
INTERVENTION

Ken Foster and the Genesis of Sports Law: A Personal Perspective

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Ken Foster's work in the field of sports law is of central importance. His sustained, high-quality contributions to sports law scholarship underpin much other work in the area. This intervention makes the case for the importance and centrality of this work, and highlights key contributions. It evidences the development of key themes and perspectives in Ken Foster's work and its fundamental and foundational significance in the relatively new field of sports law.

Keywords: Ken Foster; sports law; sports law as discipline; history of sports law; themes in sports law

Introduction

As an undergraduate law student in the mid-1990s, I opted to combine an insatiable appetite for all things sport with my final-year dissertation. At the time, the notion of the thing we now recognise as 'sports law' was all but unheard of. Research efforts turned up very little; there was, of course, Edward Grayson's characteristically idiosyncratic textbook (Grayson, 1994), but little else beyond the occasional article considering offences against the person in the context of sport. I was fortunate enough, however, to come across Ken Foster's contribution to Lincoln Allison's collection, *The Changing Politics of Sport* (Foster, 1993). At the time, I had little appreciation of the central importance Foster's work had, and continues to have, both for sports law as an academic discipline, and for my own academic career.

What follows is an unapologetically personal perspective on the centrality of Foster's work to the discipline as a whole, but also on his work's particular importance to those who, like me, are scholars, students, teachers and writers in the field. I begin by seeking to draw out the key characteristics of Foster's work so as to explain its particular and, arguably, unique position of importance amongst sports law scholarship. Subsequently, I consider three key pieces of Foster's work and assess their particular importance to scholarship in the field. These are pieces drawn principally from edited collections, which demonstrate the key themes I emphasise here. However, his key contributions in this journal are also of note, and I highlight these, too, as being influential (Foster, 2003; Foster 2005b; Foster & Osborn 2010).

The Characteristics of Sports Law: The Context of Foster's Work

Foster's important contribution to sports law scholarship has to be understood in the context of the developing legal sub-discipline in which it sits. As I have written elsewhere (Boyes, 2012), the field of sports law has often been dominated by a worldview of a predominantly practitioner-oriented approach. In the earliest days of the development of the field, this was largely due to information asymmetry between practitioners and academics. In a pre- or early-internet era there was very little information available relating to sport and its regulatory and legal interactions. This much is emphasised by the nature of the first academic sports law text of note to be published in the UK in 1998, which served very much as a 'text and materials' style approach, seeking to ally academic commentary with materials not otherwise readily available (Gardiner *et al.*, 1998). As a consequence, in its formative years the academic world was very much reliant on practitioners in sharing insight, information and materials otherwise unavailable to those not actively engaged with the sports industry. It is true, too, that much of the scholarship of this early era was the work of established academics, often coming from the perspective of a traditional legal sub-discipline, such as criminal, tort or public law.

The consequence of these factors was that, though not without exception, scholarship tended to be reactive – responding to events – and focussed on the application of established sub-disciplines in connection with sport. Sports ground safety in the wake of the Hillsborough disaster; ongoing concerns about football-related violence, and the susceptibility of sports governing bodies to judicial review are all examples. Arguably, this characterisation remains at least partially true even today; there remains a close relationship between scholars and practitioners in the field – indeed I would go so far as to say that there are very few, if any, legal sub-disciplines in which the legal professions and academe are so

closely integrated. Similarly, there remains a tendency, though perhaps now less pronounced, for sports law scholarship to be located within mainstream classifications, most notably, and most prolifically in the post-*Bosman* era, in that of European Union law.

The above is an observation and, by no means, a criticism; there is, now, a steady flow of high-quality scholarship produced by scholars in the field which, because of that nature, is better placed to be impactful on real world problems than is the case in more esoteric scholarly endeavours.

Developing Perspective and Building A Legal Sub-Discipline

This being the case, Foster's work has played an important part in building the identity of the 'new' legal sub-discipline of sports law. This is a significant trait evident throughout his body of work. This is a consequence, principally, of the perspective adopted in Foster's work. As I suggest above, the predominant approaches to the relationship between sport and law have been to ask one of two questions.

First, in effect, to approach an issue through a legal lens, 'how does the law of X apply in relation to sport?' or, second, to take a position from a sports perspective, provoked by a particular incident or legal problem in practice. Foster's approach is different; by standing at one remove from the specifics of a particular legal issue, he is able to identify the patterns and characteristics that emerge from an interaction and/or interactions between the law and sport. The result is a much more nuanced and, arguably, more sophisticated appraisal of the area.

By taking this 'bird's-eye' view, Foster's work does more than just assess individual interactions at the sport/law interface, contributing to the establishment of a more rounded appreciation of the characteristics and trends evident across the sub-discipline and, as a consequence, a more complete mapping of its topography. This has been a crucial component in developing a sub-discipline, which not only reacts to specific real-world problems or which is limited to assessment of the interactions of traditional legal categories with sport. It enhances that by providing identification and understanding of the features and patterns which cut across those narrower concerns.

In this sense, Foster's work has been of fundamental importance in providing a key element arguably required of any discipline or sub-discipline worthy of recognition, a 'golden-thread' which runs through it and unites its component parts. One of the consistent – and sometimes legitimate – challenges levelled to the field of 'sports law' is that it is a cluster of individual legal interactions brought together because they all relate to sport in some way. In seeking to corral and to organise these individual elements, Foster's work does much to justify claims to a meaningful field of study.

A Critical Viewpoint: Challenging Orthodoxies

One of Foster's key contributory elements to this development of sports law as a meaningful sub-discipline has been the application of a critical eye, to both the primary subject matter and subsequent scholarly analysis within the field. As I have asserted on a number of occasions here, because of its heritage, much sports law work has as its focus particular incidences, or types of incidence, or interface between the law and sport, driven by particular sports- or legally-oriented perspectives. Respective examples might be football's transfer rules or the application of human rights legislation to sport.

This is not to denigrate this type of work: exploring, explaining and assessing law/sport interactions from these perspectives is an essential part of the development and growth of the field in that it generates new knowledge and understanding upon which further analysis can build. Indeed, in the context of an area where those interactions have grown seemingly exponentially over the last two decades or more, this is vital for the maintenance of the relevance and continued validity of the field. Indeed, Edward Grayson, rightly regarded too, as a pioneer in the field, did much to raise the profile of sports law as a thing of note. His work was almost entirely based on individual incidents and did much to highlight and provoke responses to the unusual relationship between sport and the law.

The reason I draw out this characteristic, though, is to highlight the contrasting nature of Foster's work. By its very nature the type of work I highlight above tends to draw on the orthodoxies of each area, whether legal, sporting, or a combination of the two. One potential criticism of the field of sports law is that much work in the area remains 'trapped' within those institutional tenets. Foster's work is, in this respect, of great significance in that he does not automatically accept those orthodoxies but instead looks to make assessments on a more neutral, objective basis.

To me, this is a major contribution to the field; working beyond those traditional boundaries brings to the area maturity and intellectual legitimacy without which it would appear much more limited. By identifying, testing and, where appropriate, challenging those orthodoxies – the adoption of a more critical approach – Foster's work has both facilitated and challenged those of us working in the field, by both requiring and empowering us to acknowledge and address our own institutional predispositions and to, ourselves, deploy a more critical eye in our research and writing.

I write, of course, from a personal perspective, but my own experience is that as an emerging academic 'growing up' within the field, I felt emboldened to emulate this critical aspect of Foster's work and that this has had a significant formative impact on my own scholarship and, indeed my teaching.

'The Big Picture': Developing a Theoretical Lens

Of central importance to both the characteristics identified above, is Foster's harnessing of theoretical perspectives as a key tool in his analyses. This is particularly important because, first, it is an approach that has been relatively scarce as a proportion of scholarship within the field; and, second, that it facilitates both elements already espoused here.

That second aspect can, itself, be divided further. Foster's deployment of theoretical lenses enables him to provide greater insight into the patterns and characteristics evident across the sports law sub-discipline. After all, theoretical approaches are very much 'big picture', seeking to explain how and why reality is as it is or, perhaps, how it ought to be.

Framing sports law and its key issues within theoretical constructs is an important means by which they can be more meaningfully explored and understood. Foster is not alone as a sports law scholar applying this approach, but he was certainly in the vanguard and, in addition to the value of his own work, he has provided the template which many of us have subsequently followed.

The other half of this aspect is that the introduction of theories and models against which law/sport interactions can be tested, either individually or in overview, make a significant contribution to challenging the internal orthodoxies of those systems. Perhaps this is Foster's most significant contribution. In imbuing the field with this intellectual legitimacy, he provided a foundation for others to work in the field without the need to defend or justify its academic standing.

'The Golden Thread': Consistency and Longevity

What makes these elements, taken together, all the more noteworthy is that Foster's contributions span the entirety of the existence of sports law as a meaningful area of study in the United Kingdom. So, this is not a one-off contribution to the field, but a consistent and sustained one, which has spanned three decades. It is, arguably, relatively easy to gain traction and profile in a 'new' area of scholarship, simply by being a first- or early-mover; as a lone figure, or one amongst very few, recognition is perhaps sometimes more easily earned than in other, more crowded, fields. Similarly, the making and keeping of academic reputations within a field can be predicated on one, defining, 'signature' piece of scholarship.

Foster's work defies both these models. Though he was 'in' from the beginning, and deserves recognition as such, his early work in the field is characterised by the hallmarks of quality I describe above. Foster was first on the scene, but already making a nuanced and sophisticated contribution. That, in itself, is worthy of remark but, too, it must be recognised that Foster's contribution to the field has been sustained and consistent. His body of work forms the backbone of scholarship in the field, tracking and responding to the evolution of both real-world events and academic writing.

Having espoused its quality and values, it is to this body of scholarly works in sports law that I now turn.

The Backbone of the Field – Foster's Sports Law Scholarship in Context

What I say above might be disregarded as amounting to warm words and personal esteem. Indeed, as I have already intimated, this is very much a personal view, but the claims I set out above are undoubtedly supported by the evidence. In order to demonstrate this, I want to focus on what I regard as Foster's most important pieces of scholarship, and to explain how they relate to the characteristics I attribute to his body of work in this field. The choice itself has not been straightforward; there are many other pieces that I considered including but, ultimately, I have plumped for three contributions I regard as being most representative and most telling.

'Developments in Sporting Law' in Lincoln Allison (ed) The Changing Politics of Sport (1993)

The choice of this contribution to a collection assessing wider trends in sport, is an easy one to make. As I say at the outset, this chapter was, in many respects, anomalous at a time when only very limited attention had been paid to sports law, indeed, perhaps it is of note that the title of this work itself refers to 'sporting law', rather than sports law. In this respect it should rightly be regarded as being foundational for the field.

The characteristics I ascribe to Foster's body of sports law scholarship are wholly evident, even in this early work. From the outset this contribution is one which elements of this portrayal can be readily identified. It begins by noting a plethora of law/sport interactions, centred around potentially criminal incidents all occurring within a single week. Notably, however, this observation is not used as a foundation for a technical, black letter analysis of the application of the criminal law in the context of sport. Instead it is used to evidence a growing trend of legal intervention in sport. But this is not the main focus.

The key concern here is the exposition and exploration of the issue of sporting 'autonomy', and the legitimacy of the concept's deployment as a rationale for the limitation of that legal intervention. This is an excellent illustration of the particular standpoint adopted in Foster's work; the use of real-world examples as a basis for identifying underlying patterns and trends which themselves form a basis for further exploration and analysis.

The chapter is littered with these examples of instances of law/sport interfaces and associated analyses. What is more, it links to a wealth of key theoretical ideas, including legal pluralism, juridification and regulation – all themes advanced and developed in later works (e.g. Foster, 2005c).

What is captured in this chapter is a snapshot of the law/sport interface at a watershed. Foster uses a huge range of examples to illustrate the contemporary shift of sport out of an era of volunteerism into one of legalism. What is genuinely remarkable about this contribution is the astonishing prescience, which it evidences. In identifying sporting autonomy as a key issue Foster highlights a predominant concern of scholars in more recent years. In particular, this foreshadows the inception of the 'sporting exception' and the 'specificity of sport' as key instruments in reconciling the competing interests of sports regulation and European Union law. We should remember that the publication of this

work predates the Court of Justice ruling in *Bosman* by some three years but, even so, this – particularly the potentially significant role of the European Commission – is already noted.

Similarly, the recognition of sport's own internal functions and institutions as quasi-legal, 'shadow' legal systems – and their move to protecting that status by ensuring that transgressions which might otherwise be regarded as criminal are dealt with in such a way so as to render state intervention unnecessary – has become a central concern and is of substantial contemporary interest.

The key discussion resolved, at least judicially, by the Court of Appeal in *Bradley v Jockey Club* ([2005] EWCA Civ 1056) about judicial deference and restraint, and the proper role of the law regarding intervention by the courts is here, as is the highlighting of 'private' justice through the Court of Arbitration for Sport and other arbitration mechanisms as a major future issue.

The theoretical and thematic perspectives developed here remain, without exception, at the core of sports law scholarship both today and in the period since publication. All of this causes me to reflect that these are insights which we now take for granted because the 'hard-yards' have been done in this chapter. As such I argue that this should be regarded as *a*, perhaps *the*, most important contribution to the foundation of the field of sports law.

Perhaps testament to this are the themes prominent in an important collection of work collated by Steve Greenfield and Guy Osborn in 2000 which included the sort of exploratory and expository work around the themes established in 'Developments in Sporting Law', but also a clear shift towards in-depth consideration of the thematic and theoretical perspectives pioneered there. It is to Foster's own contribution to that collection which I now turn.

'How Can Sport Be Regulated?', in Greenfield and Osborn (eds) Law and Sport in Contemporary Society (2000)

This contribution is important in that it takes the 'how' element established in the earlier work and develops it much more fully. It too, embodies the key abstract characteristics I outline above. It addresses important questions such as the nature of the model of sport to which legal and regulatory actors must respond. These are fundamental questions: notably, what are the particular characteristics of sport to the sports law literature is another of these which embodies the elements I outlined above. Here Foster uses established market models to gain appreciation and understanding of the character of the sports industry. In doing so he draws out important insights from the unique nature of the sports model, not least the 'cartel vs single-entity' debate. The purpose of doing this is as a means of developing an appropriate regulatory response – whether self-, legal- or a mix of both – to the issues encountered in the sports environment.

This is undoubtedly an arm's-length perspective – charting the patterns and themes which emerge from multiple interactions at the law/sport interface. It is also overtly concerned with the construction of the field. At the outset of this contribution Foster is explicit that it is driven by the fragmented nature of academic discourse around sports law, with the adoption of approaches oriented around issues of 'intervention', public law or corporate governance, but with barely any dialogue between the three. This is an attempt to locate and unify those three within a wider framework of understanding.

This is also an excellent example of the use of theoretical lenses. In this instance, these are used as a means of delivering another key aspect of Foster's work: the challenging of orthodoxies. By testing sport against established market models, the chapter exposes important, hitherto unexplored, observations about the sports model. Most notably, it challenges the notion that sport should be treated as a homogenous entity, but there are a variety of 'markets' interwoven into sport. This analysis is married with the deployment of regulation theory which, as Foster notes, was (and continues to be) largely overlooked in the sports law literature.

This is an important contribution for many reasons but, from my own perspective, the key impact of the chapter is that it develops an objective analysis of the sports model and then seeks to develop corresponding regulatory and legal responses. It is also important as it treats law and regulation as two sides of the same coin. It is to that relationship which I now turn.

'The Juridification of Sport' in Greenfield and Osborn (eds) Readings in Law and Popular Culture (2005a)

The law/sport interface is given in-depth scrutiny in the third of my selected contributions. The focus of the chapter is the notion of 'juridification' first established in 'Developments in Sporting Law'. As before, this is genuinely fundamental in developing a top-down appreciation of the law/sport interface. The key aspect of this is the complex interactions between law and sport's self-regulatory structures, and the extent to which interaction with the law has played a part in reconstituting sport's internal processes.

This is a key contribution in understanding the complex relationships between sport and law, and offers telling insight at a high level, which is important for the sub-discipline as a whole. Importantly, this chapter highlights fundamental characteristics through the adoption of a holistic view, which are not exposed through a conventional subject- or issue-led inquiry. Though Foster makes use of individual examples, these are illustrative of the wider observations, rather than as the focus of the work itself. Again, this is all possible because of the adoption of the theoretical lens of 'juridification'; an idea which itself benefits from the careful attention paid to exploration and definition of it at the outset of the chapter.

What this contribution best evidences for me, however, is that fourth element of Foster's work I identified at the outset of this piece: consistency and longevity. What is evident in this chapter is a clear 'golden thread' running through Foster's work; the notion of 'juridification', briefly explored in 'Developments in Sporting Law', is combined with the inclusion of law within a wider concept of regulation emphasised in 'How Can Sport Be Regulated?'. As well as demonstrating the continuing and sustained relevance of Foster's work over the two or more decades in which sports law has evolved, it also evidences its versatility in a fast-moving practical environment. As new and diverse issues arise at the sport/law interface, the insights made in Foster's work are reinforced and, they too, continue to be incredibly valuable as a means to understand and assess these new developments.

In Summary: A Personal Perspective

As I say at the outset of my intervention, this is, necessarily, a personal reflection on Ken Foster's sports law scholarship. As such, it undoubtedly reflects my own preferences and perspectives. However, it must be said that the powerful nature of Foster's work is such that it has undeniably played a leading role in shaping that outlook. I think that most, perhaps all, established sports law scholars would acknowledge the importance of Foster's work in their own development. It has provided a lofty platform from which to build our own expertise and insight. Having had the opportunity, as part of this contribution, to revisit Foster's body of work, I am struck by the thought that I am often guilty of taking for granted the key insights and perspectives developed by Foster, which I deploy routinely in my own work and thinking. The extended period over which Foster has produced his key insights often means that this perspective is lost, but when his work is considered in the round, the extent of this influence becomes plain.

I have used three key pieces of scholarship to underpin my claims, but there are many more examples of Foster's work I might have used as illustrations of these wider points. In particular, there are three other pieces of work to which I draw particular attention and which I argue further sustain the central themes outlined here (Foster, 2003; Foster 2005b; Foster, 2010).

Taken as a whole, Ken Foster's body of work amounts to, in my view, the single most telling contribution to the field by an individual academic. If I return to the theme with which I commenced this intervention, Foster's work has been ever-present as a key and fundamental underpinning to my own career and those of many others. Given that I am fortunate to have had a career which spans the bulk of the 'sports law era' in the UK, this is no small feat.

Competing Interests

The author has no competing interests to declare.

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