

CHAPTER THREE

THEORETICAL FRAMEWORK

3.0 INTRODUCTION

The purpose of this chapter is to give the reader a conceptual foundation for understanding the law and its relationship to sport, recreation and physical education programs. An attempt will be made to discuss the kinds of legal problems encountered in the day-to-day operations of practitioners from a recreation and sport perspective that is easily understood. It is not intended to teach all there is to know about the law, but to serve as an introduction to the areas of law that most often have an impact on coaches, administrators and activity leaders.

Professionals in sport, recreation, fitness, exercise science and physical education should develop a legal system appropriate to their needs. This means acquiring knowledge of the South African Constitution; the constitution of the province in which they are employed; national, provincial and local statutes; executive orders; municipal/ transitional local council ordinances; and relevant common law principles that pertain to their role in the delivery of human movement and sport services.

3.1 WHAT IS LAW?

There is no universally accepted definition of law (Carpenter, 1995; Scott, 1991; Nygaard & Boone, 1989; Clement, 1988; Kaiser, 1986). There are essentially two concepts that emerge from the various definitions: some stress the law as a body of rules striving to attain justice, whilst others merely see it as a set of norms intended to regulate human conduct. The best one can do is to refer broadly to the law as a system of norms prescribed for human action by a determinate authority (Scott, 1991).

3.1.1 Relationships

Because of the plethora of definitions, the law could be regarded as a system defining relationships between people/ juristic persons. Thus a solitary inhabitant of an island will need no law, as human relations are lacking in this instance.

If a person is hurt because another person has been careless, the injured person may assert a right to be compensated for injuries. Should the injured person take the case to court, the court will decide whether the careless person had a duty to protect or prevent the injured person from being hurt. If the court finds that the careless person had no duty to look out for the safety of the injured person, then the injured person's claim for compensation will fail. There could be many reasons why the court would make such a judgement, but by not finding such a duty the court is saying that there is no causal connection between the action and the injury caused, therefore no liability arises, resulting in no award for compensation (Carpenter, 1995).

3.1.2 Behaviour

The law may also be thought of as a system of principles that tell citizens how to behave. For instance, the law tells people that they should not commit crimes. A criminal act is one that is defined by the law as being evil, or that creates such undesirable consequences that it should be prohibited and punishable by law. Thus the system of criminal law informs people how to behave and the punishment that they must suffer for misbehaving (Ibid, p.2).

3.1.3 Reasonableness

The law informs people that they must behave in a reasonable manner even when they are not committing crimes. For example, one should not drive a car in a race at the maximum speed limit if the road is suddenly covered by fog. It may not be reasonable to

drive that fast, and the court would probably say that the driver was legally at fault should an accident occur. Hence, the law is telling them how to behave (Ibid, p.2).

3.1.4 Creation and Limitation of Freedom

The law can be regarded as a system that both creates and limits freedom. The law, chiefly through the constitution, ensures that people enjoy the basic freedoms of being a citizen of the Republic. However, the freedom is not without limits. For example, the right to free expression does not guarantee one the right to “streak” across a sportsfield in full view of a crowd of spectators. While the rights of citizens are extensive, they are limited by the law so that people may realise the greatest degree of freedom consistent with the freedom of fellow citizens (Ibid, p.2).

3.2 WHY DO WE HAVE LAWS?

Although the reasons for the law’s existence seem to be explained when one describes what it is, there is more to the question than first appears. According to Carpenter (1995), The following are the main reasons for having laws:

3.2.1 Goodness

A court’s decision is closely tied to the reason for the existence of laws. For example, a decision may be based upon issues of good versus evil. The law prohibits injury or harm of one person by another. Thus the law would not allow a rugby player to bite off an opponent’s ear, because such behaviour is not within the rules of the game. In doing so the law preserves the spirit of the sport and its inherent goodness.

3.2.2 Fairness

The law may be regarded as a great equalizer, levelling the playing field so that the wealthiest or strongest does not always prevail. The constitution of the Republic of

South Africa guarantees the citizens equal protection by the law. This means that people are able to assert their rights under the law, without their race, sex, nationality or religion or such irrelevant factors being weighed against them. Fairness is the main consideration when laws are created to eliminate discrimination in educational institutions, at the workplace, in sport and recreation and in society at large.

3.2.3 Consistency

The law considers the need for consistency, or people would not know what kinds of activities were illegal. Further, it would be almost impossible to conduct business. Laws are created to see to it that underlying policies are consistently enforced. For example, if two people enter into a written contract for the sale of soccer outfits and if the contract does not stipulate the price of the outfits, it does not necessarily mean that the contract is unenforceable. The law will merely require that a “reasonable” price should be paid, because this can be ascertained and also it would be in the best interests of society to enforce contracts that are so close to being complete. It is the law’s uniform enforcement of this policy of enforcing contracts that brings consistency to the market place and allows the smooth running of commerce (Ibid,p.3).

3.2.4 Compensation

An important reason for the existence of laws relates to the idea that if one person causes injury to another, then the injured person should be compensated. The aim of the law here is to “make the injured person whole.” For example, if a reckless soccerite has caused an opponent to break a leg then the careless person should pay the cost of medical expenses, loss of income and for the resulting pain and suffering. This is the basic conceptual theme underlying the law of “delict” which will be discussed later.

3.2.5 Ownership

The law allows people to own, make use of and enjoy their property. Property may be such things as sports equipment, vehicles or land. When a person interferes with another's use and enjoyment of property, the law provides a means by which the losses may be recovered.

The aforementioned explanation of the reasons for the existence of law illustrates that definitions flow from the aim or function of the person defining it. Hence, it is simple to comprehend the lack of a universal definition of law.

3.3 SOURCES OF LAW

Sources of law may be more important than the definitions to recreation and sport educators, administrators and managers. Public and private recreation enterprises are regulated not only by national and provincial statutes, but also by local authority ordinances and provincial organisation rules.

There are many sources of law. For the purpose of this study, the focus will be on the formal or formative sources of law: "A formal or formative source of law is that which has the quality of being binding and which possesses a dynamic quality as a law-generative medium"(Hosten, Edwards, Nathan and Bosman in Scott, 1991). There are five main sources of law.

3.3.1 Constitution

A constitution is a statement that causes certain powers possessed by the people to be delegated to the government in order that the people may benefit from an ordered system of freedom. The constitution of the Republic of South Africa (Act 108 of 1996) is the "supreme law of the Republic." The constitution thus sets out the rules and regulations by which the country is governed and under which citizens live.

3.3.2 Statute

3.3.1 Custom

In this category acts of parliament, provincial ordinances, municipal ordinances and by-laws and regulations of ministers of state form the basis of law. The foregoing agencies have authority to enact laws dealing with a wide range of concerns and their powers are limited only by the constitution. For example, provinces, communities and local councils have the power to regulate, within their jurisdiction, resources and human activity for the promotion of health, safety and welfare. As an example of a provincial ordinance, one may refer to the Horse Racing and Betting Ordinance (Transvaal) 24 of 1978. Section 55 of this ordinance provides an example of a statutory measure empowering the administrator of the province to make regulations concerning horse racing. Most municipal regulation books contain by-laws that deal with parks, recreational facilities and health which fall within the ambit of the applied area of recreation and sport law (Scott, 1991).

3.3.3 Judicial Precedent

South African courts have adopted a system of judicial precedent or *stare decisis* (adherence to decided cases) from the English legal system. This means that judges follow the precedent established by prior decisions. Each time a judge hands down a decision, it is binding upon the parties to the case being tried by the court and, in the case of supreme court judgements, such decision constitutes a precedent which binds lower courts and the same division of the supreme court.

The true philosophical reason why judicial precedent forms such an important source of law has been accurately identified in the following words by Hahlo & Kahn (Scott, 1991: 3):

“In the legal process, as in all human affairs, there is a natural inclination to regard the decisions of the past as a guide to the actions of the future. In the family circle and in social organisations such as departments of state, clubs and businesses it is a product of regard for those of repute who went before, or the wish to profit from the distilled wisdom of the past, of innate conservatism, the yearning for certainty and the antipathy to analysing problems afresh [or, as it is sometimes said, to rediscover the wheel afresh each time] [or] of the desire to do justice.”

3.3.4 Custom

Under exceptional circumstances a custom may qualify as a law constitutive medium. The following requirements must be met before a custom is recognised as a source of law:

- It must be reasonable
- It should have existed for a very long time
- It must be generally recognised and observed by the particular community
- Its essence must be easily ascertainable, which requires that it should be clear and definite.

An example of a custom as legal usage having the force of law can be found in the daily phenomenon of people, for example spectators forming a queue at the entrance of a cricket stadium; each and every member of the file can claim a right that those behind her / him, or an outsider, should not take a place in the queue in front of her/him. When such custom is not observed, chaos could result in the sense that an aggrieved party will most probably resort to self-help, which in itself is normally wrongful. The layman is usually not aware that this “minor” rule of law embodied in custom has the effect of law.

In exceptional circumstances a custom as a source of law may be supported by judicial precedent. This occurs when the supreme court hands down a judgement in which a certain usage is recognised as a law-constitutive medium. This alleviates the burden of proof for a party who subsequently wishes to rely upon such a custom. In the case of *New Windsor Corporation v Mellor* (Scott, 1988:5), an eighty-one year old lady established the right of local inhabitants to enjoy lawful sports and pastimes on land in their town. It was a right, based on custom that went back 1000 years and concerned maypole dancing and archery. The result was that the local authority was thwarted in other plans they had for the use of that land. This sort of custom is particular law for a particular locality. In the case of *Van Breda v Jacobs* (1921 AD 330) the custom involved professional fishermen. The custom provided that between Cape Point and Fish Hoek, assuming that

no boats were stationed permanently between those points, once fishermen had cast their nets to catch a shoal of fish swimming parallel to the shore, other fishermen could not cast their nets closely in front of those of the first fishermen. In its judgement the highest court found that the custom “first come, first pull” conformed to all the requirements of a legal norm (Op. Cit.).

The vast body of indigenous customs of the African black population also has to be considered under customary law. When such usage is relied upon as a source of law in courts by anyone, it must be proved in exactly the same way as any other custom (Ibid, p.4).

3.3.5 Old Authorities

As the South African legal system is essentially Roman-Dutch, the works of common-law authors are important sources of law. Four of these main authors who lived in the 17th and 18th centuries were Hugo Grotius, Johannes Voet, Cornelius van Bynkershoek and Dionysius van der Keessel. According to Scott (1991: 4), “one can broadly state that a treasure house of legal rules lie hidden in a vast number of ‘musty tomes’.”

An example from Roman law may be briefly mentioned. In a Roman text [D 9294] the case is mentioned of a javelin-thrower who killed a slave while exercising his sport: It is laid down in the source that the thrower will be liable if he practised in a public place. However, if the accident occurred in an arena or place clearly marked off for javelin-throwing, he will not be liable as everybody is expected to avoid the danger. This text, pertaining to sport activity, provides an example of how wrongfulness and negligence are established and, how it is relevant to the law of delict, which is dealt with later (Parmanand, 1987).

3.4 BRANCHES OF LAW

For theoretical and practical purposes it is essential to subdivide the law of a country into several categories. Two broad categories of law are criminal law and civil law. Criminal law is concerned with a wrongful act committed against society as a whole. Although a criminal act may involve only one victim, the act is considered an offence against the general public. A criminal proceeding is not concerned with compensating the victim but with protecting the public interest by punishing the offender. There are criminal law cases concerning sport, especially those involving violent assault and battery of one player by another, drugs and gambling (Scott, 1991).

Most lawsuits involving coaches and physical educators and sport personal injury are regarded as matters of civil law. Civil law is concerned with the duties that exist between persons, or between citizens and their government. In a civil lawsuit one party tries to make the other party comply with a duty or pay for the damage caused by the failure to comply. The two chief branches of civil law are law of contract and law of delict, for example the rules prescribing the requisites and the form of agreements, and those pertaining to the redress of injury suffered during sporting activity, where such injury was caused by the wrongful and negligent or intentional conduct of another.

Most sport personal injury lawsuits are tried under the law of delict involving negligence. Hence, this study will focus heavily on negligence. While there may be a wide variety of sport lawsuits, it is not the intention of this study to discuss them all. The purpose is to explore the kinds of lawsuits that physical educators and coaches are most likely to encounter – those involving personal injury. It is imperative that coaches, physical educators, program administrators and anyone who chooses to be involved in the conduct and management of human movement activities, understand the theory of negligence law.

3.5 SPORT LAW

According to Gardiner et al. (1998), the study of sport law is a relatively new worldwide phenomenon. However, there are two opposite viewpoints on the matter. One school of thought holds that sport law in itself does not exist. Rather, sport law study is seen merely as the application of traditional legal principles to the sport industry (Moore, 1997; Grayson, 1994; Collins, 1993). However, there is a growing body of thought that sees the emergence of a recognizable body of statutory and case law as a subject that can be designated as a distinct legal area, namely, sports law. This view is supported by Gardiner et al., 1998; Gouws, 1997; Scott, 1991; Nygaard & Boone, 1989 and Parmanand, 1987. The author concurs with this latter view.

Whichever may be the correct view, sport law covers a broad range of legal disciplines such as contract, delict, labour, trade regulation, criminal and administrative law. As a subject, sport law can encompass many topics, ranging from the regulation of governing bodies to the rights of athletes; from safety in sport to violence on the field; from protecting the commercial value of an athlete to ambush marketing; from providing an internal dispute resolution system to protecting the constitutional rights of its participants (Gardiner et al., 1998).

In America, sport injury litigation is common. Newspapers have reported that the number of lawsuits related to sports and recreation had increased 150 percent in ten years. The number of million dollar judgements resulting from all personal injury lawsuits, not just sport injury lawsuits, had increased from 7 in 1970 to 407 in 1985 and 488 in 1986 (Nygaard & Boone, 1989).

Clement (1988) and Nygaard & Boone (1989) have reported that most sport injuries occur in the educational setting. Physical activity is a risk profession. It provides one of the few environments in which people can experience risks in a controlled setting. Physical education classes, intramurals and extramurals provide a system where young people test themselves in a risk taking manner. They acquire confidence as they take

risks, succeed, and then try more challenging tasks. As in all endeavours, most people succeed; but, some people fail. When a student fails English or Science s/he receives an “F”. A student who fails on the high-bar or rings would fall and risk serious injury. The student may look to the coach, teacher, school or the institutions insurers for compensation (Clement, 1988).

The relevance of the regulation of sport has only recently been recognised in Britain (Gardiner et al., 1998; Moore, 1997). According to Grayson (1994), while for many who view it through traditional eyes and minds sport is a healthy vehicle for fair play, others have corrupted it through the triple diseases of drugs, violence and commerce, which destroy its healthy foundation. Hence, he formulated the following pyramid as a guideline to the facets which constitute sport. The base elements of this pyramid are shaped and conditioned by the upper levels.

Violence
Internationalism
Politics and Power
Commercialism
Entertainment
Healthy Competition
Free – For – All - Fun

(Ibid, p.22)

The inspiration for such structuring came from Sir Roger Bannister, the pioneer who broke the four-minute mile barrier, who had this to say of sport:

“Internationally it is becoming increasingly complex to organise and regulate and has become fraught with commercial and political pressures or even, as in the Munich Olympics, terrorism”

(Ibid, p. 22)

The pyramid, with violence at its apex has been confirmed by subsequent Olympic and Commonwealth Games. The different levels of law which are applicable and appropriate to sport were identified as follows:

1. the administration of justice:
 - i. balanced refereeing and umpiring for play
 - ii. balanced disciplining administration in committee rooms and

council chambers

2. legal order: playing and administrative laws for all games and play
3. law: with concepts that are generally and sportingly applicable

(Ibid, p. 24).

Thus it can be established that sport in a broad sense acknowledges the laws' existence at one or more of four separate levels aforementioned:

- i. basic *playing* laws, eg. rules prohibiting unfair or foul play
- ii. playing *penal* laws, eg. immediate field sanctions ie. dismissals, sin-bins
- iii. *administrative* laws, eg. disciplinary tribunals, ie. suspensions, life-bans
- iv. *national* laws eg. civil or criminal

(Ibid, p. 34).

According to Gardiner et al. (1998), the 1996-1997 season witnessed many examples of the law's involvement in sport : the criminal trial of the soccerites John Fashanu, Bruce Grobelaar and Hans Seger for fraud ending in a hung jury at their first trial and an acquittal at their retrial; the European Court of Justice decision in *Bosman* (ASBL and Jean-Marc Bosman, Case C-415-93, 15 December 1995); Imraan Khan's successful libel case against Ian Botham; Ben Smoldon's successful action against the rugby referee for damages for his paralysing injuries; the criminal conviction for assault of Duncan Ferguson; and a child successfully suing a mountaineering guide for the negligent death of his father (Gardiner et al., 1998).

There have been other cases that involved lawyers operating within internal mechanisms of sporting bodies: the Diane Modhal drug incident; the successful overruling of the Football Association's docking of league points from Tottenham Hotspurs for financial irregularities. There have been increasing incidents where the threat of legal action was raised: the Leicester City fan's attempt to sue for 'football trauma', claiming he was unable to work for two days due to a failed penalty in the F.A.Cup semi-final against Chelsea, and the Rugby Football Union's feud with the leading English clubs (Ibid, p.8).

The law's involvement in sport has progressed to the development of law that can be identified as being specific to sport. The creation of the British Association for Sport and the Law in 1993 was a result of such an evolutionary process. In some countries there is

legislation that controls the operation of sport on a general level, eg. The Fitness and Amateur Sport Act 1961 in Canada, The Act Respecting Safety in Sports RSQ, s.3.1 in Quebec, and the Malaysian Sports Act 1997. However, this has not happened in Britain but a recognisable body of sports-specific law has emerged in recent years as cases involving sporting issues have developed through the common law and partly through Acts of Parliament. The general law that regulates social activities and relations in all areas of social life is involved in sport in such spheres as the regulation of contracts of employment and services, revenue law taxing sport as a business and personal injuries law. More recently, legislation concerning the regulation of safety in sport in general and statutes concerning particular sports such as football with the Football Spectator's Act 1989 and the Football Offences Act 1991 reflect the increase of legal intervention (Ibid, p. 8, 9).

The proliferation of sport litigation has become a trend in Australia, New Zealand and Canada also. Closer home, it is essential to consider what developments have occurred in South Africa. As mentioned in an earlier chapter, Parmanand (1987) holds that:

"South Africa unfortunately does not have a body of sports law. In the superlatively few sports litigation cases that have been presented to our courts, decisions have turned mainly upon our common law principles relating to negligence. Our courts have also invariably stopped the many *lacunae* in this field of the law by generous reference to Anglo American developments which have thus far enjoyed particularly persuasive authority. Quite clearly there is a serious need for us to have comprehensive and ordered guidelines to regulate delictual liability for injuries sustained in sports" (Ibid, p.9,10).

Scott (1991) maintains that while a definite body of sport and recreation law does exist, the only reason for it not being widely recognised in South Africa is probably that there was no need for such an applied field of law. He found it surprising that for a typically sporting country this field had not gained recognition in South African legal literature.

South Africa's re-entry into the arena of international sport and recreation, as already mentioned in Chapter Two, has necessitated several changes in the way sport is conceived and managed. The country's new democratic constitution with its Bill of Rights intersects many areas of sport and the law. Legislation that controls sport on a general level, namely, the National Sport and Recreation Act, 1998, has already been

approved by the National Assembly. The Sports Commission Act, 1998 that would establish a R58-million-a-year Sports Commission similar to the Australian Sports Commission has been approved in the National Assembly. The South African Institute for Drug Free Sport Act No.14 of 1997 and the Tobacco Products Control Amendment Bill, 1998, which is a new law banning cigarette advertising in sport (Sunday Times, August 2, 1998) are further examples of the legal regulation of sport matters in the country. The Boxing and Wrestling Control Act 39 of 1954 provides the basis upon which pre and post fight HIV testing is conducted.

In essence, this is the role of law in recreation and sport. Sometimes it is invoked to deal with a specific problem unique to an area. In other instances it is found that the existing law, which may originally have been designed for a totally different task, is quite adequate. There are many areas where common sense, agreement and co-operation are preferred to legal intervention. Against the foregoing background, the specific application of the law to recreation and sport may now be examined.

For purposes of clarity and convenience, the legal theory will be handled under the following broad headings :

- Negligence Issues
- Constitutional Issues
- Legislative Issues
- Administrative Issues
- Risk Management Theory

For purposes of convenience, only Negligence Issues will be dealt with in this chapter. The remaining areas will be discussed in chapter four.

The changing scenario of modern sport and the mind-set of today's participant's are appropriately captured in the following extract :

“In recent years there has been a growing trend for participants who have been injured whilst playing sport to turn to the law for a remedy. Some participants are seeking compensation for a career breaking or ending injury whilst others find themselves the subject of criminal prosecutions for their wayward challenges. It is

now no longer the case that all participants injured by their fellow players will willingly accept that injury as an integral part of the game. If they are injured due to somebody else's fault, they want a remedy, either from their sport's governing body or the law"

(Gardiner et al., 1998: 443).

Most recreational activities (eg. hiking, rock climbing, abseiling, jogging or horse-riding) and sport – whether contact sport (eg. rugby, judo or boxing) or non contact (eg. badminton, tennis or swimming) involve a risk of injury not only to the participants but also to spectators. There are a multitude of examples of such injuries, some of which are as follows:

- A boxer may suffer haemorrhage, a broken jaw or bruises to his face, as in the case of Nicky Erasmus, a 22 year old Pretoria amateur boxer who in September, 1964 died from a brain injury following a fight in the Transvaal Amateur Championships (Parmanand, 1987).
- A gymnast could fracture a limb or spine resulting in paralysis, as in the case of a fifteen year old schoolboy who broke his neck during gymnastic training in Tongaat in the 1970's (Parmanand, 1987).
- A spectator at a motor car race may suffer multiple injuries because of an accident eg. on 29 November, 1974 two men were killed and five people were injured when two hot-rod cars crashed through a security gate into a group of spectators at the Wembley racing track in Johannesburg (Parmanand, 1987).
- Sport fans may incur injuries because of poor crowd control eg. on 28 January, 1973 at Umlazi Stadium, three supporters were trampled to death when nearly 60,000 soccer fans stampeded towards the single exit, after a match between Kaiser Chiefs and Pimville United Brothers. These injuries may cause severe pain and suffering and lead to extensive medical expenses (Parmanand, 1987).
- A scholar may die during physical exercise sessions at school. This happened in the case of Ryan Prahladh, an 8 year old pupil at Resmount Primary School in Durban, who collapsed during a formal physical education period at the school at about 9am one Friday. The temperature was in excess of 28° C and the humidity level was high. The boy had suffered from a heart

irregularity known as a murmur. Apparently Ryan's parents had declared on the school's health questionnaire that he did not suffer from any serious health problems. Consequently, he was required to participate with the other children, and suffered from exhaustion after doing running in the sun (Sunday Tribune Herald, n.d.).

- In January 1999 Michelle Naidoo aged fourteen drowned in the shallow end (0,7metres) of the Woodview Primary School swimming pool. A lifeguard was in attendance. The questions that remain unanswered at this stage are: how could the girl possibly drown in the shallow end?; how was it possible for the lifeguard to declare her condition satisfactory when just over five minutes later a local doctor pronounced her dead on arrival? (The Rising Sun, January, 1999).
- A soccer referee shot and killed a player during a match at Tigane stadium in North West Province in February, 1999. The player was shot in the chest after he allegedly attacked the referee with a knife and a toy gun after the referee awarded the opposing team a goal. The police captain stated that "It is alarming for a player and a referee to carry such dangerous weapons during a soccer match" (Daily News, Tuesday, February 23, 1999).
- The South African Rugby Players' Association (SARPA) gave the Mpumalanga Rugby Union notice that it would take legal action to have the contract of a member, Kosie van Vuuren, restored. His contract was suspended after he informed the union that he was suffering from a shoulder injury. SARPA alleged that the Rugby Union had not acted according to the procedural obligations contained in the contract. This would be a test case to determine what obligations a union has towards an injured player. A core issue will be whether professional rugby players are deemed to be employees or independent contractors (Sunday Times, February 14, 1999).

As mentioned in an earlier chapter, all participants in recreation and sport, whether players, referees/umpires, coaches, supervisors, managers or spectators, are subject to the law and may incur civil or criminal liability. Because they happen to be involved in sport

does not protect them against liability. In South African law liability is incurred according to the same principles and rules, irrespective of whether injury occurs within or outside the context of sport and recreation, in strenuous sport contests, exercises, informal recreation activities or children's games (Prinsloo, 1991).

3.6 NEGLIGENCE ISSUES

3.6.1 THE LAW OF DELICT

As described earlier under the sub-heading of branches of law, the law is divided, inter alia, into Criminal and Civil law. Criminal law is applicable where a crime is committed while Civil law deals with cases where the actions of a legal entity lead to injury or loss on the part of another. Delict, which forms part of civil law is designed to compensate a person who has suffered injury or loss as a result of the fault of another. Delict establishes who should bear the loss, who should be compensated, how much should be paid in damages and under what circumstances.

ELEMENTS OF LIABILITY

Where sport is concerned, delict can be used by an injured player to receive compensation for medical expenses, pain and suffering caused by the injuries resulting from an act of sportsfield violence and also for lost income, whether from the playing of sport or from a non-sports related job. The law of delict can be used as a control mechanism for sportsfield violence by the threat of having to pay a large sum of damages to the injured party.

Aquilian Action

The grounds for liability for patrimonial loss are provided by the Aquilian Action which has the following elements :

- Voluntary Conduct
- Unlawfulness

- Capacity
- Fault (Negligence or Intention)
- Causation
- Patrimonial Loss

All of these elements must be satisfied for liability to be proven (Neethling, Potgieter & Visser, 1999).

Voluntary Conduct

Voluntary conduct arises when the conscious will of the defendant is applicable. Conduct is involuntary when it takes the form of “automatism” as in certain instances eg. during sleep, hypnosis, epilepsy, intoxication or possibly even extreme provocation. However, this does not imply that if a person voluntarily drinks alcohol and in a state of extreme intoxication stabs another s/he would escape liability on grounds of non-consciousness. Such a case would also consider the facts of whether the initial voluntary conduct of starting to drink was accompanied by at least negligence with regard to the causing of bodily harm.

Unlawfulness

One of the basic requirements for delictual liability is that the defendants conduct must have been wrongful ie. it must either have infringed the plaintiff’s legally recognised right or have amounted to a breach of a legal duty owed by the defendant (Neethling et al., 1999; Van der Walt, 1997). It follows that an act is only wrongful or unlawful where it has caused a consequence which has violated the law. The act by itself, isolated from its consequence, cannot in private law be described as lawful or unlawful. As Boberg (Parmanand, 1987: 10) observes, “liability in delict is for causing damage, not for causing ‘accidents’ or ‘events’ leading to damage.”

Generally, the judge has to achieve a balance between conflicting interests. Where a person is thought to be liable for failure to act (an omission), the court has to balance the

individual freedom of a person not to act, against the interests of another (in unimpaired physical integrity or property) in order to determine whether there was a legal duty to act. In its assessment the court would consider the elements of **reasonableness** or the general legal views of the community (*boni mores*). For instance, a referee in boxing may be legally liable for failure to stop a fight when one contestant is clearly injured severely and unable to continue the match.

Unlawfulness or wrongfulness may be evident *prima facie* (on the face of it) eg. where physical damage is visible. In other cases, such as omissions, unlawfulness is not *prima facie* evident in which case the courts will have to rely on factual proof.

While every person has the right to bodily integrity and thus injury, maiming, death or other physical harm is, in general, unlawful, there are special circumstances in which apparently unlawful conduct (because an actual infringement of legal interests is present) is in fact lawful because a violation of the law is absent. Examples of these special circumstances, known as grounds for justification, are self-defence, statutory authority, provocation and consent to risk of harm (Prinsloo, 1991).

Capacity

Persons who are adult, sane and sober are presumed to have the capacity to appreciate the wrongfulness of their conduct and to act in accordance with their appreciation. But, a child between the ages of 7 and 14, a mentally ill person or a person acting under automatism (eg. an intoxicated person) may lack such capacity and so may escape liability for causing harm while in such condition.

Fault

The elements of either intention or negligence could constitute fault. Intention is determined subjectively and relates to the state of mind of the defendant, including knowledge of unlawfulness.

A participant who intentionally inflicts injury and or even death of a fellow participant could be liable for assault, culpable homicide or murder under criminal law as well as for intentionally causing harm to another under the civil law of delict. If a rugby player punches an opponent on the head in the field of play, it constitutes an assault outside of the rules of the game and can give rise to civil and criminal liability. Should death result from the punch and such death was foreseen as a possibility by the assaulter, a conviction of murder could be made. If death was not foreseen but only reasonably foreseeable, a conviction of culpable homicide could result. Motive is not equivalent to intention. Thus the political motive of a person who hurls a bomb into a crowd of cricket spectators does not detract from the conclusion that s/he intended to injure or kill some of them.

When it comes to negligence as a form of fault, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care that is required of him legally. The criterion used by South African law to establish whether a person has acted carelessly and thus negligently is the objective standard of the *reasonable man*. This terminology could change to the *reasonable person* in the future because of new anti-discrimination laws. "The defendant is negligent if the reasonable person in his position would have acted differently; and according to the courts the reasonable person would have acted differently if the unlawful causing of damage was reasonably foreseeable and preventable" (Neethling et al., 1999: 127-128).

Causation

For the defendant to be held liable, not only must the conduct be unlawful, but it should also cause harm. The element of causation is traditionally divided into two parts: factual and legal causation.

- **Factual Causation**

The aim of this approach is to establish a factual link between the consequence and various forms of conduct or events. It is based on the question: would the harm have occurred, in any case, without the

defendant's conduct? If it would not have, then the defendant's conduct is a "sine qua non" of the harm, and s/he may be held liable for the harm. In other words, a causal relationship exists between the conduct and the resultant harm or injury.

▪ **Legal Causation**

The existence of a relationship of factual causation between the defendant's conduct and the harm suffered by the plaintiff is not sufficient to establish the presence of a legally relevant causal connection. An additional rule or test is required to determine whether the defendant's conduct was a legal cause of the plaintiff's harm (Van der Walt & Midgley, 1997)

According to Neethling et al. (1999), a wrongdoer cannot be held liable without some limitation for the endless chain of harmful consequences which his act may have caused. There has to be a means of limiting the boundaries of the wrongdoer's liability. The question of legal causation arises when determining which harmful consequences actually caused by the wrongdoer's wrongful, culpable act he should be held liable for. In other words, which consequences should be imputed to the wrongdoer? It is sometimes stated generally that the defendant's conduct must not be "too remote" from the harm suffered by the plaintiff.

In the past, opinions differed in regard to the criterion that should be applied to determine legal causation. The courts acknowledged the existence of the problem but they were hesitant to lay down a single, inflexible criterion, or they took a neutral stance in regard to the test to be applied. According to Neethling et al. (1999), the best-known theories for determining legal causation are the flexible approach, based on policy considerations, reasonableness, fairness and justice, the theory of adequate causation, the "direct consequences" criterion; the theory of fault and the reasonable foreseeability criterion.

3.6.2 NEGLIGENCE

These principles could be illustrated by the following example :

During an inter university rugby match a player(A) is tackled hard, but without the rules of the game being transgressed by his opposition(B). A collapses in agony and his coach rushes onto the field and, although suspecting a neck injury, lifts A up and carries him to the sideline for a doctor to attend to him. Because of being removed in this manner, A suffers injuries which make him permanently quadriplegic. B's tackle is the factual cause of A's ultimate injury, because if it were not for his tackle, A would not have required medical attention and would not have been removed from the field of play. In other words, barring the tackle by B, A would not have suffered the additional injuries. But, is B's conduct the legal/proximate cause of A's paralysis? It is not. The legal cause is the coach's negligent conduct of moving him without the advice of a medical doctor?

Patrimonial Loss

There is a distinction between damage (ie. loss suffered by the plaintiff) and damages (ie. monetary award) made by a court to compensate someone who has suffered harm or injury.

A plaintiff can only recover damages under the Aquilian action if patrimonial loss can be proven to have been caused by the defendant's voluntary and unlawful, negligent (or intentional) conduct. Patrimonial loss must be assessable in monetary terms.

A plaintiff is entitled to recover damages for bodily injuries and attendant losses (eg. loss of future earnings as a professional sportsperson, and medical expenses). Damages for pain and suffering, loss of amenities of life and loss of expectation of life may not be claimed under Aquilian action but with the separate "action for pain and suffering" (Neethling et al., 1999).

3.6.2 NEGLIGENCE

Where a player seeks compensation for injury on the sportsfield, s/he will usually rely on a delictual action based on negligence. Van der Walt and Midgley (1997: 133) define negligence as follows: “Conduct is therefore negligent if a reasonable person in the same position as the defendant would have foreseen the possibility of harm and would have taken steps to avoid the harm and the defendant failed to take such steps.” According to Neethling et al. (1999), in the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him.

The test for negligence is to be found in the authoritative statement of the judge in *Kruger v Coetzee* (1966 2 SA 428 (A) 430):

“For the purposes of liability *culpa* [negligence] arises if -

- (a) a *diligens paterfamilias* [the reasonable man] in the position of the defendant-
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.”

This has constantly been used by the courts for over 50 years.

The Reasonable Man Test

The conduct that the law, therefore, demands is that of the **reasonable man**. Before a person can be held liable on account of negligence, it must be established that the reasonable person, had s/he been in the same circumstances, would have behaved differently. The question, therefore, in each instance is whether the reasonable person would have foreseen and prevented the consequence caused by the other (Van der Merwe & Olivier, 1989).

The reasonable man takes the central place in the determination of negligence. The reasonable man is merely a fictitious person who the law invents to have a workable objective norm for conduct in society. Accordingly, the reasonable man is not an exceptionally gifted, careful or developed person but neither is he underdeveloped, nor someone who recklessly takes chances or who has no prudence. Between these two extremes are found the qualities of the reasonable man. The reasonable man thus serves as the legal personification of those qualities that the community expects from its members in their daily contact with one another (Neethling et al., 1999).

What could be some of the factors that may influence the reasonable man's decision whether to take steps to prevent the occurrence of reasonably foreseeable damage? The fact that the nature and extent of the risk is very small, or that the foreseen harm is slight, may have the result that the reasonable man – despite the fact that the harm was reasonably foreseeable – would not have taken steps to prevent such harm (and consequently the wrongdoer is not negligent where he did not take such steps). Other factors that may influence reasonable man's conduct are the seriousness of the damage if the risk materialises; the utility of the wrongdoer's conduct; and the cost and difficulty of taking precautionary measures (Neethling, Potgieter & Visser in Potgieter, 1991).

The courts do not demand that the manager of sport and recreation possess "mind reading skill", but they do expect reasonable anticipation of risk. The court would decide if the level of conduct was sufficient to prevent unreasonable risk. It should be mentioned that the entire field of recreation and sport has an element of risk. Risk can also be described as adventure, thrills and physical exertion (Peterson & Hronek, 1992).

Requirements of Activity Leaders/ Supervisors

A person who through his careless or negligent behaviour causes damage to another may be liable to compensate such loss. This principle applies to supervisors, coaches and organisers of sports meetings; the fact that they are participating in sport provides them no insulation against liability (Labuschagne & Skea, 1999; Potgieter, 1991). Sport,

recreation and leisure professionals who work with and service diverse populations are not only required to exercise reasonable care in what they do, but also need to possess a certain amount of technical knowledge in the activities they supervise (Peterson & Hronek, 1992).

An outdoor recreation manager may have a high-risk activity on the property s/he manages. The question that should be asked is, "What type of equipment and skills are needed to reduce the risk of the activity?" A certification system should be used to determine the competency of a high-risk user. Certain high-risk recreation and sport activity leaders need a minimum amount of training under a certified instructor, specialized safety equipment, and more than one participant (buddy system) prior to engaging in any activity. Some high-risk activities needing certification may include skiing, mountain climbing, abseiling, canoeing, hunting, adventure courses and many others. Volunteers and part-time employees are held to the same standard of care as full-time employees (Carpenter, 1995). A discerning manager will never place them in the position of taking responsibility for the safety, training or general wellbeing of clientele (Peterson & Hronek, 1992).

Degrees of Negligence

There are also different degrees of negligence. The words "simple," "ordinary," "gross," "wilful," "wanton," and "reckless" are used to modify the degree of negligence in most Anglo-American courts.

Ordinary Negligence

The failure to exercise such care as would be expected by the majority of people under like circumstances.

Gross Negligence

The disregard of life and property of others. This exhibits very great negligence or the lack of even slight care. It consists of conscious acts of negligence.

Wilful & Wanton Negligence

The conduct complained of was so “gross” as to have something of a criminal nature or be deemed equivalent to an evil intent, wantonness, or recklessness indicative of malice (Peterson & Hronek, 1992).

Reckless Disregard

According to Gardiner et al.(1998), the main alternative theory to that of using simple negligence is the test of reckless disregard. Reckless disregard has not yet been accepted as a standard in English Tort law and has been expressly rejected in Australia (*Frazer v Johnstone* 1990 ATR 81-056). It is the recognised standard for sports violence in all except one (Wisconsin) of the states of America. The debate around this concept probably shows that reckless disregard more accurately reflects the actual state of mind of the perpetrator of the violent act than does simple negligence.

This test was first mentioned in English law in the case of *Wooldridge v Sumner* (1963 2 QB 43), in relation to sport participants injuring spectators. It was held that a spectator accepts the risk of a lapse of judgement or skill in a competitor who is going all out to win but does not accept the risk of a participant having a reckless disregard for his safety. In *Condon v Basi* (1985 1 WLR 866) the judge stated that the defendant had been guilty of dangerous foul play and having a reckless disregard for the plaintiff’s safety in a football game(Gardiner et al., 1998). As this test is non-existent in South African law, it is expected that the reasonable man test would apply in such circumstances. As stated previously, the reasonable man is not someone who recklessly takes chances or who has no prudence.

The author accepts the view of Gardiner et al. (1998) that reckless disregard is a more appropriate standard for sportsfield violence. They argue that the test is more workable as it allows for a greater degree of culpability before liability arises than does simple negligence. It puts pressure on the players to change their style of play simply because of the threat of a civil action hanging over them. Players do not really intend committing acts of violence and because most injuries occur through actions committed in the heat of the moment, with no thought of the outcome of the act except for, maybe, who is going to gain the advantage or win the game, they should have to adhere to a lower standard of care than other people. In other words, instead of having to fall below the standard of the ordinary reasonable sports participant, they must act with reckless disregard to the safety of their fellow players. Reckless disregard allows more leeway to players, punishing only a high degree of negligent and dangerous play as opposed to simple negligence which can be too easy to satisfy, especially in contact sports (Gardiner et al., 1998).

The author is of the view that the theory of reckless disregard should apply in South Africa to sportspersons, because it could be argued that they fit into a different category of people that should be viewed seriously. The professional sportsperson of today is hardly the average citizen. The circumstances they find themselves in during competition are very different to what the ordinary, reasonable man experiences. Further, it is often the demands of the reasonable man in the stands that creates the kind of electric atmosphere in which the sportsman must function. Clearly, the additional pressures that such a player is subjected to are not what most people would regard as reasonable.

Grounds of justification for sport injuries

Several sports law experts have stated that most of the injuries in sport are acceptable and sometimes even to be expected (Gardiner et al., 1998; Collins, 1993; Neethling, 1991; Prinsloo, 1991; Parmanand, 1987). Injuries may occur as a result of factors such as the normal risks involved in a game, misjudgement or negligence on the part of the injured person, facilities which are not up to date, defective sporting equipment, the speed of some games, actions done in the heat of the game, and so forth. There is an ever

increasing degree of unnecessary and even intentional violence being experienced especially in professional sport. In South Africa, rugby players, closely followed by soccerites are the main culprits (Gouws, 1997). One is inclined to agree with Parmanand (1987) that it is the incidence of injuries caused by such conduct that is particularly legally objectionable and morally reprehensible. However, as indicated earlier, there is a dearth of civil litigation on the ground of sport injuries in South Africa (Labuschagne & Skea, 1999; Neethling, 1991; Prinsloo, 1991; Parmanand, 1987; Van der Merwe, 1975). One of the main reasons for this is that most of the cases are settled out of court. While references will be made to South African case law, valuable insight can also be gained by referring to English, American and Australian law with regard to sports injuries. In these countries there are far more definite sports injury cases, because they apparently have more serious consequences for professionals in sport. In South Africa, sport is not as professionalised and commercialised as in these countries (Prinsloo, 1991).

Grounds of justification without wrongfulness

In South African law, where injuries are caused by the conduct of another person (whether participant, spectator or manager), such factual infringement of the injured person's interest in his bodily integrity is considered as an indication of, or a pointer to the legally wrongful nature of the conduct – the conduct is then in principle or *prima facie* wrongful. However, the fact that a person was injured by another is not in itself sufficient to make a final decision about the wrongfulness of the conduct. A further investigation is necessary since it may appear in the area of organised sport, that the said interference with the person of another is excused or justified in law (Neethling, 1991). For example, a boxing match, which in general is assault from beginning to end, is lawful because of the internal rules of boxing being followed and hence, the absence of wrongfulness.

Consent to Risk of Injury

Most lawsuits dealing with delictual liability for sports injuries are based on negligence. The defences available range from the *volenti non fit iniuria* (a willing person is not wronged) or consent or assumption of risk, to defences of contributory negligence, provocation, “involuntary reflex”, self-defence, waivers and indemnities and so on. Most jurisdictions internationally, do give some measure of consideration to these various defences. The *volenti* defence receives the widest judicial acceptance and respect (Parmanand,1987).

According to Labuschagne & Skea (1999), assumption of risk means that when a person exposes himself to a known or obvious danger, he may not claim any damages resulting from the injury.

A person who willingly gives consent that another may cause him harm, cannot later complain that the damage was done unlawfully (Van der Walt, 1997). Consent takes two forms: consent to a specific injury (eg. a rugby prop-forward consents that his opponent may scrum against him); and consent to the risk of injury (eg. a squash player accepts that his opponent’s racquet could hit him against the head). If any of these risks should materialise, the injured person cannot, as a result of his acceptance of the risk involved, sue his opponent for damages. This is because wrongfulness is absent and it thus becomes a ground of justification (Neethling et al., 1999; Neethling, 1991).

Characteristics of Consent

- (i) Consent to injury is a unilateral act. It is not necessary to have an agreement or contract to this effect between the injured party and the defendant to be relieved of liability (eg. two opponents in a football game). Because consent is a unilateral act, it may also be unilaterally revoked eg. a boxer may indicate his unwillingness to proceed with the contest in the middle of the round. If his opponent nevertheless continues to punch him, the latter’s conduct will be wrongful.
- (ii) Consent can only exist if it is clearly evident to outsiders; it must therefore be

apparent. This could be done expressly (eg. by words) or tacitly (eg. by conduct, such as willingly participating in any competitive game without expressly giving consent to injury). In this regard acquiescence or submission is not necessarily consent. Where a scholar, to avoid punishment, “submits” to a teacher’s or coach’s threats and participates in an activity, consent is absent.

- (iii) Consent must be given before the prejudicial conduct ; “approval” given after the act is not consent.
- (iv) As a general rule, the injured person himself must consent. Hence, a parent’s permission that her minor child may do gymnastics will not exclude the wrongfulness of the child’s injuries sustained during a contest if the child participated unwillingly. However, the parent will not be able to claim damages for medical expenses he incurred because of the injuries (Neethling, 1991).

Requirements for Consent

The law sets specific requirements for valid consent.

- (i) The consent must be given freely, willingly and voluntarily. The injured person should not in any way be pressured to give consent.
- (ii) The person consenting must be able to form a will, that is to have the mental capability and maturity to evaluate responsibly the nature, extent and implications of his consent or assumption of risk (Van der Walt, 1997). Hence, a child of thirteen years may be legally capable of forming a will and will be able to consent validly to the risks involved in a hockey match, while a child of seven years may not be. In the latter case, the parent/ guardian must act on behalf of the child.
- (iii) The plaintiff must have full knowledge of the extent of the possible injury or risk of injury in order to consent to it. Any participant in a recreational or sport activity will thus have to be fully informed about the rules of the game or activity and the inherent dangers for the purposes of an informed consent.

(Neethling, 1991)

Further, in sport a participant assumes the risks which are inherent to the game and not the risks of injury caused by the violation of the duty owed to the player by the coach or any other party involved in the event (Labuschagne & Skea, 1999). In this regard Article 1-1-123(a) of the *Recreation Safety Act* (1989) of the American state of Wyoming stipulates the following:

“Any person who takes part in any sport or recreational opportunity assumes the inherent risk of injury and all legal responsibility for damage, injury, or death to himself or other persons or property that results from the inherent risks in that sport or recreational opportunity”

(Labuschagne, 1998: 82).

The term “inherent risk” has been defined in article 1-1-22(a) as “any risk that is characteristic of or intrinsic to any sport or recreational opportunity and which cannot reasonably be eliminated, altered, or controlled” (Labuschagne, 1998: 82).

The Participant

A few examples from South African case law will clearly illustrate the principles and their requirements. The case of *Boshoff v Boshoff* (1987 2 SA 694 O) illustrates the application of the test of knowledge, appreciation and consent to a situation of sporting injuries. The plaintiff, who was playing squash, was hit by his opponent’s racquet on the head resulting in an eye injury. The court held that the plaintiff knew that players could be hit and injured by the opponent’s racquet. He had full knowledge and appreciation of the risk involved and consented to it and so the claim for injuries failed.

However, in *Santam Insurance Co. Ltd. v Vorster* (1973 4 SA 764 A) the plaintiff was seriously injured in an accident between two cars on a country road. The two cars, driven by their owners, were engaged in a “dicing” contest and the plaintiff was the stake-holder of a ten rand bet. When the cars went around a curve, one of them accelerated to overtake the other and skidded against the other car which rolled, resulting in injury to the plaintiff. The appeal court held that the plaintiff had only assumed the normal risks of a motor race eg. a mechanical fault or burst tyre, and did not foresee - and was thus

unaware of – the risk of injury resulting from grossly negligent behaviour on the part of the defendant.

In *Steel v Pearman* (1877 NLR 22; Parmanand, 1987, 108-110), South Africa's earliest reported authority relating to sports injuries, the plaintiff went hunting together with the defendant and others. It was alleged that despite the fact that the defendant was aware of the plaintiff's hunting position in a bush, he fired without warning in the plaintiff's direction and injured him. The court found that the defendant was not liable, because he did not shoot intentionally at the plaintiff but was negligent. Today, this verdict is generally criticised as being incorrect, since negligence is sufficient for liability under Aquilian action. It is clear that as far as consent to the risk of injury is concerned, even if the plaintiff had consented to the normal risks involved in game hunting, he did not consent to the negligent conduct of the defendant as it was not foreseeable – he was thus unaware of the danger.

The case of *Broom v Administrator, Natal* (1966 3 SA 505 D) concerned the negligence of a teacher who allowed boys to play rounders for physical exercise. When one of the boys struck the ball, the club (a cricket stump) slipped out of his hands and hit and injured one of his team mates who was waiting for a turn to bat five metres away. A claim was made against the teacher and his employer, on the grounds of the teacher's alleged negligence. The court found that the teacher was not negligent, because injuries in rounders are not serious, occur very rarely, and because the use of a stump without the metal point does not, in itself, constitute negligence. The facts in *Clark v Welsh* (1975 4 SA 469 W) are relevant here, because unlike the previous cases, the plaintiff did have knowledge of the risk involved. The plaintiff and two other beginners in golf, who were incompetent and inexperienced strikers of the ball were participating in a game. The plaintiff was hit in the eye by a golf ball which was struck by the defendant. The eye had to be removed later. She claimed that the defendant was negligent when she teed off at right angles and failed to warn the plaintiff not to stand in the usual position. The court found that the ball's flight was so unusual that no reasonable person could have foreseen it. Thus the defendant's conduct was not negligent and she was not liable. The author

agrees with the viewpoint of Parmanand (1987) that this decision could also have been reached on the basis that the plaintiff consented to the risk of injury. The plaintiff knew that she and the other two were beginners and that they were wild and unpredictable in their playing. Because of her knowledge, and by participating in the game, she assumed the risk involved in the defendant's playing.

In *Mandelbaum v Bekker* (1927 CPD 375) the plaintiff and defendant participated in a military mock battle. During the mock attack the defendant approached the plaintiff and deliberately shot a blank cartridge at him. The unburnt gunpowder injured the plaintiff's eyes and maimed his face. The court decided in favour of the plaintiff because his consent to the risk of harm was only valid for injuries inherent in mock battles, but not for the risk of being shot with a gun, loaded with a blank cartridge and held against his body. This and the next case clearly illustrate that consent is only valid for the risk of injuries inherent in a particular game. In *Pretorius v Van Rensburg* (unreported, TPD 6 September 1935; Parmanand: 112) the defendant injured the plaintiff with a sharp object and damaged his clothes during a friendly wrestling match. The defendant was held liable because the plaintiff had only agreed to the risk of ordinary physical contact inherent in wrestling, and nothing further.

The next case, like *Santam Insurance v Vorster*, confirms that in the case of sport, the participant only consents to the risks inherent in the specific type of sport. In *Rousseau v Viljoen* (1970 3 SA 413 C) the defendant's miniature car left the track for no apparent reason and, while it was under the control of the defendant and he was in a position to stop the engine, headed towards a track official and injured him. The court found that this risk of injury was not inherent in miniature car racing and rejected the defendant's defence of consent to the risk of harm.

In *Human v Van der Merwe* (unreported, OFS Supreme court 4193/83; Parmanand: 121) it was alleged that a rugby player had struck his opponent in the face and seriously injured him. The issue of consent to risk of injury was not raised. Only the unlawfulness of the defendant's action, a punch on his opponent's nose was considered. Since the

punch was in conflict with the rules of rugby, both parties tacitly accepted the unlawfulness of the defendant's conduct. The case was settled out of court for an amount lower than the original claim. In *R v Billingham* (1978 Crim Lr 553), an English case, the plaintiff's jaw was broken in two places as a result of the opponent's punch and it was testified that "in the modern game of rugby punching is the rule rather than the exception". The court found that the accused's conduct fell outside the limits of normal rugby violence and was unlawful. This ruling coincides with the position in South African law.

Two Australian cases will be cited to illustrate the principle which applies in South African law also: that consent is only valid for injuries inherent in the game. In *Mc Namara v Duncan* (1971 26 ALR 584) an Australian Rules Football player, who had already released the ball by kicking it, was struck on the head and seriously injured by his opponent's stiff, raised elbow. The court decided that the deliberate striking of an opponent on the head is a serious offence against the rules of Football and does not form an acknowledged part of the game. The second case, *Rootes v Shelton* (1967 116 CLR 383) concerned a water-skiing accident. The water-skier was injured when the driver of the boat which was towing him, collided with a stationary boat. The court did not consider the risk of a boat driver who does not observe a visible obstacle in the water as an inherent risk of water-skiing.

In *Condon v Basi* (1985 1 WLR 866 CA 869), an English case, a soccer player executed a "late slide tackle" on an opponent and injured him. The court found that the defendant's conduct was "serious and dangerous foul play which showed a reckless disregard of the plaintiff's safety and fell below the standards which might be expected in anyone pursuing the game". The defendant was held liable because he did not comply with the reasonable conduct of a football player.

When, as a result of sportsmen's conduct, spectators were injured in England, the standard of reasonableness was also set as a requirement. In *Wooldridge v Sumner* (1963 2 QB 43) a rider at a gymkhana rode around the track too quickly and the horse left the

track, injuring a spectator (the official photographer). According to the court, a spectator consents to the risk of harm which may happen to him in the course of the game, whether the conduct is an error of judgement or a lack of skill, unless the participant's conduct constitutes reckless disregard of the spectator's safety. The "reckless disregard" test had already been used in the *Payne v Maple Leaf Gardens* (1949 1 DLR 369) case when it was decided that an ice-hockey player was liable for a spectator's injury. Two players had ceased playing and began fighting for possession of a hockey stick. The stick flew out of their hands and hit and injured a spectator. It was found that spectators had not accepted the risk of this conduct and that the player who began the fight was liable.

The English court of appeal stepped down from "reckless disregard" and set "the reasonable man of the sporting world" as a standard in *Wilks v Cheltenham* (1971 2 All ER 369). In the case a motorcycle left the track during a race, leapt over two barrier ropes and injured a few spectators. While the driver did race fast, he acted with reasonable care. He was a reasonable driver and went all out in the contest, but did not act unreasonably and was thus not liable. The measure of reasonableness would also apply to South African law too, where spectators are injured by participants (Prinsloo, 1991).

Spectators

One could refer to Roman law to illustrate the requirement of knowledge in order to consent as a spectator. A javelin thrower was held liable for injuries caused to someone outside the arena marked for javelin throwing. On the other hand, a person who exposed himself to the risk of being injured by walking in the arena could not institute an action. A possible explanation for liability in the first case is that the injured person was not aware of, and therefore did not consent to the risk of injury (Parmanand, 1987).

The famous *Barber* case is also relevant here. Wacke (Parmanand, 1987) gives the following account: A barber had placed his chair in the open air near a playground where people were playing with a ball, possibly a hockey-like game played with sticks. Many people, like Caesar were in the habit of being shaved daily. The rich went to an expensive

barber shop (also for entertainment) while the poor were shaved cheaply in the open air. The customers of the barber in question were not very distinguished. While he was shaving a slave, a ball thrown with some force by a player, hit the hand of the barber so that he cut the throat of the slave. As the forceful throwing of a ball was expected in the vicinity of the playground and was thus a foreseeable risk which the slave assumed, the player was not liable for the slave's injuries. Wacke (Neethling, 1991) concludes that a player was thus not liable for injuries caused to passers-by and spectators in the normal course of a sports event.

Two South African cases that have relevance here will be discussed under the issues relating to facilities: *Van Wyk v Thrills Incorporated Pty Ltd* (1978 2 SA 641 A); *Cape Town Municipality v Paine* (1923 AD 207).

Today the clamour for tickets at major sporting events makes one appreciate that two of the most important reasons for spectating sporting events are the intensity and importance of the competition. This applies mainly at top level professional sport where the participants are performing to the maximum of their endeavours. Such extremes of performance, if misjudged, can result in balls, pucks, cars, and even participants themselves hurtling into spectators (Gardiner et al., 1998).

An early English case that examined the issue of liability was *Hall v Brooklands Auto Racing Club* (933 1 KB 205; Gardiner et al., 1998: 558, 559). The cause of action in this case was a breach of contract with the club which had failed to provide adequate safety for spectators. The judge held that there was an implied term whereby the plaintiff agreed to take the risk of such an accident occurring. However, today such an action would be brought under negligence rather than contract (Gardiner et al., 1998).

The principle enunciated in *Hall v Brooklands Auto Racing Club* was applied in *Murray and Another v Harringay Arena Ltd* (1951 2 KB 529; Gardiner et al., 1998: 559). A six year old spectator was injured by a puck hit out of the playing area during an ice-hockey match. The court of appeal held that the defendants, by installing nets at both ends of the

rink only, had satisfied their duty in that the limited netting conformed with other ice-hockey rinks. The child's injury, as a result of something incidental to the game, was held to be a risk the spectator accepted. This case was also decided on contractual grounds. In the *Wooldridge v Sumner* case previously cited, the judge stated the following on the issue of *volenti*:

“In my opinion a competitor or player cannot in the case at least of competition or game rely on the maxim *volenti non fit iniuria* in answer to a spectator's claim, for there is no liability unless there is negligence and the spectator comes to witness skill and with the expectation that it will be exercised. But provided the competition or game is being performed within the rules and the requirement of the sport and by a person of adequate skill and competence the spectator does not expect his safety to be regarded by the participant”

(1963 2 QB 43; Gardiner et al., 1998: 561).

The view of Gardiner et al. (1998) is that *volenti* is apparently unlikely ever to feature in sports spectator injury cases as legal issues would revolve around the establishment of negligence rather than defences to negligence. The spectator struck by a ball, racquet or car, as long as it was done as an accepted part of the game, is subject to a lower standard of duty by the plaintiff and will have impliedly accepted that lower standard (Gardiner et al., 1998).

Incidents where spectators are injured as a result of deliberate actions outside of the rules of the game will be subject to both criminal and civil law. The infamous incident of Eric Cantona kicking a spectator following his dismissal during Manchester United's FA Cup match against Crystal Palace in 1995, resulted in a criminal conviction for assault (Gardiner et al., 1998).

Although the courts apply the principal of **consent** in both civil and criminal matters, it cannot be generally applied to all cases. Each case is decided by considering its own particular circumstances. In conclusion therefore, participants and spectators only consent to risks that are inherent to a specific sport or activity. The risks of the game are acceptable as long as officials act prudently and as long as those inherent risks are known, understood and appreciated by the participants (Labuschagne & Skea, 1999).