

BURNT AT THE STAKE : UNFAIRNESS AND THE ‘UGLY PARENT’

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Introduction

“No passion so effectively robs the mind of all its powers of acting and reasoning as fear”. [ii]

There are few issues which enliven the latent fears of sports administrators, like doping, violence and child abuse, especially when one of these issues arises on their watch.

Of course all of these concerns are matters which unfortunately, yet rightfully, provoke considerable anxiety in the community as is evidenced by the raft of legislation and policy enacted by governments and sporting associations so as to prevent such evils.

While the sporting community must remain vigilant and act decisively against such anti-social conduct, where and whenever it occurs, officials responsible for the application of these policies should exercise caution to ensure that such legitimate concerns do not manifest themselves in a blinkered and zealous crusade, where natural justice and the rights of the individual are sacrificed in order to achieve an expedient Machiavellian outcome.

‘Ugly Parent Syndrome’ is a topic which in recent years has attracted the attention of the sporting world at large, politicians, bureaucrats and the media. [iii]

There is no settled or universal definition of ‘ugly parent syndrome’. It is an expression often referred to in the media and sports policy material and could be summarised as *“unreasonable behaviour often consisting of the screaming of abuse, use of bad language, repeated negative or ‘putting-down’ remarks, or physically or verbally threatening or intimidating conduct towards players (including their own children), officials or other spectators, by parents (acting as officials or as spectators, at a sporting event involving the participation of their child), or other adults”*.

During 2003 when faced with what at first glance may have appeared to have been an episode of ‘ugly parent syndrome’ within a Sydney outer suburban netball association, a group of concerned members of the Mount Druitt Netball Association (“MDNA”), precipitously confronted the matter. After raising their concerns with the New South Wales Netball Association (“NSWNA”), the Disciplinary Committee of the

NSWNA then commissioned an investigation (which was botched) and then summarily determined (unfairly), that the Plaintiff, Sandra Carter had engaged in ‘child abuse’ contrary to the NSWNA’s Anti-Harassment Policy. The result of this process was that the NSWNA then notified the Commissioner for Children and Young People (“the Commissioner”), under the *Commission for Children and Young People Act 1998* (NSW) (“CCYP Act”), which resulted in the Plaintiff being ‘registered’ with Commissioner under the CCYP Act.

By overcoming the restraints imposed by *Cameron v Hogan* [iv] and electing to intervene in the dispute between the aggrieved Plaintiff and the MDNA and the NSWNA and then setting aside the decision of the NSWNA’s Disciplinary Committee, the relatively recent decision of Palmer J of the Supreme Court of New South Wales in *Carter v New South Wales Netball Association* [v] may prove to be one of the more significant Australian sports law cases in recent times.

Carter v New South Wales Netball Association

Sandra Carter was a life member of the MDNA and was a highly accomplished netball coach and administrator within the local and State netball community. As the Plaintiff said (in her evidence) and as highlighted in the judgment, “*For the last nineteen years, netball has been my life*”. [vi]

Reacting to what the Court ultimately found was conduct no higher than “*excessively enthusiastic coaching*”, a group of parents, some of whom held a personal dislike of the Plaintiff, formed an ad hoc group calling themselves the “No Excuse for Abuse Committee” (“NEAC”) and improperly obtained signatures on a petition, which formed the basis of a letter of complaint which was forwarded to the NSWNA.

Motivated by ill-will, NEAC wrote to the NSWNA, enclosing the Petition, making serious allegations against the Plaintiff of child abuse in highly charged terms, which included, “*physical and psychological (abuse), gross neglect of duty of care, medical mismanagement, deprivation of prescribed medicine and basic human rights to deception and cheating*”. The letter did not identify a single person alleged to have been abused and was unfairly framed in such general terms that the Plaintiff was unable to provide any meaningful rebuttal. The letter also carried with it a demand, namely that the Plaintiff be expelled from the MDNA and withdraw from all activity in netball.

A copy of the letter was forwarded to the Plaintiff by the NSWNA for her response. Following receipt of this letter, the Plaintiff developed severe depression and suffered major psychological distress, the treatment of which required medication and at one stage, hospitalisation. She ceased all involvement with the MDNA and even resigned from her employment as her reactive illness worsened.

An offer by the NSWNA to mediate the dispute between the Plaintiff and NEAC under the NSWNA’s *Anti Harassment Policy*,ii[vii] was refused by NEAC, after which the NSWNA appointed an Investigator to review NEAC’s complaint and to determine whether or not the Plaintiff engaged in harassment under the NSWNA’s *Anti Harassment Policy* which provides: [viii]

“Harassment is offensive, abusive, belittling or threatening behaviour directed at a person ... the behavior must be unwelcome and the sort of behavior a reasonable person would recognise as being unwelcome and likely to cause the person to feel offended, humiliated or intimidated”.

In short, the investigation was badly mishandled. The Plaintiff offered to the Investigator several specific corroborated denials of the allegations against her (supported by both documentation and witnesses). Such alternative avenues of inquiry which offered a contradictory position to the complaint were never properly investigated. By way of illustration, the Investigator never even interviewed those witnesses put forward by the Plaintiff as persons supporting her contentions. Notwithstanding, the Investigator concluded that the Plaintiff's conduct '*on the balance of probabilities*' (as alleged in the complaint), constituted misconduct under the NSWNA's *Anti Harassment Policy*. [ix]

Without even convening a proper hearing which afforded the Plaintiff the opportunity to fairly and properly respond to the allegations and contest the 'evidence' which formed the basis of the complaint against her, the Disciplinary Committee of the NSWNA met to '*review documents*' and determined that a '*preliminary penalty*' be imposed, (subject to the Investigator's response to the significant bundle of letters received by the NSWNA in support of the Plaintiff), that being the Plaintiff, "*be banned as a member of Netball New South Wales for a period of five years and that during that time (the Plaintiff) seek professional advice and guidance on the correct procedures on how to manage childrens behavior in a more appropriate manner*". [x]

The Disciplinary Committee of the NSWNA subsequently affirmed its preliminary penalty and consequently notified the Commissioner under section 39 of the CCYP Act that the Plaintiff "*has been the subject of disciplinary proceedings relating to child abuse, sexual misconduct or acts of violence in the course of employment*". [xi]

Such notifications are kept by the Commissioner under the CCYP Act for the purposes of "*employment screening*" with respect to "*child related employment*",iii[xii] and in the Plaintiff's case, the effect of such notification was that it was most unlikely the Plaintiff would have ever been able to either work or be engaged in any activity in a voluntary capacity, where she would have had direct unsupervised contact with children. [xiii]

The Plaintiff commenced proceedings in Supreme Court of New South Wales seeking declaratory relief to set aside the decision of the Disciplinary Committee of the NSWNA.

Judicial Intervention in the Affairs of a Voluntary Association

What was remarkable from a purely legal perspective in *Carter* was the judicial creativity employed by Palmer J in finding a means to seize jurisdiction and intervene in what was essentially an internal dispute within a voluntary association so as to rectify what he rightly observed to be a significant injustice.iv[xiv]

Courts in Australia, have long shown a reluctance to become involved in the internal disputes of voluntary associations such as sporting organisations.

In *Cameron v Hogan*, this reluctance was emphasised in the decision of Starke J. [xv]:

"As a general rule, the Courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any voluntary association, society or a club".

The effect of the High Court's decision in *Cameron v Hogan*, now more than seventy years old, is that Courts in Australia, as a matter of general principle, will not intervene in the affairs of voluntary associations unless:

- the issue can be characterised as an infringement of contractual, proprietary, equitable or statutory rights [xvi]; or
- where a person's livelihood is at stake [xvii]; and where,
- a Tribunal has, where a person's legal rights are at stake;
 - acted ultra vires to its Constitution [xviii];
 - denied the aggrieved person natural justice [xix]; or
 - acted in a manner with manifest unreasonableness or absurdity [xx].

In *Carter*, the Court found that notwithstanding the consensual compact which ordinarily exists between a member and an association by virtue of the association's constitution and the nature of membership, the Plaintiff was unable to characterise the NSWNA's adverse determination of her case under its *Anti Harassment Policy*, [xxi] as an infringement of her contractual rights, since on the proper construction of the *Anti Harassment Policy*, [xxii] it was no more than a policy or guideline and did not have the contractually binding force it otherwise might have had, had it been properly incorporated into the NSWNA's constitution. [xxiii]

However, Palmer J observed the door being slightly ajar when it came time to consider the livelihood exception as a means to judicial intervention, on the following basis: [xxiv]

"In the present case, the Plaintiff seeks to protect no right of property nor does her livelihood depend directly on membership of the Defendant. She is not a professional netball coach and her previous employment was unrelated to the Defendant's activities. But she is now unemployed and, it is to be assumed, she may have to seek employment in the future. As matters presently stand, by virtue of the entry of her name on the database maintained by the Commission, one area of employment which is, as a matter of reality, closed to her, is any employment involving direct, unsupervised contact with children. That is not a narrow or insignificant area of activity: it stretches from coaching, child minding or employment in a school to activities which one would not immediately connect with children yet which may frequently involve contact with children when they are alone, such as driving a taxi or any number of occupations which require the employee to make visits to people's homes.

Just as important as the matter of the Plaintiff's future employment is that the Plaintiff is now branded as a "child abuser", both by the decision of the Disciplinary Committee and by her inclusion in the database of the Commission. Most damaging to her reputation and self esteem is that she is branded as a child abuser in her own local community.

...

The words "child abuse" are heavily charged.

...

Knowing that the Plaintiff is registered with the Commission, most people would not stay to listen to any explanation by her that the “child abuse” in her case consisted of “excessively enthusiastic coaching” of a netball team...

...

Thus it is that the decision of the Disciplinary Committee in the present case has actually produced a consequence which, quite apart from its potential to damage the Plaintiff's future employment prospects, has damaged the Plaintiff's reputation in her community”.

By seizing upon the NSWNA's referral of its Disciplinary Committee's decision to the Commissioner (as it was legally obliged to do upon making such a finding as it did against the Plaintiff, assuming of course the finding was properly reached), as the basis to intervene in the dispute on 'livelihood' grounds, Palmer J held that such was the NSWNA's conduct, the direct effect on the Plaintiff's reputation and the consequent indirect effect on her livelihood, significantly impaired her future employment prospects.

The Tension between Official Duties and Individual Rights

Sports administrators nowadays have greater legal responsibilities than ever before, be it in the implementation of public liability risk prevention strategies, the application and enforcement of anti-doping regulations or alternatively the protection of participants and spectators, especially when acting *in loco parentis* with children playing sport. [xxv]

In times of greater accountability to all stakeholders (members, sponsors, government and ultimately the sporting public), sports associations and their administrations are increasingly sensitive to these nascent responsibilities, none more so than those which rightfully address the protection of children.

The cliché, *in times of war, the first casualty is truth*, seems to have an increasing relevance to sports administration, given that the modern cause celebres are often pursued with great passion and expressed in military like terms: *the fight against child abuse, the war on doping, etc.*

Carter though painfully illustrates the risk of collateral damage occurring through the implementation of these policies as part of a campaign or on-going battle, when the underlying truth or the rights of the individual is/are subordinated to the reckless or scattergun enforcement (often with Puritanical fervour), of what is in most cases, in principle, sound policy.

For sports associations, often the pursuit of implementing popular and well founded sports policy (ie. *to stamp out all forms of child abuse, to eradicate violence in sport, or to enforce a zero tolerance policy with doping, etc*) will abrasively conflict with the need to accord procedural fairness, to the subject of any action taken under such policies. Anecdotally, in such instances administrators can be placed under a considerable amount of pressure (usually from a fearful membership or other stakeholders) to conform with an ill-informed public or internal opinion, prompting them to shoot first and ask questions later, rather than be seen to be taking what might be perceived as an unpopular stance, if they were to adopt a more measured and cautious approach to the enforcement of relevant policy, while having regard to the individual rights of the alleged offenders while under investigation.

Topics such as child abuse, violence and doping, understandably arouse intense emotions in many sections of society. In some instances though, the depth of feeling is such, that the rights of individuals are deferred to what may be perceived by many in the community as the greater good, that being to widely and vigorously enforce policies on these topics, *whatever the cost*, usually by an administrator who might rather leave the problem ultimately for a tribunal to decide, than be seen to be taking a stance where he or she or the organisation concerned could be labelled as being *soft on child abuse, weak on violence or indifferent to doping*.

One need look no further than the recent cases where legal responsibility for school assaults has been sought to be sheeted home to the institutions themselves, [xxvi] (as well as the perpetrators), to appreciate the apprehension of risk on the part of many sports administrators, especially when dealing with children. While the High Court recently has all but cast aside the principle of non-delegable duty, sporting associations may still be vicariously liable and vulnerable to claims involving children, where the conduct or abuse occurs within a setting which satisfies a ‘sufficiently close connection with employment’ test. [xxvii] Such a test in a sporting context would encapsulate those persons for whom the association could be liable, namely, all coaches or other parents or adults holding official positions in the coaching and administration of junior sport.

Such legal risks combined also with varying levels of public pressure therefore may explain the overcompensating reactions of some officials to cases involving allegations of child abuse (or violence or doping), where these officials are vulnerable and fearful to the possible accusation from association members, the public or other stakeholders, that insufficient and inadequate means were taken by them to prevent the subject incident.

The burden of expectation sometimes placed on associations to conform to public opinion (irrespective of its merits) and adopt a scorched earth approach to the enforcement of sports policy, can result in a failure to accord natural justice to the accused person(s), if succumbed to. However, even in times of war, most rules of engagement require the aggressor to be certain that the object of the proposed attack is a legitimate target. [xxviii] As *Carter* amply demonstrates, the application of procedural fairness in the conduct of such investigations and ultimately hearings, does not in any significant way dilute the force or effect of appropriate sports policy and if anything results in a positive outcome for all parties concerned by reducing the risk of innocent casualties which could arise in any legal battle.

The Lessons Learnt from Carter

Having established the basis for intervention, the Court found that by reason of the consensual compact existing between the Plaintiff and the NSWNA, the Disciplinary Committee was required to afford the Plaintiff procedural fairness when considering the complaint against her.

The Court ultimately found that the Disciplinary Committee of the NSWNA failed to accord procedural fairness to the Plaintiff and accordingly declared its decision concerning the Plaintiff invalid and set it aside. The Court, relying upon the decision of Mason P in *Rozniak v GIO*, [xxix] also subsequently ordered that the NSWNA pay the Plaintiff’s costs on an indemnity basis, stating that (referring to the NSWNA): [xxx]

“... its conduct in defending this case to the end, after notice of deficiencies in the process, was unreasonable to such a degree to warrant the making of an indemnity costs order”.

Finally, it is assumed that the CCYP Act data-base kept by the Commissioner was rectified, after the NSWNA undertook to the Court through its Counsel, that it would notify the Commissioner of the Court’s decision.

In reaching his decision, Palmer J listed nine points upon which the NSWNA failed to accord the Plaintiff procedural fairness in the determination of the complaint. Essentially, the Court held that the Plaintiff should have been: [xxxix]

- Correctly informed of the nature of the proceedings against her;
- Informed with sufficient particularity of what she was accused and by whom;
- Given a reasonable opportunity to consider the specific accusations in advance of her interview with the Investigator, so that she could consider her position and obtain legal advice if she thought it necessary;
- Granted a proper hearing before the Disciplinary Committee of NSWNA, so that she could call evidence, challenge the witnesses called against her and make submissions; and
- Afforded an unbiased, fair and reasoned decision on the part of the Disciplinary Committee of NSWNA, after conducting a fair hearing and impartially considering the evidence and submissions of both sides.

‘Ugly Parent Syndrome’ sadly seems to be an affliction of sport which will always be present. While it is unlikely to ever be eliminated, it is capable of being successfully managed and controlled through the careful and tactful application of appropriate conduct guidelines.

Already this year, the Australian sporting community has witnessed two notable incidents of ‘ugly parent syndrome’. One in Sydney and the other in Melbourne.

The Sydney incident occurred at a GPS football match between a Sydney High School Third XV and a Sydney Grammar School Fourth XV, when a scuffle took place “off-field”, amongst some spectators, which included a parent of one of the students.v[xxxix] It is not known what action has been taken by the Schools concerned, each of which presumably has in place, codes of conduct or similar policies for parents and spectators.

In Melbourne, an 11 year old child was banned from playing for Fitzroy Junior Football Club (“FJFC”), as a consequence of what was claimed by the Club to be an unacceptable pattern of conduct on the part of his mother stretching over a period of five years, understood to have consisted mainly of on-going bouts of verbal abuse directed towards officials and players.vi[xxxix] Notwithstanding what emerged as a legal battle fought over a period of a fortnight, the dispute between the parties was ultimately resolved successfully, upon the child’s mother apologising for her past indiscretions and agreeing to abide by the parents’ code of conduct. As a result, the child concerned was able to return to his team.

The Australian Football League (“AFL”), is one of the pioneers in junior sport in encouraging good conduct and a safe sporting environment amongst children, parents and officials through its Auskick programs and junior leagues, which is partially achieved through its “AFL Kids First” policy and the resolution of the FJFC dispute is a pleasing example of this policy in action. [xxxiv]

Most mainstream sports have policies or codes of conduct for parents and spectators. It is more often than not, the application or enforcement of conduct codes or policies, than the codes or policies themselves, which present as being problematic for sporting administrators and from which risks emerge for persons who may be subject to the application of the code or policy. However, in balancing the rights of and risks to all parties concerned, such codes and policies when applied with common sense, good judgment and sound legal advice, will ensure that those problems which ultimately confronted the NSWNA in *Carter* will be well and truly minimised, if not avoided.

Conclusion

For sports administrators, the fear of possible harm coming to bear upon a sporting association or any or all of its members as a consequence of anti-social or unacceptable conduct, or of social or political repercussions being visited upon themselves for not being seen to embrace a hard line or politically correct stance against delinquent behavior, must always be addressed while being mindful of the need to provide fair and reasonable consideration to the rights of the individuals concerned, from the perspectives of both the alleged victim(s) and perpetrator(s).

While the ever-present threats of doping, violence and child abuse should be carefully monitored and where appropriate, acted against by sporting officials in positions of authority, where such threats are inflexibly pursued in accordance with some over-riding ‘zero-tolerance’ or ‘get tough’ objective, without regard to procedural fairness or the rule of law, the outcome is often a misconceived, improperly maintained prosecution, where innocent individuals are unjustly burnt at the stake in a fashion reminiscent of witch trials conducted in Salem in the seventeenth century. [xxxv] In such circumstances, the resulting injustice is real and manifest.

In his classic work, *The Republic*, the ancient Greek philosopher Plato rhetorically poses the question: *Is not injustice the worst of all evils for one’s own community?* [xxxvi]

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[ii] Ratcliffe, S., *The Oxford Dictionary of Phrase, Saying and Quotation*, Oxford University Press, Second Edition, 2002 at page 172, citing Edmund Burke (1729-97): *On the Sublime and Beautiful* (1757).

[iii] See for example: Victorian Government, Department of Sport and Recreation, *User Friendly Sport*, 2002 at page 15.

[www.sport.vic.gov.au/web9/srvimage.nsf/Images/UserFriendlySport/\\$File/UserFriendlySport.pdf](http://www.sport.vic.gov.au/web9/srvimage.nsf/Images/UserFriendlySport/$File/UserFriendlySport.pdf) (viewed 30 August 2005); Rood, D., “Bid to stamp out ugly parent syndrome”, *The Age*, 4 June 2002, www.theage.com.au/articles/2002/06/04/1022982688265.html (viewed 21 June 2005) and *Australian Press Council Adjudications* Adjudication No. 228 (May 1985), [1985] APC 20.

[iv] (1934) 51 CLR 358.

[v] [2004] NSWSC 737.

[vi] n.5 at [7].

[vii] www.netballnsw.com/policies/policies.htm (viewed 21 June 2005).

[viii] n.7 and n.5 at [24].

[ix] n.7.

[x] n.5 at [37].

[xi] n.5 at [57].

[xii] *Commission for Children Young People Act 1998* (NSW), Part 7.

[xiii] n.5 at [60].

[xiv] See discussion: Hayes, P.J., “Current Problems in the Resolution of Sporting Disputes in Australia”, [2004] 2 *International Sports Law Review* 22, as to instances of judicial intervention in sporting disputes in Australia, despite the restrictions of *Cameron v Hogan*.

[xv] n.4 at 384.

[xvi] See for example: *News Limited v Australian Rugby Football League Limited and Others* (1996) 64 FCR 410; *Dunkley and Sydney Football Club v Australian Football League* (unreported, Supreme Court of Victoria, No 7176/1996); *Drummoyne District Rugby Football Club Inc v New South Wales Rugby Union Limited* (1994) AustContractR #90-039, [1994] ACL Rep 435 NSW 1; *A G Thompson v Gray-Nicolls (Australia) Pty Limited* (unreported, Federal Court of Australia, Victoria District Registry, General Division, No VG89/1992); *Adamson and Others v New South Wales Rugby League and Others* (1991) 31 FCR 242; *Hospitality Group Pty Limited v Australian Rugby Union Limited* (2001) 110 FCR 157.

[xvii] *Buckley & Others v Tutty* (1971) 125 CLR 353 at 373-374, and more recently, *Mitchell v Royal New South Wales Canine Council Limited* (2001) 52 NSWLR 242 at 246.

[xviii] *Malone v Maher* [1981] 2 NSWLR 894 at 898. See also, as to the ultra vires principle and voluntary associations more generally, *Scandrett & Others v Dowling & Others* (1992) 27 NSWLR 483.

[xix] *Malone v Maher* (at 900-903).

[xx] *Dickason v Edwards & Others* (1910) 10 CLR 243 at 254 and more recently, *Australian Football League and Others v Carlton Football Club Limited and Another* [1998] 2 VR 546 at 557-559.

[xxi] n.7.

[xxii] *Ibid.*

[xxiii] n.5 at [90] to [92].

[xxiv] n.5 at [100] to [109].

[xxv] See: White, S., and Orr, G., “Precarious Liability: The High Court in *Lepore, Samin* and *Rich* on school responsibility for assaults by teachers” (2003) 11 *Torts Law Journal* 9; Williams, Y., “Playing it Safe”, (2005) *New Law Journal* 155.7164 (234) and more generally, Yeo, S., “Am I my Child’s Keeper? Parental Liability in Negligence”, (1998) 12 *Australian Journal of Family Law* 12.

[xxvi] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511 (The High Court heard all three cases together).

[xxvii] White, S., and Orr, G., “Precarious Liability: The High Court in *Lepore, Samin* and *Rich* on school responsibility for assaults by teachers” (2003) 11 *Torts Law Journal* 9. As the authors note, in *Lepore, Samin* and *Rich*, Gummow, Hayne and Callinan JJ., preferred to apply a test which rested on whether the conduct occurred within the “apparent or ostensible authority” of the perpetrator, rather than look to the broader test adopted by Gleeson CJ, Gaudron and Kirby JJ., of “sufficiently close connection with employment”. McHugh J., did not submit a view on this specific issue.

[xxviii] *Rules of Engagement*, Australian Defence Force Publication, Operations Series 3, 1992; *Geneva Conventions Act 1957* (Cth); *International Convention with Respect to the Laws and Customs of War on Land* (Hague Convention) [1901] ATS 131 and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva Convention) [1958] ATS 21.

[xxix] (1997) 41 NSWLR 608 at 615 to 616.

[xxx] *Carter v New South Wales Netball Association (No 2)* [2004] NSWSC 778 at [14].

[xxxi] n.5 at [116] to [133].

[xxxii] Norrie, J., “Rugby Dad hit me, says student”, *The Sydney Morning Herald*, 4 June 2005.

[xxxiii] McRae, S., “Abusive mum says sorry”, *Herald Sun*, 20 June 2005.

[xxxiv] <http://afl.com.au/default.asp?pg=printerfriendly&spg=default&articleid=204107> (viewed 21 June 2005). Also, the Australian Sports Commission suggests suitable guidelines for sporting associations to adopt on parental behaviour and harassment free sport. See: www.ausport.gov.au/junior/codeparent.asp and www.ausport.gov.au/ethics/hfs.asp (viewed 21 June 2005).

[xxxv] See generally: Mather, Cotton., *The Wonders of the Invisible World : being an account of the tryals of several witches lately executed in New England*, republished by Smith, J.R., London, Chiswick Press, First Edition, 1862.

[xxxvi] Plato, *The Republic*, translated by Lee, H.D.P., Penguin Books, Second Edition (Revised), 1987 at page 147.
