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Abstract

Stephen Dank is a name that will now be forever linked to the doping scandals at Cronulla-Sutherland and Essendon which arguably represents the biggest ever story in Australian sports law. Part of that story are the numerous defamation actions Dank took against anyone he perceived to be making criticisms of him in the media. However, rather than restoring his reputation, it is suggested the defeats he suffered in court actually protected the reputations of those accused of defamation, while at the same time further damaging his own. At considerable expense, too, with costs being awarded against Dank on all occasions. The cases reinforced the principle that even if someone has contributed material, unless they have consented, or have control of the final version, they will not be held liable for what is said or written. Most significantly, however, was the insight the cases provided into what actually happened at Cronulla-Sutherland during its doping scandal.

Keywords

Cronulla-Sutherland, Essendon, scandal, football

Disciplines

Law

DOPING IN SPORT AND THE ISSUE OF DEFAMATION IN AUSTRALIA: THE STEPHEN DANK CASES

CHRIS DAVIES*

Stephen Dank is a name that will now be forever linked to the doping scandals at Cronulla-Sutherland and Essendon which arguably represents the biggest ever story in Australian sports law. Part of that story are the numerous defamation actions Dank took against anyone he perceived to be making criticisms of him in the media. However, rather than restoring his reputation, it is suggested the defeats he suffered in court actually protected the reputations of those accused of defamation, while at the same time further damaging his own. At considerable expense, too, with costs being awarded against Dank on all occasions. The cases reinforced the principle that even if someone has contributed material, unless they have consented, or have control of the final version, they will not be held liable for what is said or written. Most significantly, however, was the insight the cases provided into what actually happened at Cronulla-Sutherland during its doping scandal.

I INTRODUCTION

The doping cases against the Australian Football League (AFL) team, Essendon, and National Rugby League (NRL) team, Cronulla-Sutherland, dominated much of the sports media during the 2013-15 period. In regard to Essendon, it resulted in two Federal Court cases,¹ a Court of Arbitration (CAS) decision,² and appeal to the Swiss courts.³ The person behind the supplement program at both Essendon and Cronulla-Sutherland, Stephen Dank, faced media scrutiny in relation to these programs. His response was invariably to threaten

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¹ *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1; *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95.

² *World Anti-Doping Agency v Bellchambers* CAS 2015/A/4059.

³ For further discussion of these cases see Chris Davies 'The Essendon doping saga: The legal ramifications,' (2016) 42 *Australian Bar Review* 415; For further discussion of 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.

defamation against anyone who criticised what he had done, these threats leading a number of cases that were heard in the New South Wales Supreme Court.⁴

This paper will therefore examine the complex case history of these actions which involved numerous respondents in a number of proceedings. It will examine the basis of the claims, the judicial reasoning behind the decisions and their relevance for Australian sport. It will also examine the insight they provide to the associated doping scandal, the significance of which is that Dank refused to give evidence in relation to the supplement programs he conducted at both Essendon and Cronulla-Sutherland. Thus, one of the points that will be discussed is the function the litigation played in improving the awareness of the doping regime at Cronulla-Sutherland.

II THE STEPHEN DANK CASES

A *Dank v Cronulla-Sutherland*

During the 2011 season Stephen Dank was involved in providing a supplements program to Cronulla-Sutherland players. Although no player tested positive to any doping tests carried out during that season, Cronulla-Sutherland later became the centre of an ASADA investigation. This resulted in ASADA issuing 17 players with show cause notices in relation to use of illegal substance during Dank's 2011 supplement regime, the players accepting a back-dated 12 month ban in August 2014.⁵ In the meantime, Dank had taken defamation action against those who criticised his program, one of the actions being against Cronulla-Sutherland.

The claims against Cronulla-Sutherland were in relation to a Channel Nine television broadcast involving comments Cronulla-Sutherland Chairman, Damien Irvine, had made to journalist, Phil Rothfield,⁶ which had been

⁴ *Dank v Cronulla-Sutherland District Rugby League Football Club* [2013] NSWSC 1101; *Dank v Carroll; Dank v Nationwide News Pty Ltd* [2013] NSWSC 1122; *Dank v Whittaker (No 3)* [2013] NSWSC 1822 *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288; *Dank v Whittaker (No 5)* [2014] NSWSC 914; *Dank v Nine Network Australia Pty Ltd* [2014] NSWSC 1728; *Dank v Rothfield* [2015] NSWCA 193; *Dank v Nationwide News Pty Ltd* [2016] NSWSC 156; *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295.

⁵ Chris Davies and Neil Dunbar, 'A Tale of Two Codes: The Australian Football and National Rugby League's doping saga', (2015) *International Sports Law Journal* 1, 11.

⁶ In *Dank v Nine Network Australia Pty Ltd* [2014] NSWSC 1728 the actual defamation action itself was in relation to a television news broadcast, the defendants being the Nine Network, two employees, Peter Overton and Sarah Harris, and also Phil Rothfield: [1]. Justice McCallum noted that Dank's claim against Rothfield was on the basis that he was liable 'as a publisher of the television,'[3] and that Dank had 'a history of attempts' against him:[4]. In regard to Rothfield, her Honour noted that 'where a person merely contributes material to an article, but has no control over the publishing process, liability will not ordinarily be established unless he or she assents to the final form.'[9] Her Honour noted that the proposition of the application was that 'by participating in an interview in his newspaper article, Mr Rothfield had brought

published in *The Daily Telegraph*. The broadcast from 10 March 2013 showed Irvine being confronted by journalists in regard to the contents of this newspaper article. Dank's statement of claim alleged 'defamatory publications arising from those events'⁷ in relation to a comment that had been made by Irvine 'on or about 9 March'.⁸

Justice McCallum noted 'that the pleading of the words attributed to Mr Irvine does not plead the whole of the words said by him on any single occasion and does not plead the context in which the words were allegedly said'.⁹ Since the pleading did not 'provide the whole of any single publication'¹⁰ her Honour granted Dank an opportunity to draft interrogatories.¹¹ When the proceedings resumed four months later, however, McCallum J noted that Dank saw 'no utility in interrogating Irvine'.¹² and held that the amended statement of claim repeated 'the vices identified in the original'¹³ and therefore the 'matter complained of remains in embarrassing form and must be struck out'.¹⁴ Justice McCallum also stated, relying on *Webb v Block*,¹⁵ that 'where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form'.¹⁶

Dank then appealed this decision,¹⁷ one of the grounds being that Justice McCallum had applied the wrong test in relation to assessing whether the respondents were joint publishers in regard to the television broadcast.¹⁸ Dank's argument was that McCallum J had applied 'some new form of control test.' The Court of Appeal, however, held that her Honour had correctly applied the test in *Webb v Block*,¹⁹ reaffirming that to be liable the person has to assent the final

himself within the scope...of being someone as to whom "something further" has been established so as to make the person liable as joint publisher.' [11] It was Dank's claim that while the newspaper article did 'not draw a direct link between Mr Dank and the provision of "horse drugs" to football players, the television broadcast' did, the inference being that Rothfield had provided the Nine Network with the information: [15]. Her Honour held that 'it could hardly be thought that the Nine Network defendants required Mr Rothfield's assistance to draw that conclusion,' further stating that the pleading against Rothfield 'must be struck out without liberty to re-plead' [20].

⁷ *Dank v Cronulla-Sutherland District Rugby League Football Club* [2013] NSWSC 1101, [5].

⁸ *Ibid* [17].

⁹ *Ibid* [24].

¹⁰ *Ibid* [25].

¹¹ *Ibid* [36].

¹² *Ibid* [10].

¹³ *Ibid* [14].

¹⁴ *Ibid* [16].

¹⁵ (1928) 41 CLR 331.

¹⁶ *Dank v Cronulla-Sutherland District Rugby League Football Club* [2013] NSWSC 1101 [17].

¹⁷ *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288.

¹⁸ *Ibid* [127].

¹⁹ *Ibid* [137].

form. It then held that ‘no error warranting appellate review had been established’.²⁰

At the same time the action against Cronulla-Sutherland was in the courts, Dank was also taking legal action against Nationwide News in relation to articles that had appeared in *The Daily Telegraph* and *The Sunday Telegraph* newspapers.²¹ The actual case would take nearly three years to be heard, as it involved a number of interlocutory judgments that were needed to resolve a number of issues. While interlocutories can be viewed as merely preliminary steps to the actual decision, it is suggested that these particular ones are more significant than usual. This is because not only do they contain comments relevant to the actual defamation case, but also provide some insight into what actually happened during Dank’s supplements program at Cronulla-Sutherland. It should be noted that Dank refused to co-operate, or give evidence, during the doping investigations into his programs at both Cronulla-Sutherland and Essendon, and while the facts surrounding the doping issues at Essendon are now well documented in both the Federal Court and CAS decisions, no such material exists in regard to the situation at Cronulla-Sutherland. Thus, all the judgments in the Dank defamation cases, including the interlocutory judgments, provide relevant material beyond just the defamation issues since they also provide a valuable insight into the doping aspects of the cases.

B *Dank v Nationwide News*

1 *The Interlocutory Decisions*

The interlocutory decisions began on 7 August 2013 with *Dank v Whittaker (No 1)*,²² Whittaker being the staff editor at *The Daily Telegraph*. Others involved in the proceedings were Dr Peter Larkins, Professor Kenneth Ho, and a number of News Ltd journalists. The first proceeding arose out of an article published in *The Daily Telegraph* on 26 April 2013 referring to a leaked report warning Cronulla-Sutherland ‘of an apparent causal link between the administration of peptides to its footballers, and the death of one footballer, Mr Jon Mannah’.²³ Mannah had been diagnosed with Hodgkin’s lymphoma, though after going into remission he was able to return to the club in 2011 where he had been injected with two peptides over a several month period. He subsequently died in early 2013.²⁴

This report referred to published medical literature suggesting a causal link between peptides and ‘the acceleration of the condition of the disease Hodgkin’s

²⁰ Ibid [144].

²¹ The dates of publication of these articles were 10 March 2013, 26 April 2013 and 4 June 2013. [2013] NSWSC 1062.

²³ Ibid [5].

²⁴ Ibid.

lymphoma'.²⁵ The newspaper article then referred to statements attributed to Dr Peter Larkins that 'I would have thought if I had any player or any patient that had any history of any cancer process the last thing I would even contemplate giving them is anything that increased cell growth'.²⁶ Justice McCallum, however, noted that 'the comments attributed to Dr Larkins by no means make up the whole of the matter complained of' as there was also 'a great deal of input' from journalists and other sources.²⁷

Dr Larkin's submission was that 'in order to establish a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent'.²⁸ This was accepted by McCallum J who stated that 'a person who merely contributes to part of what is published will not be jointly liable as an original publisher unless he or she assents to its final form'.²⁹ Since the particulars were incapable of sustaining the allegation Dr Larkins had control over the final version, the pleading against him was struck out.

The second proceeding related to an article published in *The Daily Telegraph* on 4 June 2013, with Dank suing Professor Ho,³⁰ the implication relied on by Dank being that he was 'a murderer and had murdered Jon Mannah' and was 'facing potential criminal action by the NSW Police Force'.³¹ Again these particulars were held to be incapable of sustaining the allegation of control or assent,³² though leave to re-plead was granted. Significantly, costs were awarded against Dank on both matters.³³

The *Dank v Whittaker (No 2)*³⁴ interlocutory judgment again related to articles referring to Jon Mannah that had appeared in both the hard copy and internet versions of the paper. The first two alleged imputations were that (a) the plaintiff was a murderer, and that (b) he had murdered Jon Mannah. The defendant's submissions were that the articles made it clear that Mannah had died of cancer, and there was nothing to suggest deliberate killing or 'that the plaintiff's culpability (if any) in connection with the death would be such as to make him criminally responsible for murder'.³⁵ It was then held by McCallum J that the 'matter complained of is plainly incapable of conveying any imputation of deliberate killing or of an act causing death with any intention to harm'.³⁶ In

²⁵ Ibid [45].

²⁶ Ibid [8].

²⁷ Ibid [9].

²⁸ Ibid.

²⁹ Ibid [[22], [26]].

³⁰ Ibid [13].

³¹ Ibid [17].

³² Ibid [33].

³³ Ibid [36].

³⁴ [2013] NSWSC 1064 [7].

³⁵ Ibid [8].

³⁶ Ibid [10].

regard to imputation (c) that the plaintiff accelerated the death of Jon Mannah, Justice McCallum accepted the articles were ‘capable of carrying some defamatory meaning arising from the causal link drawn in the articles between the administration of peptides to Jon Mannah...and an accelerated return of his cancer, which ultimately caused his death.’ However, her Honour then held that the ‘difficulty is that the imputation in its present form fails to identify any defamatory sting’.³⁷

A further imputation, imputation (f), was that the plaintiff administered dangerous and cancer causing supplements to footballers, therefore exposing them to risk.³⁸ While the defendants’ submissions were that ‘the distinction between causing cancer and contributing to its growth is well made’, her Honour held that imputation was ‘open to the jury to conclude from the material reported... that the substance in question could be characterized as “cancer causing”’. Thus, although the imputation was ‘perhaps tenuous’, her Honour was ‘not persuaded that it is liable to be struck out on a capacity basis’.³⁹

The next interlocutory, *Dank v Carroll*,⁴⁰ was in relation to the article published in *The Sunday Telegraph* on 10 March 2013. It had been reported in the article that Rachel Givney, daughter of the Cronulla-Sutherland doctor, Dr David Givney, had posted ‘an emphatic defence of her father’s reputation on Facebook’ after he had been sacked by the club. The newspaper article quoted Rachel Givney that shortly after her father had seen heavy bruising on some players, he had ‘discovered that Dank had been injecting them with warfarin, a blood thinning medication in an attempt to increase blood flow.’ She went on to state that ‘concerned about the welfare of his beloved players, the doc confronted Danks and Elkin about what they were doing’ and that when ‘they refused to tell him, Dr Givney resigned...in protest’.⁴¹

The first imputation relied on by Dank, imputation (a) was that he had caused Cronulla-Sutherland players to be at risk of sustaining fatal injuries.⁴² The defendants’ objectives to this imputation was that it was not reasonably capable of being conveyed by the matter complained of since there was no reference in the article to any injury which might be considered fatal, only the ‘mysterious heavy bruising’ described by Givney. Justice McCallum held ‘that imputation (a) plainly overstretches any reasonable reading of the article’ since there is nothing

³⁷ Ibid [14]. Justice McCallum also stated that the ‘imputation has the vice of also suggesting a more sinister meaning,’ and was therefore ‘liable to be struck out for that additional reason [19].

³⁸ Ibid [24].

³⁹ Ibid [27].

⁴⁰ *Dank v Carroll; Dank v Nationwide News Pty Ltd* [2013] NSWSC 1122.

⁴¹ Ibid [3].

⁴² Ibid [7].

‘in the language or the tone of the article to suggest to the ordinary reader that footballers were exposed to serious injuries’.⁴³

However, in regard to next imputation, imputation (b), that the plaintiff oversaw the administration of the medication warfarin on Cronulla-Sutherland players which cause heavy bruising and endangered their health,⁴⁴ it was held that this matter complained of was capable of carrying the imputation. The reason for this was that Justice McCallum was ‘not persuaded that a jury could not reasonably understand the article to mean that the administration of warfarin endangered the footballers’ lives.⁴⁵

A feature of the proceedings was that Dank attempted to maximise the actual number of proceedings in order to maximise any subsequent damages award. This issue was addressed in *Dank v Whittaker (No4)*⁴⁶ where there was an application by the defendants to have the six proceedings consolidated into one, or alternatively into three.⁴⁷ The basis for this was the claim that the multiple proceedings amounted ‘to an abuse of the process of the court in that it is calculated to defeat the statutory ‘caps’ on the amount of damages than can be recovered for non-economic loss in a single defamation proceeding’.⁴⁸ Justice McCallum pointed out that the publication of defamatory matter can give rise to more than one cause of action, particularly in relation to publications in the mass media. Her Honour added that ‘strictly speaking there is also a separate cause of action for each publication, that is, each occasion on which the defamatory matter is comprehended by an individual reader’.⁴⁹

Justice McCallum then held that the application to consolidate all six proceedings into a single one had to be rejected since ‘the three discrete sets of allegedly defamatory matter’ did not ‘amount to the same defamatory matter’.⁵⁰ Thus, the publication of a different defamatory article may properly be regarded as a different wrong giving rise to an entitlement to claim a separate amount of

⁴³ Ibid [11].

⁴⁴ Ibid [12].

⁴⁵ Ibid [16]. Note that *Dank v Whittaker (No 3)* [2013] NSWSC 1822 involved an application by Dr Larkins to have costs awarded to him on an indemnity basis due to the fact Dank had been granted leave to re-plead, but in the following months there had been a number of amendments to the statement of claim after objections by Dr Larkins. Justice McCallum stated that if close consideration is given ‘to the points taken in the correspondence and the plain lack of attention given on behalf of the plaintiff to those points, the matter, in my view does rise outside or above the ordinary category.’ Costs were therefore awarded on an indemnity basis, her Honour further noting that Dr Larkins experience of the litigation against him had been an ‘unhappy one’: at [9-10].

⁴⁶ [2014] NSWSC 732.

⁴⁷ Ibid [4].

⁴⁸ Ibid [7].

⁴⁹ Ibid [24].

⁵⁰ Ibid [40].

damages for non-economic loss'.⁵¹ However, her Honour did accept that 'within each of the three sets of two proceedings, the defamatory publication relied upon the same or like matter'.⁵² Her Honour added that 'the division of the plaintiff's causes of action into separate proceedings for print and internet entails a measure of artificiality'.⁵³ The six proceedings were therefore consolidated into three.⁵⁴

2 *The Trial Decision*

Justice McCallum stated there was a need to produce a set of questions for the jury,⁵⁵ while the defences raised by the defendants were s 25 of the *Defamation Act*, and contextual truth under s 26 (2). Her Honour determined the jury should be directed to answer the questions in two stages, the first stage being whether the imputations were conveyed, were defamatory, and were substantially true. The second stage was then 'to determine the questions raised by the defendants' defence of contextual truth'.⁵⁶ Her Honour ordered that the questions of truth to be determined by the jury were:

- (a) First the questions as to publication, whether the plaintiff's imputations were conveyed, whether the plaintiff's imputations were defamatory, and whether those of the plaintiff's imputations to which the defence of justification is pleaded are substantially true.
- (b) Secondly, the questions raised by the contextual truth defence, namely whether the matters complained of conveyed the contextual imputations, whether those imputations were substantially true and whether because of the substantial truth of the contextual imputations the plaintiffs defamatory imputations do not further harm his reputation'.⁵⁷

Justice McCallum noted that the first matter complained of in the published articles⁵⁸ related to allegations that Dank had injected players with Warfarin. The second matter complained of was a collection of related articles discussing the content and implications of a 'secret' independent report to the board at Cronulla-Sutherland concerning Dank's supplement program for the club, the report noting a matter of special concern being the case of Jon Mannah who had

⁵¹ Ibid [43]. Note that her Honour held that the Act does not consider all those involved in the publication, that is, the journalists, editors and corporate proprietor to be the "same defendant": [51].

⁵² Ibid [56].

⁵³ Ibid [64].

⁵⁴ Note that costs were then awarded in regard to the application to have the previous proceedings consolidated on a 'costs in the cause' basis: *Dank v Whittaker (No 5)* [2014] NSWSC 914 [11].

⁵⁵ *Dank v Nationwide News Pty Ltd* [2016] NSWSC 156 [3].

⁵⁶ Ibid [4].

⁵⁷ Ibid [17].

⁵⁸ *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 [2].

been diagnosed with Hodgkins lymphoma.⁵⁹ The third matter complained of was an article with the headline, ‘Police look at Mannah death’ which had been written by journalist, Yoni Bashan, and while Dank was not actually named, Dank argued readers would have identified him from earlier articles.⁶⁰ It was contended that the article contained the following defamatory imputations, namely that (a) he administered peptides to Jon Mannah and thereby accelerated his death; (b) by giving peptides to Mannah, placed him at considerable risk of propagating his cancer; (c) that he had ‘administered banned substances to Mannah without his consent.’ The jury, however, found that none of the imputations was conveyed. Judgment was therefore entered in favour of the defendants, with costs again being awarded against Dank. Justice McCallum noted that ‘the article was carefully written’ and that ‘the newspaper argued that it merely reported that the information in question had been handed to the police and did not pre-judge the issue of Dank’s involvement in Mannah’s death’.⁶¹

In regard to the second matter, the jury found the articles had a number of conveyed defamatory comments. These were that Dank had administered prohibited substances; had acted with reckless indifference to Mannah’s life by administering dangerous peptides during his remission; had thus accelerated his death; and that his conduct in administering peptide substances to football players was absolutely indefensible, and justified one of Australia’s leading sports physicians to express his horror. The jury, however, found that each of these imputations were substantially true, and the effect of this verdict meant that a complete defence was established in relation to the second matter.⁶² Judgment was therefore for the defendants, with Dank ordered to pay costs.⁶³

What then had to be determined was the first matter, which involved the article where Rothfield had republished comments posted by Rachel Givney on Facebook.⁶⁴ It was held that Givney’s assertion that Dank ‘had been injecting players with the drug Warfarin was factually correct’.⁶⁵ It was contended that the article conveyed the following imputations: (a) he had caused the Cronulla-Sutherland football players to be at risk of sustaining fatal injuries; (b) has overseen the administration of Warfarin which had caused heavy bruising; (c) has overseen the administration of a physically dangerous medication to Cronulla-Sutherland players; (d) had injected the Cronulla-Sutherland players with Warfarin thereby endangering lives.

⁵⁹ Ibid [5].

⁶⁰ Ibid [9].

⁶¹ Ibid [11].

⁶² Ibid [8].

⁶³ Ibid [9].

⁶⁴ Ibid [14].

⁶⁵ Ibid [15].

While (a) was not considered to be defamatory, and substantial truth applied to (c), both (b) and (d) were held to be defamatory.⁶⁶ Thus, ‘the effect of the jury’s verdict in respect of the first matter the defences of justification and contextual truth both failed, and Dank was therefore entitled to judgment in his favour.’⁶⁷ What then had to be determined was the damages, with it being noted that the defendants were permitted to rely, in mitigation of the damages, on the imputation being substantially true, namely that he oversaw the administration of a physically dangerous medication to Cronulla-Sutherland players.⁶⁸

In regard to the defamatory impact of the first matter, it was noted that the complaint arose from the wrong report that Dank had injected players with Warfarin, and while this can be a dangerous drug, ‘there was no suggestion Mr Dank ever injected any player with it.’ It was therefore ‘wrong and defamatory to say that he had’.⁶⁹ Justice McCallum then noted that ‘in order to assess the impact of Mr Dank’s reputation of the publication of the two Warfarin imputations, it is important to evaluate the nature of the error’.⁷⁰ Her Honour then referred to one Cronulla-Sutherland player, Isaac Gordon, who had been instructed by the club’s strength and fitness coach, Elkin, to take 20mls of a BB Formula supplied by Dank every ‘morning and night’.⁷¹ When Gordon suffered severe bruising after a match on 15 May 2011, Dr Givney had made an inquiry ‘as to whether it maybe something to do with the supplements’,⁷² given the fact it was similar to bruising suffered by another Cronulla-Sutherland player in an earlier game.⁷³ When Dr Givney examined Gordon on 24 May 2011, he made notes of the consultation in which he stated: ‘Covered in bruises after footy game...?? Looks like a patient on Warfarin’.⁷⁴ Her Honour noted this was likely the source of his daughters ‘misapprehension that Mr Dank had injected the players with Warfarin.’ Thus, ‘the important point is that it was not a wild error which came

⁶⁶ Ibid [18].

⁶⁷ Ibid [24].

⁶⁸ Ibid [26]. Note that what was also raised was whether further evidence should be tendered at the damages hearing. This included a letter dated 30 June 2014 from ASADA to Dank giving notice of the decision of the Anti-Doping Rule Violation Panel’s finding against him: [30]. While this had been tendered during the proceedings, as going to damages only, it had been held it would be ‘unfairly prejudicial...if the jury were to learn of the view of the ADRUP on the very issue for the jury’s determination: [31]. In regard to it being tendered during the damages hearing, it was held that ‘the relevance of the letter is so tenuous as to require the rejection of the letter: [35]. The second document was the arbitral award at CAS involving WADA and the Essendon players: [36] This, however, was held not to have ‘relevant background context’, her Honour adding that the failure to particularise the matters was ‘determinative’ and also raised doubts about the ‘fairness of admitting the evidence: [38].

⁶⁹ Ibid [45].

⁷⁰ Ibid [46].

⁷¹ Ibid [47]. Note that this ‘BB Formula’ was described as ‘horse feed supplement’: [1].

⁷² Ibid [50].

⁷³ Ibid [49].

⁷⁴ Ibid [53].

out of the blue' since it 'reflected the substance of a medical concern about Mr Gordon based on the doctor's observations'.⁷⁵

It was also noted that a photograph of the BB Formula, taken by the club's physiotherapist, Konrad Schultz, and sent to Dr Givney, revealed it was recommended 'for animal treatment only.' Justice McCallum stated that despite Dank having investigated its effect, 'the decision to give football players a supplement intended for horses in training was alarming, to say the least'.⁷⁶ An expert haematologist, Professor Salem, called by the defendants, stated his opinion was that Gordon's 'bruising was extensive and pathological, pathological because it was abnormal and suggestive of a derangement on the person's ability to clot'.⁷⁷ His conclusion was 'that the most likely cause of the bleeding disorder he observed in Mr Gordon was the intake of a substance that interfered with the functioning of the [blood's] platelets.' Thus, the taking of the BB Formula was 'to be akin to a person receiving a platelet-inhibiting drug'.⁷⁸

Justice McCallum stated there 'was evidence on which the jury was satisfied that Mr Dank oversaw the administration of a physically dangerous medication to Cronulla-Sutherland football players',⁷⁹ further adding that the remarks of Rachel Givney posted on Facebook, and republished by Rothfield, expressly attributed Dank with having injected Warfarin. Her Honour then stated that:

Although this was untrue, the evidence has persuaded me that the sting of the two Warfarin imputations has been proved to be substantially true. The substance in question was not Warfarin; it was a substance intended as a feed supplement for horses. It might have sounded harmless but it had not been appropriately tested for therapeutic use by humans. It should not have been used on football players.

Her Honour then held that she 'was of the view that the mitigating impact of the true imputation reduces the damages that should be awarded to such an extent that there should be no award of damages in this case.' Dank was, once again, ordered to pay costs.

III DISCUSSION

The intense media coverage of the doping scandals that engulfed Cronulla-Sutherland, and also Essendon, highlighted the seriousness of doping issues within sport. Thus, to state that someone is involved in doping, either in supplying banned substances, or to be actually taking them, may potentially harm

⁷⁵ Ibid [54].

⁷⁶ Ibid [59].

⁷⁷ Ibid [61].

⁷⁸ Ibid [68]. It was also noted that this had been made worse by the fact he was also taking Lacitaway that contains Pyenogent, which also has an inhibiting effect on platelet activation: [69].

⁷⁹ Ibid [73].

their reputation. If so, defamation law can be important in providing legal protection to those accused of some involvement in doping.

Stephen Dank viewed much of the media coverage of his involvement at Cronulla-Sutherland as an attack on his professional reputation, which is why he launched legal action against numerous parties. In the case against the club itself, words attributed to club chairman, Damien Irvine, and published in *The Daily Telegraph*, were held not to be defamatory because Irvine had no control over the publishing process, a point upheld by the Court of Appeal. The main case was against Nationwide News where the allegations were held to be true, or at least substantially true, which is why no damages were awarded.

Thus, it is suggested that what these *Dank* cases also illustrated was that defamation law can, in fact, protect the reputations of those accused of making defamatory imputations by allowing them to prove in court that they were merely conveying the truth, or that it was fair comment. It is worth noting that Justice McCallum stated that the relevant articles in *The Daily Telegraph* and *The Sunday Telegraph* were ‘carefully written.’ The author would also add that they were made at a time when the Australian sporting public wanted, and needed, to know as much as possible about the doping scandals forming part of the biggest case in Australian sports law. A significant aspect of this doping scandal was that while the players could be forced to attend ASADA interviews by means of clauses in their contracts, there was no such legal right to subpoena the person responsible for actually administering the substances, namely Stephen Dank. It is suggested therefore that the case highlights that an important function of a state funded court system is that the actual litigation can provide the public with information which has not fully come to light by any other means. It is further suggested that the cases also highlight a positive aspect of the adversarial system, and that is of the truth emerging during the process. While Dank could avoid ASADA, the NRL and AFL processes by refusing to be interviewed, once he launched legal action, he could not avoid being cross-examined in court, and it is clear that Dank was not able to cope with the scrutiny of these cross-examinations.

In launching so many actions it is clear that Dank very much took the approach that attack was the best form of defence in regard to the media criticism. It is the author’s opinion that his action against Dr Peter Larkins was the most deplorable as he had merely responded to a question put to him on a live television interview, his answer being based on sound medical knowledge and principles.⁸⁰ While this was vindicated in court, with the judgment backing his medical reputation, the action was still stressful for Dr Larkin. However, the

⁸⁰ The author witnessed this television coverage and can testify that Dr Larkins reply was in response to an interview question.

person who seemed to be deliberately targeted by Dank was Nationwide News journalist, Phil Rothfield.

In *Dank v Nine Network Australia Pty Ltd*⁸¹ the actual defamation action was in relation to a television news broadcast, but Rothfield was also included.⁸² Justice McCallum noted that Dank's claim against Rothfield was on the basis that he was liable 'as a publisher of the television',⁸³ and that Dank had 'a history of attempts' against him'.⁸⁴ It was Dank's claim that Rothfield had provided the Nine Network with the relevant information.⁸⁵ Her Honour, however, had held that 'it could hardly be thought that the Nine Network defendants required Mr Rothfield's assistance' further stating that the pleading against Rothfield 'must be struck out without liberty to re-plead'.⁸⁶ Dank, however, took the matter to the Court of Appeal, the application for leave to appeal being 'an attempt to restore Mr Rothfield as a defendant in the proceedings'.⁸⁷ The application, however, was dismissed, it being held that it raised 'no issue or principle'.⁸⁸ The Court of Appeal also added that the 'prolonged interlocutory disputation of the kind that has occurred in this case is not to be encouraged' and that it was 'time that this case proceeded to trial'.⁸⁹

Dank was also ordered to pay Rothfield's costs, and indeed a common thread to the narrative of the fifteen judgments resulting from his defamation actions was that of costs being awarded against him. Thus, while Dank considered legal action to be the best way to protect his reputation, it proved to be spectacularly unsuccessful. And very expensive, for even in the one situation where a comment was held to be defamatory, it was held to be substantially true, and Justice McCallum exercised her discretion not to award any damages. As previously mentioned, one of the benefits of all these cases was that it threw more light on what actually happened at Cronulla-Sutherland, with it being further suggested that what did emerge further damaged Dank's reputation, rather than helping to restore it. For instance, the confirmation in court of the truth of the statement Dank had supplied players with a substance only intended to be consumed by horses, reinforced the perception of him being nothing more than a 'witch-doctor sports scientist'.⁹⁰

⁸¹ [2014] NSWSC 1728.

⁸² Ibid [1].

⁸³ Ibid [3].

⁸⁴ Ibid [4].

⁸⁵ Ibid [15].

⁸⁶ Ibid [20].

⁸⁷ *Dank v Rothfield* [2015] NSWCA 193 [10].

⁸⁸ Ibid [28].

⁸⁹ Ibid [31].

⁹⁰ Patrick Smith, Essendon doping, *The Australian*, 24 February 2017, 32.

In regard to defamation law, the cases reinforced the aspect of the law that even if you have contributed material, unless you consent, or have control of the final version, you will not be held liable for what is said or written. While this was, from a general defamation law perspective, merely a reaffirmation of the High Court decision in *Webb v Bloch*,⁹¹ it is suggested this is still a significant contemporary statement for sport. The reason for this is that the rise of professionalism in Australian sport, has also seen a rise in the media coverage of sport, particularly with the advent of pay television. Thus, the situation where someone says something which is then included in other reports is more likely to happen. It is suggested that this is an important reaffirmation of the law for sport, namely that you will not be liable under defamation law unless you consent or have control over the re-using of your material. Another feature of modern media is the fact newspapers are now usually published online as well as the traditional hard copy. What these sports defamation cases have confirmed is that the law will not consider these as separate publications, a significant outcome considering the limitations of damages now present in the Defamation Acts.

IV CONCLUSION

The Dank defamation action involved multiple respondents in a complex myriad of cases and decisions. It is suggested the benefit of these in relation to both sport and general defamation law, it that they highlight that if statements are true, or at least substantially true, the law will back the publication of those statements. If you have contributed material, unless you consent, or have control of the final version, you will not be held liable. In any civil matter a significant aspect of the outcome of the case is the awarding of costs. The Dank defamation cases therefore highlight the potential liability of a litigant taking defamation action when the comments made are covered by one of the available defences, with Dank being required to pay the costs of all his actions, thus making them an expensive exercise. While the most significant legal aspect of the Dank cases was the application of defamation law, from a sports perspective, it is suggested that they were also provided valuable insight into what had actually happened at Cronulla-Sutherland. The doping sagas involving both Cronulla-Sutherland and Essendon represent, in the author's opinion, the biggest story in Australia's sports law history, the Dank defamation actions being very much a part of that story.

⁹¹ (1928) 41 CLR 331.