

CHAPTER ONE

INTRODUCTION

1.1 RATIONALE FOR THE STUDY

Sport, medicine, music and dance are a universal form of communication. They know no boundaries in any land and any language. Sport has progressively become a global phenomenon due to the impact of modern travel and television. Sport fans and television viewers in South Africa appear to be interested not only in watching the sides they support play abroad, but television has aroused interest in many foreign sports which were hitherto unpopular or unknown. In essence, travel and television have contracted the globe to bring international sport into every living room.

There is an increase in sports-related activity globally. In South Africa, this trend is likely to continue in the future (Van Heerden, 1996), for various reasons:

- i. The vision of the Ministry of Sport & Recreation “to get the nation to play”
- ii. The adoption of the slogan “to get the nation to play” as an aim by the macro-bodies of sport and recreation, namely, The National Sports Council (N.S.C.) and South African National Recreation Council (S.A.N.R.E.C.)
- iii. The intention of the National Department of Sport and Recreation to pursue an “Active” South Africa campaign
- iv. South Africa’s re-entry into international sport
- v. The transition to democracy and the adoption of the new Constitution (Act 108 of 1996) which includes the Bill of Rights that protects the human rights of all citizens
- vi. Interest in sports participation being stimulated through the general media and televised sports contests

- vii. Dedicated sports channels on television and the rapid growth of satellite television
- viii. Increased leisure time allowing more people to participate in recreation and sport
- ix. An increase in sports participation by females
- x. The formation of the organisation known as Women and Sport, South Africa (W.A.S.S.A.)
- xi. The restructuring of the educational system and rearticulation, whereby the teaching of lifetime sports in schools, technikons, colleges and universities have resulted in more people, male and female, continuing participation in recreational activities after graduation
- xii. The promulgation of the South African Sports Commission Act (Act No. 109 of 1998) and the National Sport and Recreation Act (Act No. 110 of 1998).

Given this trend of a wider spectrum of activities and an increased participation in sport, it would be logical to assume that there would be a “concomitant increase in the incidence of injury” (Labuschagne, 1998; Van Heerden, 1996; South African Teachers’ Federal Council, 1990; Baley & Matthews, 1989; Kaiser, 1986). It can consequently be expected that there would be an inevitable increase even if the injury rate remained unchanged. The trend towards more lawsuits occurring, involving more coaches, physical educators and sport managers, and affecting the manner in which games are played and taught is well documented in the literature (Labuschagne, 1998; Opie, 1994; Prinsloo, 1991; Trisley, 1990; Parmanand, 1987; Nygaard & Boone, 1989; Baley & Matthews, 1989). However, statistics in respect of sport injuries in tertiary sport in the Republic of South Africa are not available. Such records are not maintained by the national governing body of sport, South African Student Sports Union (S.A.S.S.U.) (Personal Email communication, S.A.S.S.U. secretariat, March 9, 1999). Nevertheless, in spite of the situation of sport injuries being unknown, it can only be surmised that the general trend in society would also be applicable to tertiary sport. Research in this regard becomes a necessity.

There are a number of factors that can be advanced for the significant growth of sports litigation in the past few decades :

- i. Sport is a microcosm of society, a reflection of the larger society. Law that affects society, therefore, will affect sport (Nygaard & Boone, 1989). The modern social philosophy amounts to a “me first” approach to life : this principle is expressed in legal matters by a higher tendency to litigate as a means of dispute resolution.
- ii. Society has an expectation that those who place themselves in positions involving risk and potential liability, will insure themselves; and that there is an insurance company in the background which will meet the bill, not the defendant.
- iii. The availability of legal aid to injured sportspersons /spectators to litigate their claims for compensation.
- iv. The community is more “aware” and information communication is comprehensive and almost instantaneous.
- v. The law of the land does not cease at the touch-line or fence or at the door of the committee room, contrary to what some people believe. Sport does not exist in a vacuum; like all other social activities, it is under the ultimate control of the law of the land (Trisley, 1990). Participants, institutions and officials are amenable to both private and criminal law (Labuschagne & Skea, 1999).
- vi. Commercialisation of sport, for example through sponsorship and endorsements, marketing and merchandising operations, has converted modern sport into big business (Berry & Wong, 1986). For instance, the tobacco industry in South Africa spends R40 million per year sponsoring sport and cultural events (Sunday Times, August 9, 1998). The media coverage of elite sport primarily by television has helped change its financial image (Gardiner et al., 1998; Labuschagne, 1998; Gouws, 1997).
According to Moore (1997), the increasing commercialism in sport has culminated “in the pivotal role which it now enjoys”, “but there is a danger of looking at sport through rose-coloured spectacles”. He maintains that: “The playing-field has undoubtedly changed, but it is still essentially level for those who abide by the rules.”

The aforementioned factors lead to the question: does the law have a legitimate role to

play in sport? According to Gardiner et al.:

“This is a contentious issue. Clearly there are areas of sport where the law needs to intervene and its role is uncontroversial. However, there are areas where this intervention is contested”

(Gardiner et al., 1998:6).

To obtain a more complete answer to the foregoing question, a primary question that needs to be asked is: what role does law play in modern sport? Grayson (1994:xxiii) succinctly explains:

“For any abdication of the Rule of Law within Sport (ie. The Laws and Rules of Play backed up by penal playing effective disciplinary sanctions) creates chaos. Concurrently and consistently alongside it, abandonment of the Rule of Law in society (ie. Parliament, common law and equity) results in anarchy. Thus, the reason *why* the wider Rule of Law in society has to fill the gaps left by Sport is the frequent absence of any effective and thoughtful sanction, policy, or philosophy for penalizing offences committed within it at both playing and administrative levels, and the need to destroy the myth that victims of sporting violence during play consent or are *volens* to it”.

Moore (1997) also states that the law has taken an ever-increasing interest in sport, and that such intrusion has not been totally welcomed by sport administrators, who jealously guard their ability to manage their own affairs. He believes that because of the sophistication of modern society, the law is now an essential tool in those areas of life which, in an ideal world, we would prefer to remain as unencumbered as possible. The case of *Jones and another v Welsh Rugby Football Union* (1997, The Times, 6 March) indicates a willingness on the part of the courts to become involved in issues which were previously regarded as the exclusive preserve of sporting bodies.

In the United States of America (U.S.A.) the evidence of physical education, sport and the law dates back to the 1950's. The relationship between physical education, sport and the law was very superficial and limited in professional preparation programs. However, this changed in the 1960's. Disciplines such as health, physical education, recreation and sport studies began to realize that a substantial body of knowledge, which affected their programs, already existed. Since then, numerous scholars in recreation, physical education and sport studies, and in law have explored this body of knowledge in an attempt to organise it, analyse it, and develop professional guidelines from it. The study

of “sports law” became a fundamental part of professional preparation of coaches, physical educators and recreation specialists (Nygaard & Boone, 1989).

In Britain the corresponding changes began occurring in the 1970’s. In 1977 a three-part series on *Sport and the Law* appeared in the Sunday Telegraph. This was followed by a 76-page Sunday Telegraph booklet under the same title. In 1988 Grayson published his first edition of *Sport and the Law*. The second edition appeared six years later. There were no earlier precedents on how to structure the body of knowledge into what is now called sport law (Grayson, 1994). The role that law plays in sport has only recently been recognised in Britain. Legal issues in sport are not solely concerned with commercial law – a wide variety of sports law issues have become a part of the general discourse of sport (Gardiner et al., 1998). The relationship between sport and the law is now firmly entrenched and likely to increase in intensity. The recent case of *Smoldon v Whitworth & Nolan* (1996; Gardiner et al., 1998) underlines the developing nature of the relationship, and also demonstrates the enormous interest created by sports-related litigation (Moore, 1997).

In South Africa, there has been a dearth of sports injury litigation from a criminal law viewpoint and in civil law. Unfortunately, the country does not have a body of sports law (Labuschagne & Skea, 1999; Neethling, 1991; Parmanand, 1987; Van der Merwe, 1975). Everyone involved in sport, from players to spectators and management, needs to be made aware of legal issues and modern sport management principles demand from professionals that they translate this knowledge into nationally and internationally accepted practices. If “sports law” is not a fundamental part of the professional preparation of coaches, physical educators, recreation and sport specialists, then it should be (Nygaard & Boone, 1989).

It is a widely accepted fact that one of the main functions of recreation and sport is to contribute to the health, fitness and wellbeing of individuals and society at large. The issue of harm or injury detracts from this value. Therefore, scientific inquiry into injuries in sport and their prevention becomes paramount in an age where violence has become an

integral part of contact and non contact sport (Gouws, 1997; Parmanand, 1987). The following preview of the National Football League(N.F.L.) in America clearly illustrates what has become a common occurrence in modern day sport :

‘Michael Strahan, the Giants’ Pro Bowl defensive end, was chasing down Washington Redskins running back Terry Allen, his eyes locked on the target. Wide receiver Michael Westbrook, running in the opposite direction with a full head of steam, hit Strahan with a vicious crack-back block that knocked the nearly 285-pound Strahan off his feet. Then Westbrook stood over Strahan and celebrated, pointing a finger in his face. “It was such a cheap shot,” Strahan said. “He could have killed me. But that’s life in the N.F.L.”

That life is more violent than ever. While Strahan was not injured on that play, many doctors, team trainers and National Football League team executives agree that the increases in the size and speed of the players today have led to record numbers of severe injuries. Then there is the violence that officials and fans do not see, shrouded by a massive cloak of bodies weighing thousands of pounds. Kicks in the groin, punches in the stomach, gouged eyes and bitten fingers and arms are all common in the pileups after tackles.

Strahan and some 1,500 fellow players have spent the summer in intense, almost militaristic training camps preparing for the exhilarating but brutal ritual that is the N.F.L. season, which begins today. Players train for a game that is more violent than any other organized sport, one in which, to be effective, they must reach a peak of aggressiveness at least 16 times during the season – regardless of the effect it has on them off the field’

(The New York Times, Sports Sunday, September 6, 1998).

The other values such as fair play and discipline and participation in a safe environment have also been eroded. Gardiner et al. (1998:5) have also been concerned with the changing nature of sport:

“Certainly there seems to be some dissatisfaction with what sport has become in the modern world. Some detect a loss of innocence, a fading away of the essential spirit and values of sport, that has been replaced by cynicism, gamesmanship, commercial excess. It may well be however that the past generations have had this same view of the deterioration of what they understand as sport and a nostalgia for a lost notion of true sport and sportsmanship. This is not just a British phenomenon”.

1.2 PURPOSE OF THE STUDY

The literature places great emphasis on safety in sport. While legal liability needs to be understood and avoided, the stress is on professionals conducting their affairs in a manner where specific risk reduction strategies are utilized to prevent or reduce injuries, and consequently litigation. It has been established that there is a dearth of civil litigation concerning sport in South Africa, and that there is no body of knowledge that has evolved in this country (Parmanand, 1987). There is a paucity of scientific research in this field locally. As explained in the rationale for this study, information regarding the situation of sport injuries in tertiary sport is non-existent.

The purpose of this study was to evaluate the risk management policies and practices in sport at tertiary institutions in South Africa, by gathering baseline information on sport and not primarily to draw comparisons amongst them. Further, a study in sport law in an emerging and rapidly changing democracy like South Africa is warranted.

The emphasis of this investigation is on sport personal injury lawsuits, and to a lesser extent, on civil rights and sport because it is believed that these are the main sources for relationships between sport and the law that will affect most sport managers, coaches and physical educators. The study aims to remove the mystique and fear surrounding legal concepts and to explain these concepts in as simple but accurate a manner as possible so that professionals better understand their legal duties. Society today is so complex that an understanding of the law as it affects any profession is no longer desirable, it is mandatory (Labuschagne & Skea, 1999; Nygaard & Boone, 1989). It is expected that once professionals are legally educated, they will incorporate risk management into public and private recreation, sports and leisure enterprises. This study was undertaken to accomplish that goal by investigating and setting out those principles and issues of sport law, appropriate to the needs of professionals in South Africa. According to Baley & Matthews (1989:xvii):

“Many people involved in athletics and exercise don’t like to think about the possibility of being sued for being negligent because it makes them feel uncomfortable. However, ignorance of the law is no excuse”.

It had consequently been decided to determine which risk management practices were applied, how they were applied, and which practices were not applied, specifically at South African tertiary institutions. At most South African universities sport is controlled by a Director of Sport. At technikons a Director of Sport or Head of Sport is employed to carry out this responsibility. While many of these institutions insist on adequate training and appropriate experience, there are others that do not employ personnel with adequate training and/or experience. To aggravate the situation, in most cases the services of coaches and volunteer student leaders are utilised, and they do not possess the required knowledge in respect of the legal aspects of sport and recreation. The ignorance of the managers as well as the participants augments the purpose of the study.

The information could be used to develop an instrument to quantitatively assess risk management practices in tertiary sport. The findings of this study could be useful to:

- tertiary sport participants, coaches and managers for development of awareness and improving their general standard of care and quality of service;
- curriculum development specialists and authors of reference-works who prepare training materials for trainees and professionals in the field of sport management, leisure management and human movement sciences;
- internal auditors and legal advisors at Technikons and Universities; and
- national and regional policy-makers, such as S.A.S.S.U., the Department of Sport and Recreation (DSR), the South African Sports Commission, and the National Department of Education, who draft sport policies for the nation or for educational institutions and departments.

1.3 CRITICAL QUESTIONS

Having established the focus of the research, the following questions need to be addressed:

- i. Are sport managers aware of their legal responsibilities?
- ii. Which risk management practices are most frequently addressed formally, informally or not addressed at all?
- iii. Can a value be obtained for each institution to assess the overall manner in which risk management practices are being applied?

1.4 LIMITATIONS

In terms of the methodology proposed, it would have been ideal to visit each campus and interview the directors or heads of sport. This process would have yielded more reliable data. Due to financial considerations however, this was not possible. Questionnaires were mailed to respondents.

The second limitation was that only the directors or heads of sport were targeted. This did not include coaches, student leaders and volunteers who are also involved in the management of tertiary sport.

Although the focus of this study is sport law, it is approached from a sport and recreation management perspective or an applied perspective, and not from a purely legal perspective.

1.5 DELIMITATIONS

- i. The investigation will include Universities and Technikons in South Africa, but not colleges of education.
- ii. The areas of criminal liability and contractual liability in sport will not be covered by this study.

Tertiary institutions comprised the population because it was felt that many relevant legal principles were applicable to sport at this level. Also, because of adult participation, the variety of programs, wider scope of competition, national and international tours and professional management responsibilities, tertiary sport closely resembles community sport, thus allowing for generalizations to be made where similar circumstances exist.

Another important reason for selecting tertiary institutions is because they are the training grounds of professionals in sport and the law. They prepare individuals in the various subfields that have a relationship with the law. These could be courses in law, sports law, sports medicine, biokinetics, fitness/health management, sport and leisure management. As such, they should be at the forefront of information technology and methodology and hence lead by example. It makes sense that every professional should be well versed in the background relating to their field of expertise. Today this would include a sophisticated background in the area of civil rights and procedures and the area of drugs, steroids and their impact on the mind, body and immune system.

1.6 ASSUMPTIONS

The following were the assumptions of this study:

- i. Respondents were sufficiently familiar with risk management practices in their programmes to answer the questions reliably.
- ii. Respondents would have answered honestly.

1.7 HYPOTHESES

The following were the hypotheses for the study :

- i. Sport managers are aware of their legal responsibilities.
- ii. Most of the risk management practices are addressed formally.
- iii. A value could be obtained to assess the overall manner in which risk management practices are applied.

1.8 METHODOLOGY

This research represents an analysis and an assessment of risk management in sport and recreation practices at tertiary educational institutions. As mentioned previously, the study is approached from an applied perspective, and not from a purely legal perspective.

The specific methodology utilised was twofold. The first and major method used was descriptive research. The aim of the first part of the study was to provide a critical review of mainly South African literature on :

- what has been written on the topic.
- what has not been written on the topic or is written in such a way that it is conceptually inadequate.
- what gaps or weaknesses exist in the literature.

The review also sought to determine the concerns and practices, from an international perspective, that tertiary sport departments should address to reduce the risk of litigation. The methodology used in the first part was thus library research, a review of legislation and case law.

The second part of the study aimed to investigate the current risk management practices of sport departments at tertiary institutions. The survey method was used to quantify the different practices.

1.8.1 THE QUESTIONNAIRE

The instrument used has been produced by Penman and Adams (1980) and is known as Assessment of Legal Aspects in Sports. Their publication, which is widely used is entitled: "Assessing Athletic and Physical Education Programs: A Manual with Reproducible Forms." The instrument was adapted to apply to South African circumstances and terminology. A copy of it is included in the appendix.

The evaluation instrument consisted of four major categories that were identified by Roman numerals. The categories were as follows:

- i. General Liability
- ii. Equipment and Facilities
- iii. Medical Aspects
- iv. Records and Information on Athletes

Within each major category there were varying numbers of subcategories that were identified by capital letters.

The subcategories under general liability were as follows:

- A. Insurance
- B. Classification and Association Relations
- C. Standard of Care
- D. Transportation
- E. Spectators
- F. Supervision
- G. Miscellaneous

The category of Equipment and Facilities was subdivided as follows:

- A. Equipment
- B. Facilities

The category of Medical Aspects consisted of the following subcategories:

- A. Legal Considerations – Pre Season
- B. Legal Considerations – During Season
- C. Legal Considerations – Post Season

The following subcategories comprised the category of Records and Information on Athletes:

- A. Health Records
- B. Documents from Parents
- C. Assessment of Performance

This could be illustrated in the example that follows.

Table 1: An Example of Categories, Subcategories and the Rating Scale.

iv. Records and Information on Athletes (Major Category)							
A. Health Records (Sub Category)	1	2	3	4	5	6	7
<u>Comments</u>	N						Y
1. Preseason physical examination data are kept on all athletes	1	2	3	4	5	6	7
2. Accurate records of injuries occurring during practice and contests are kept on all athletes	1	2	3	4	5	6	7
3. A written record of all medical treatment given to athletes is kept on file	1	2	3	4	5	6	7
Add numbers and divide by N for subcategory rating (ie., $12 \div 3 = 4$)							

To the right of each subcategory heading was a scale from 1 to 7. There were various statements listed under each subcategory. These statements also had the 1 to 7 scale. Respondents were requested to examine the statements and to rate them individually. The individual statement ratings were then to be added and divided by the number of items rated (N) to determine an average sub-category rating. These were the ratings that the author was interested in.

1.8.2 PILOT STUDY

The questionnaire was piloted in November and December of 1998. It was posted to five tertiary institutions in Kwa Zulu Natal after prior arrangements were made and the co-operation of the heads of sport was enlisted. Three of these were Universities and two were Technikons. They were allowed between three to four weeks to complete and return the questionnaires. During this period the author was in constant telephonic contact with the respondents in the event that they experienced any difficulties.

All five institutions co-operated by returning the questionnaire timeously. The returns were analysed and evaluated in January, 1999. Certain errors that were found were

corrected. Statements (comments) under each sub-category were clearly understood and required no adjustment. Several typographical errors and omissions had surfaced and they were adjusted accordingly. The questionnaire was found to be suitable for the final gathering of data.

1.8.3 FIELDWORK

The names and addresses of the institutions comprising the population were downloaded from the S.A.S.S.U. database on their website (<http://www.unisa.ac.za>). The questionnaire was mailed to all 46 tertiary institutions that represented a 100 percent sample and were spread throughout the country. Each questionnaire was accompanied by a covering letter explaining the purpose of the study and the return-by date, as well as a self-addressed, stamped envelope for returns. The envelopes were marked for the attention of the director or head of sport at each institution. A period of three weeks was allowed before the return date. Letters of reminder were prepared and mailed to all institutions three weeks after the initial mailing. After a period of six weeks, some of the institutions were also contacted by telephone to encourage them to return the questionnaire.

1.8.4 RETURNS

There were six institutions that submitted a nil return, indicating that they had no formally constituted department or specialised staff to manage sport. These were mainly satellite campuses. Hence, the sample of institutions that offered organised sport as a service to their students consisted of the remaining forty. Of this number, twenty completed returns were received. This represented a fifty percent sample. For the purposes of this study and the method of analysis used, the size of the sample was considered adequate to proceed with the analysis. The responses were scrutinised for accuracy and completeness and then categorised and analysed.

1.9 DEFINITION OF TERMS

For the purposes of this study, the following definitions are assigned to the terms that are listed below :

- i. **Sport Law** : The body of knowledge that deals with legal issues pertinent to recreation and sport programs
- ii. **Risk Management** : An integrated strategy for both conducting safe, equitable programs and reducing the potential for loss arising from successful legal claims against the recreation and sport program, its individual employees and administrators
- iii. **Formally Addressed** : The use of the printed form to deal with or verify a behaviour
- iv. **Informally Addressed** : The use of the verbal form or any other non-printed form to deal with or verify a behaviour.

Specific legal terminology is defined hereafter, in a glossary, although it would be applicable mostly in the chapter on legal theory. These “definitions” do not reflect the comprehensive legal meaning of the terms but are intended to facilitate an understanding of them by sport and recreation professionals who are not trained in law. Such professionals should be warned against using them without adequate legal knowledge.

1.10 GLOSSARY

Accused	:	the person charged with the offence
Assumption of risk	:	when a person voluntarily submits to exposure of the risks knowing the danger
Boni mores	:	good values
Breach of duty	:	failure to perform a specified legal duty owed to another
Civil action	:	action instituted to protect a private right, as contrasted with a criminal action which protects the right of the state
Civil rights	:	the rights of all citizens, guaranteed by the constitution

Complainant	:	the injured party in a criminal action
Contract	:	an agreement entered into between two or more parties setting out the terms and conditions as agreed between them
Crime	:	an unlawful, wrongful act committed either intentionally or negligently, which causes harm or injury to another person and is punishable by law
Criminal action	:	action brought by the state against an individual
Criminal liability	:	liability in the form of punishment, ie. a fine or prison sentence
Defendant	:	the person who defends an action in a civil case
Delict	:	the act of a person which in a wrongful and culpable way causes loss to another
Discrimination	:	illegally unequal treatment of another based on race, religion, sex, age, or ethnic background
Duty	:	a legal obligation to another person
Foreseeability	:	ability of one to anticipate the outcome of one's actions
Fault	:	where a wrongful act has been established, the legally blameworthy participation or role of the defendant, either intentional or negligent
In loco parentis	:	to act in place of parents
Judgement	:	a decision handed down by a court of law
Judicial precedent	:	a decision of a court used as authority for an identical or similar set of facts
Legislation	:	laws passed by parliament
Liability	:	a legal responsibility, duty or obligation
Litigation	:	action brought in a court of law; a lawsuit
Plaintiff	:	person who institutes action in a civil case
Prima facie	:	on the face of it; a fact that will be considered true or a case that will win unless the other side comes forward with evidence to dispute it

Risk	:	a specified contingency or danger
Summons	:	documents served on the defendant setting out the allegations upon which the plaintiff's claim is based
Supervisor	:	one who is in charge of and responsible for others as they go through the course of a certain act
Sue	:	to start a civil lawsuit
Unlawful	:	conduct which is committed contrary to the law prevailing at the time
Vicarious liability	:	liability of an employer for the negligent acts of his employee committed during the course and scope of his employment; this principle also applies to a principal-agent relationship and to a motor car owner-motor car driver relationship
Volenti	:	of one's own free will
Volenti non fit iniuria:		a willing person cannot be wronged; a person who consents to an act cannot claim that he was wronged unlawfully