrional, LSH and testosterone'.²⁷ A cost of \$200 per player was approved, and Carolan's services were retained by the club.²⁸

During January and early February 2013, Carolan visited the club's premises 'about once a week to monitor the players' progress and provide advice'.²⁹ However, the now well-known ASADA press conference on 7 February 2013³⁰ 'prompted the [Sydney] Roosters to review the club's internal procedures, presumably to determine whether the club was at risk of becoming embroiled in any drug cheating scandal'.³¹ However, while the club's Board looked into the matter, there was 'no note or other record to suggest he [Carolan] did anything without the club's authority'.³² Later in 2013, 'news leaked of the blood test results being found on a mobile phone and an influential investigative journalist got wind of a good story'.³³ During the time when the issue of potential use of banned substances at other clubs, namely Cronulla-Sutherland and Essendon, comments from various journalists appeared in newspapers in regard to what may have occurred at the Sydney Roosters.

The comments were contained in four on-line publications written by a number of Fairfax journalists, namely Kate McClymont, Chris Barrett, Michael

²⁵ *Carolan v Fairfax Media Publications Pty Ltd* [2016] NSWSC 1091, [1].

²⁶ *Ibid* [49].

²⁷ *Ibid* [53].

²⁸ *Ibid* [55].

²⁹ *Ibid* [83].

³⁰ For a discussion of this press conference and the impact on Australian sport see Chris Davies and Neil Dunbar, 'A Tale of Two Codes: The Australian Football League and National Rugby League's Drug Controversies', (2015) *International Sports Law Journal* 1-28; Chris Davies, 'The Essendon doping saga: The legal ramifications', (2016) 42 *The Australian Bar Review* 415.

³¹ *Ibid* [86].

³² *Ibid* [88].

³³ *Ibid* [95].

Carayamnis and Peter Fitzsimmons, with their publication leading to Carolan taking legal action.

B *The Judgment of Justice McCallum*

The first of the on-line publications, dated 25 September, had the headline, ‘Rosters disturbed by blood results’, and was written by McClymont, Barrett and Carayamnis. In this article it was stated that the Sydney Roosters Chairman, Brian Canavan, had stated the players had been tested for human growth hormone, without their consent, or that of the club officials and staff, with the club then severing its arrangement with Nubodi.³⁴ Justice McCallum held that the article conveyed the two imputations argued by Carolan, and were therefore defamatory, namely that he had conducted blood tests on players without their consent, and ‘had so conducted himself as to warrant being terminated by the Sydney Roosters’.³⁵

The next article, written by McClymont, had the headline ‘Drugs cloud over Roosters as players’ blood results found on criminal’s phone.’ It referred to the Roosters’ ‘sacking sports nutritionalist Sean Carolan after his company tested players for human growth hormone’, with ‘some of the results found on a seized mobile phone, were found to have high [human growth hormone] HGH levels’.³⁶ A further alleged imputation from this article was ‘that the Plaintiff gave the results of blood tests he conducted on Sydney Roosters football players to an organised crime figure’.³⁷ Justice McCallum held that three imputations were conveyed by that article, and that each was defamatory ‘as the ordinary, reasonable reader would understand the article to attribute to Mr Carolan the act of giving the results of the blood tests to the unnamed organised crime figure’.³⁸

The next article complained of was ‘a commentary piece by the popular sports columnist, Mr Peter Fitzsimmons,’ that had been published on 26 September 2013 with the headline ‘Roosters drug cloud: saddest thing is we are not surprised’.³⁹ In this article Fitzsimmons had stated:

No drug cheating story in football is complete without a shady figure in a tracksuit, flogging sports supplements from the boot of his car, usually introduced to the club by one of the players. In this case, a personal trainer by the name of Sean Carolan, with “different training philosophies” was introduced by Roosters prop Martin Kennedy to the club. And the club was happy to have him on board! If we are to believe the Roosters’ Carolan conducted blood tests without the club’s knowledge or

³⁴ Ibid [4].

³⁵ Ibid [6].

³⁶ Ibid [8].

³⁷ Ibid [11].

³⁸ Ibid [13].

³⁹ Ibid [14].

consent, and wouldn't you know it, discovered that "a few of the boys had high growth hormones level".⁴⁰

The only imputation argued in regard to this article was 'that the plaintiff, a personal trainer, injected Sydney Roosters football players with the banned substance HGH' with McCallum J stating that the 'matter complained of conveys that imputation and that imputation is defamatory of Mr Carolan'.⁴¹ Her Honour then stated that as was 'the common practice of online newspapers' the article 'included hyperlinks to three related articles.' In this case these were the articles from 25 and 26 September, and another article, not sued separately, from 26 September which had the headline 'Crime link raises serious question NRL cannot ignore.' These four articles were then sued 'together as a separate, single publication'⁴² with Justice McCallum holding that Carolan was 'entitled to sue on the four articles taken together as a single publication'.⁴³

In regard to defences, McCallum J held there was no defence to the imputation that 'Carolan gave the results of the blood tests to an organised crime figure', and was plainly 'defamed by the publication of that imputation and is entitled to damages on that account'.⁴⁴ However, in regard to the imputations that Carolan had carried blood tests without the players consent, and had conducted 'himself so as to warranted being terminated by the club, Fairfax raised the defence of justification under s 25 of the *Defamation Act*. It then raised honest opinion under s 31 in regard to the imputation Carolan had injected players with HGH.⁴⁵

Justice McCallum stated that what Carolan 'ultimately demanded of his clients was hard training, good living and a healthy, natural diet...and with the added discipline of regular blood tests, it is hardly surprising that he got good results and was able to develop a good business'.⁴⁶ Her Honour also pointed out that no-one from the Roosters, or any player, had ever raised any question with Mr Carolan about the blood testing he had carried out, or whether he had tested the players for HGH. Furthermore, 'at no time from January 2013 to the end of August 2013 did any person raise the complaint with him about his having tested Sydney Roosters players for HGH or make any complaint to him about his work'.⁴⁷

It was submitted by Carolan that the defence of justification 'fails in circumstances where no player was called to give evidence that he did not consent

⁴⁰ Ibid.

⁴¹ Ibid [16].

⁴² Ibid [17].

⁴³ Ibid [22].

⁴⁴ Ibid [24].

⁴⁵ Ibid [26].

⁴⁶ Ibid [43].

⁴⁷ Ibid [85].

to' his tests, with McCallum J stating that 'I am inclined to think that is correct'.⁴⁸ Her Honour then stated she was 'satisfied that the players were told what tests were to be conducted and why' and that 'most of the players then attended the testing and had their blood taken'.⁴⁹

The justification defence for imputation (b) was primarily based 'on the contention that the plaintiff conducted a test for human growth hormone without notifying the club in advance and that such conduct would warrant his being terminated by the club'.⁵⁰ Justice McCallum, however, noted that there was 'a high degree of overlap between the tests' carried out by Carolan, and the tests on a list compiled by the club doctor, Dr Orchard. Her Honour then held that 'even if testing for human growth hormone by Mr Carolan was not expressly authorised by the club, I do not accept that was conduct such as to warrant his being terminated',⁵¹ and was 'not satisfied that the truth defence' was satisfied'.⁵²

The defence of honest opinion was raised in relation to both the Fitzsimmons' article and the composite article.⁵³ Justice McCallum noted that under s 31(1) (c) the opinion needs to be 'based on proper material' which is a defined term and 'relevantly for present purposes it includes material that is substantially true'.⁵⁴ Her Honour also pointed out that this defence is directed to the 'defamatory matter,' and what has to be determined is whether the defamatory matter 'amounts to a statement of fact about the plaintiff or an expression of opinion'.⁵⁵ Justice McCallum also acknowledged that the Fitzsimmons article was 'a commentary piece in which the author expresses his personal opinions' but then stated that 'the critical question is whether its defamatory import regarding the injection of players with the banned substance HGH would be recognised as comment or fact'.⁵⁶ Her Honour then stated that:

In my view the clear imputation that the explanation for high growth hormone levels in some of the players was that Mr Carolan had injected them with human growth hormone would be recognised as part of the factual premises for the robust opinions otherwise expressed by Mr Fitzsimmons in the article rather than as part of his conclusion or opinion. The focus of the commentary of the article is criticism of the club for not discovering an obvious fact and not preventing the drug cheating that in fact occurred.⁵⁷

⁴⁸ Ibid [89].

⁴⁹ Ibid [90].

⁵⁰ Ibid [91].

⁵¹ Ibid [92].

⁵² Ibid [96].

⁵³ Ibid [97].

⁵⁴ Ibid [99].

⁵⁵ Ibid [100].

⁵⁶ Ibid [105].

⁵⁷ Ibid [107].

It was then held that the defence failed ‘because the matter was, in its defamatory sense, a statement of fact rather than an expression of opinion’.⁵⁸

Justice McCallum therefore held that Carolan had established he was defamed by all four publications, that the ‘defamation was serious and it cannot be doubted that he is entitled to a substantial award of damages’.⁵⁹ Her Honour accepted that Carolan ‘had enjoyed an excellent reputation as a personal trainer prior to the publication of the matters complained of’, and that ‘the defamation struck at the heart of his reputation’.⁶⁰ Her Honour also accepted Carolan’s evidence ‘as to the dramatic impact of the publications to his reputation,’ that ‘he was devastated and shattered’ by them, and that he had ‘felt helpless’ and was in ‘a battle he could not fight’.⁶¹ Damages of \$300 000 were therefore awarded.

Thus, this case like those involving Stephen Dank, highlight that when looking at the issue of defamation and doping in sport, it can be support staff who are involved. However, it should be kept in mind that allegations of actually taking banned substances can also harm the reputations of athletes and players. Such allegations can therefore potentially lead to defamation action, as highlighted by *French v The Herald and Weekly Times Pty Ltd*.⁶²

IV FRENCH V HERALD AND WEEKLY TIMES PTY LTD

Mark French was a professional cyclist who had been found to have breached anti-doping policies, and was suspended for two years by CAS in June 2004, and a life Olympic ban by the AOC for trafficking in banned substances. However, on appeal, the CAS decision was overturned in July 2005, and his suspension set aside.⁶³ During this time articles had appeared in the *Herald Sun* newspaper containing material which French considered to be defamatory. He therefore began legal proceedings and in a preliminary hearing⁶⁴ requested the trial be conducted without a jury, which was upheld, the reason given by Beach J was that the defences taken by the defendant made the case ‘too complex to be heard by a jury’.⁶⁵

At the trial Justice Beach noted that the proceedings were in relation to two articles, the first, dated 10 August 2004 had the headline ‘We are the best in the world,’ while the second one had been published on 27 August 2004 with the heading ‘Coach pleads for a fair go’.⁶⁶ The two imputations that were pleaded in

⁵⁸ Ibid [109].

⁵⁹ Ibid [122].

⁶⁰ Ibid [130].

⁶¹ Ibid [138].

⁶² (No 2) [2010] VSC 155.

⁶³ Ibid [1].

⁶⁴ *French v The Herald and Weekly Times Pty Ltd* [2010] VSC 127, [22].

⁶⁵ Ibid [21].

⁶⁶ *French v The Herald and Weekly Times Pty Ltd (No 2)* [2010] VSC 155, [3].

the first article was that: (a) “The plaintiff was a drug cheat”; and (b) “The plaintiff had falsely claimed that five members of the [Australian Institute of Sport] AIS cycling team had used prohibited substances.’ The defendants denied the first article was defamatory, denied the plaintiff’s meanings,⁶⁷ and also pleaded it was true.⁶⁸

Justice Beach noted the meaning of this first article was ‘to be determined by the sense in which fair-minded, ordinary, reasonable people in the community would understand it,’ and ‘what the author or publisher intended it to convey is irrelevant when determining its meaning’.⁶⁹ His Honour then stated that while the first article did ‘not contain the express words “Mark French is a disgraced drug cheat” the only reasonable interpretation’ of the ‘words “instead of through the distorted views and allegations of disgraced drug cheats” is that it is Mr French who is the disgraced drug cheat referred to.’ It was then held that the ‘imputation that “the plaintiff was a drug cheat” arises and was conveyed by the first article’.⁷⁰

In regard to the claim that the first article also included imputation (b) Justice Beach held that ‘a reasonable reader of the article would, in my view, be left in no doubt that the article means that the plaintiff was a drug cheat and the plaintiff had falsely claimed that five Australian cyclists had used prohibited substances’.⁷¹ Since ‘saying that the plaintiff was a drug cheat was likely to lead an ordinary, reasonable person to think less of the plaintiff’, his Honour held that the ‘first article was undoubtedly defamatory of the plaintiff in both of the meanings which I have found it conveyed’.⁷²

Justice Beach, in relation to the second article, noted that unlike the first article, it merely referred ‘to the claims of Mr French as being “disproved”’.⁷³ It was then held that it did not convey the imputation that the plaintiff ‘had falsely claimed the relevant cyclists were drug cheats... to the ordinary, reasonable reader’.⁷⁴

In regard to the defendant’s argument that the first article was fair comment, Justice Beach held that ‘the ordinary, reasonable reader of the article would have understood that in saying the plaintiff was a drug cheat, a statement of fact was being made’ in regard to both the imputations.⁷⁵ It was also the view of his Honour that ‘what was conveyed by the article was not a mere statement of

⁶⁷ Ibid [6].

⁶⁸ Ibid [7].

⁶⁹ Ibid [13].

⁷⁰ Ibid [14].

⁷¹ Ibid [19].

⁷² Ibid [22].

⁷³ Ibid [24].

⁷⁴ Ibid [25].

⁷⁵ Ibid [37].

opinion, much less one backed by reasons'.⁷⁶ It was then held that it followed 'that the defence of fair comment is not made out'.⁷⁷ The defence of qualified privilege meanwhile was considered not to be available in this case as to do so 'would defeat the policy upon which the privilege is founded, making a plaintiff once defamed liable to being further defamed on every occasion he or she seeks to defend themselves'.⁷⁸

When looking at the question of damages, Justice Beach stated that 'it is, no doubt, a very serious defamation to call an elite professional cyclist a drug cheat.' His Honour then stated that 'the most relevant consideration when assessing the plaintiff's damages in this case is vindication. That is, whatever view one takes of the actual damage to reputation and hurt feelings, the amount must be sufficient to "nail the lie"'.⁷⁹ It was then held that compensatory damages of \$175 000 was 'the appropriate amount'.⁸⁰

V DISCUSSION

The media's coverage of sport in Australia is intensive, and with it comes criticisms of players and officials. Some of these criticisms can go as far as to amount to defamatory imputations, potentially leading to legal action. It is suggested that what then becomes a crucial factor is the truth, or otherwise, of those statements, with *Carolán* being an example of a case where the comments made were clearly not true. It is also suggested the subsequent decision at least partly reinforced Carolán's business reputation, and that he had simply been in the wrong place at the wrong time, there being no worse time to have become involved in a training and supplement program at an NRL club than in January 2013. While journalist Peter Fitzsimmons had almost self-righteously suggested that the facts had only emerged from investigative journalism, what emerged in court indicated little evidence of any proper investigation having taken place. These reports caused Carolán much stress and clearly impacted on his professional reputation, and while a successful defamation case does not lessen the stress caused, it at least allowed him to be financially compensated. The lesson for journalists from this case, it is suggested, is to make sure facts are checked before allegations are made regarding someone's involvement in doping related matters.

Thus, *Carolán* is a case that clearly shows the importance of defamation law in protecting someone's reputation and that supposedly restricting freedom of speech should never be considered an issue when the comments made are clearly

⁷⁶ Ibid [42].

⁷⁷ Ibid [43].

⁷⁸ Ibid [76].

⁷⁹ Ibid [87].

⁸⁰ Ibid [93].

not true. The case can also be contrasted with those involving Stephen Dank, even though the basic facts are similar as they likewise resulted from media comments in regard to a supplement program, in Dank's case, at another NRL club, Cronulla-Sutherland. Unlike Carolan, Dank was not successful, thus providing a stark contrast in the outcome of the defamations actions, despite the similarities of them both involving comments made about support personal and what they may have administered to rugby league players. The difference between the outcomes was lay in the truth behind the comments as in the Dank cases, the alleged defamatory imputations were held to be either true, or at least substantially true. Thus, from an examination of the outcome in these cases, the conclusion would be that defamation law in Australia does find the right balance between protecting reputations and allowing freedom of speech. In *Dank v Whittaker*, Justice McCullum made the comment that the articles in question had been 'well-written'. The author would also add 'well-researched' and at a time when the Australian public was keen know as much as possible about what had taken place at Cronulla-Sutherland. Thus, this represented a time when there was a clear need for freedom to publish material, with the court upholding this right while at the same time helping to protect the reputations of those who allegedly had made defamatory statements.

The lesson to be learned by the media in regard to the Mark French case meanwhile is to be careful what is said in regard to a sportsperson allegedly being involved in doping related activities until all the internal sports investigative and arbitration processes have been completed. As this case highlighted, defamation problems can later arise when an earlier decision of a sport's internal governing body or doping body, is overruled. Thus, what the media needs to do is be more careful it what it actually states, referring, for example, that someone had been found guilty of a doping offence by an internal tribunal, rather than at that stage labelling them a 'drug cheat.' It is also suggested that an interesting sideline to this case are the doping allegations made against Lance Armstrong, most notably by journalist David Walsh, five years before the 2012 United States Anti-doping Agency (USADA) Report into the matter. With the benefit of hindsight, it is perhaps noteworthy that Armstrong did not take any legal action in regard to the allegations Walsh made in his 2007 book, *From Lance to Landis*,⁸¹ when an innocent athlete might have been expected to do so.

It is the author's opinion that both *Carolan* and *French* were correctly decided, as were the *Dank* cases. Thus, from an examination of a specific aspect of sports defamation law, namely those cases arising from a sports doping situation, the decisions indicate that Australian defamation law does find a balance between the need for freedom of speech, and the need to protect an individual's

⁸¹ David Walsh, *From Lance to Landis: Inside the American Doping Controversy at the Tour de France*, 2007, Ballantine Books. For further discussion see Chris Davies, 'Doping in Sport: Landis, Contador, Armstrong and the Tour de France', (2013) 25 *Bond Law Review* 66.

reputation. The law protected an individual's reputation in the both the *Carolan* and *French* cases, and preserved the right to freedom of speech in the *Dank* cases. All the cases involved comments made in the media, the difference being in the truth of the comments, the law protecting the well written and well researched media comments made about Stephen Dank, but not the ones lacking journalistic integrity concerning Sean Carolan. It is further suggested that this is also highlighted in the other sports defamation cases. Freedom of speech does not need to extend to comments, such as those made by Phil Gould, that a tribunal had acted 'corruptly' and had 'conspired together', unless it can be shown the comments are true. Nor should it allow the comments made by Alan Jones about John Coates's handling of the Sally Robbins situation when the comments were, again, clearly not true.

VI CONCLUSION

The level of media coverage of sport in Australia, and the amount of criticism contained in that coverage, does mean that from time to time, comments made in the media will lead to defamation action. The last few years have seen a multitude of actions by Stephen Dank, as well as the one involving Sean Carolan, all of which involved comments made in relation to support personal and banned substances they may, or may not, have given to players. These, and the earlier case involving Mark French, highlight that because of the significance of alleging someone in sport may be involved in doping, defamation action may arise, the cases illustrating that the outcome will usually come down to the truth, or otherwise, of these allegations. Defamation law needs to find a balance between protecting reputations while at the same time preserving the freedom of speech. It is suggested that an examination of both the specific doping defamation cases, and the general sport defamation cases, indicate that in its application to sport, the law does provide the right balance.