

## Warnings, Indemnities and Consent

A warning is any device that informs one in advance of impending or possible harm. It may be written or oral, but it is easier to prove that warnings have been given if they are in writing. Written warnings reduce the potential for having a coach or physical educator placed in a “my word against yours” approach. Written warnings accompanied by verbal explanations are preferable. For a warning to be sufficient, the following elements should be contained. Warnings should:

- (i) Specify the risks presented by the activity or product,
- (ii) Be consistent with the way the game will be played or the product will be used,
- (iii) Provide a reason for the warnings,
- (iv) Reach foreseeable users.

(Nygaard & Boone, 1989).

In addition, warnings must be unambiguous; they must be thorough and written clearly in language appropriate for the participants. They must also be very specific – they will vary depending on the level of play, the playing conditions, the level of supervision and many other factors. As a general rule, it is advisable for coaches, physical educators and sport managers to develop warnings for their participants in their facilities under their supervision. Warnings should be given, and they should be repeated. Warnings *must* enable participants to *know, understand, and appreciate* the inherent risks they may encounter (Nygaard & Boone, 1989). According to Labuschagne & Skea (1999), even in situations where the user is highly educated and a qualified person, a warning is still needed.

In *Pell v Victor J Andrew High School and AMF Inc.* (123 Ill. App.3d 423, 462 NE 2d 858, 1984; Clement, 1988) the failure to provide adequate warning was a major factor. A beginner gymnastics student was injured as a result of a faulty somersault performed on a

mini trampoline. The caution label was attached to the trampoline which gave a very broad and accurate description of the dangers involved in the use of the specific equipment. It also specified that the equipment was only intended for properly trained and qualified participants under supervised conditions. When a member of staff assembled the trampoline he placed the bed in such a manner that the warning label was on the bottom, facing the floor and therefore out of sight of anyone attempting to use it. The warnings on the frame were covered by pads and were also invisible. The staff member was held liable for the failure to warn the student. This makes a clear point on the importance of passing warnings to users.

Equipment used today is becoming very sophisticated and warnings will become of even greater importance. Teachers, coaches and physical activity specialists will be held to a high standard in passing on warnings. It is thus clear that they have a duty to take all of the abovementioned into consideration when purchasing and applying products for use by their players (Labuschagne & Skea, 1999).

An indemnity agreement (also known as exculpatory agreements) is a contractual undertaking not to institute action against a wrongdoer for damage caused by him; in other words, not to hold the wrongdoer liable. It should be distinguished from consent to risk of injury in that although the effect of both are the same (in each case the wrongdoer is not held liable) the reasons for non-liability differ. In the case of an indemnity agreement there is no doubt that the person who caused the damage acted unlawfully; but the prejudiced person waives his action and therefore loses the remedy he would otherwise have had at his disposal. In the case of a valid consent unlawfulness is excluded. It thus follows that consent can only be given before the act, whereas an indemnity agreement may also be concluded after the damage (Neethling, 1991).

Indemnity agreements are common in the area of recreation and sport activities organised by schools and tertiary educational institutions. Usually parents are required to sign an agreement indemnifying the institution from any liability for damages as a result of

injuries to their child that may arise from the sport or recreational activity involved.

There are two important principles to be noted in this regard :

- (i) It is doubtful whether liability for intentional (conscious wrongdoing) or grossly negligent conduct on the part of the institution may be contractually excluded; such a clause may be null and void. Despite an agreement, the parent/ guardian will under these circumstances still be able to claim damages for the child's injuries. Labuschagne & Skea (1999) state that these agreements are therefore not favoured by the courts.

For example, in the case of *Minister of Education & Culture (House of Delegates) v Azel* (1995 1 SA 30) a minor pupil at a Pretoria school had been seriously injured in a motor vehicle whilst on an educational (and incidentally recreational) tour arranged by his teacher. The pupil's mother signed an indemnity absolving the Department of Education and Culture from liability in certain circumstances should the pupil be injured. The minibus provided to transport the scholars could not accommodate all of them. The teacher conveyed two pupils in her private car. On their way the teacher lost control of her car; it left the road and collided with a tree causing the pupils injuries. It was found that the teacher drove negligently by failing to take reasonable precautions necessary to avoid the accident. The teacher relied on the indemnity signed by the mother. While the indemnity contained certain exemption clauses that absolved the Education Department from liability in certain circumstances, it contained an additional phrase that was decisive in this case:

**“....in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child”.**

The appeal court confirmed the decision of the local court and the appeal was dismissed. Indemnity was not regarded as a defence to the claim for damages for injuries caused by the negligence of the school teacher.

(ii) The fact that the parents agreed not to institute an action, does not in itself exclude an action by the injured child himself. The general rule is that a person cannot conclude an indemnity agreement on behalf of someone else. Hence, if the child did not give valid consent to injuries, or conclude an indemnity agreement himself (assisted by his parents), he should succeed in principle. But his claim will usually be for compensation for his pain and suffering as the financial loss incurred will in most cases be borne by the parents. The same rule also applies to the situation where a breadwinner, who is for instance a jockey, concludes an agreement on behalf of himself and his dependants that they will not bring an action for loss of support if he dies as a result of riding injuries caused by the unlawful and blameworthy conduct of an opponent. Such an agreement would not be binding on the dependants (Neethling, 1991).

Labuschagne & Skea (1999) mention that the more dangerous the activity and the higher the level of skill required, the less reluctant the courts will be in permitting a participant to waive his or her right to recover damages for injuries sustained. In certain cases the signing of a release may be applicable. In *Hewitt v Miller* (1974, Nygaard & Boone, 1985) a scuba diver failed to surface and drowned. The court held that failure to surface is an inherent risk of scuba diving and that by signing the release, the person acknowledged the possibility of this danger occurring. Another reason that courts invalidate liability waivers is disparity in bargaining power. When clubs or organisations require parents or participants to sign a waiver of liability as a precondition for participation, such a person is unfairly burdened. This will deprive participants of competing and there are no other options available to either the parent or the adult participant under these circumstances, and the courts are inclined to view these agreements as contrary to public policy (Labuschagne & Skea, 1999).

With regard to indemnities, reference should also be made to signs, eg. at the entrance to a stadium, stating that the entry of spectators will be “at own risk” or where a spectator knowingly buys a ticket containing a clause with similar wording. Firstly it means that

spectators entering the stadium agree to normal, foreseeable risks of injury, eg. slipping on a staircase and spraining an ankle or being hit on the head by a cricket ball. Secondly, the question to consider is whether the wording of the indemnity sign also covers negligent conduct causing injuries to a spectator eg. where s/he is injured as a result of a negligently designed stand. It must be ascertained whether the words in their ordinary meaning are extensive enough to include the specific negligent conduct. Whenever it is doubtful, the answer should be negative; in other words, the “risk” clause does not cover the negligent conduct and an action for damages will in principle succeed (Van der Walt, 1997). In *Vuurwa Stampklub and another v De Jager* (unreported, OPD April 1960; Parmanand, 1987: 123) the plaintiff’s car which was parked behind a fence erected around a stock car race course, was struck by one of the cars that left the course and hurtled through the fence. An admission ticket issued to the plaintiff read: “We assume no liability for any person who may be injured”. The court found that the driver of the car as well as the promoters of the race were negligent. As the risks created by their negligent acts were neither covered by the exclusion clause, nor assumed by the plaintiff, the consent defence was rejected by the court and the plaintiff’s action succeeded (Neethling, 1991).

In *Lawrence v Kondotel Inns (Pty) Ltd.* (1989 1 SA 44 D) the plaintiff and his family, including his seven year old daughter, were on holiday at the defendant’s resort. They hired horses from the defendant for a riding trail. The contract of hire was subject to the condition that “all riders ride at their own risk: if any accident should occur, Kondotel or the management of this hotel will not be held responsible.” The plaintiff alleged that an unsuitable mount was chosen for his daughter by a riding instructress employed by the defendant, and that supervision was also lacking. The horse bolted causing the girl to fall off. She sustained multiple injuries as a result of being dragged along the ground before the horse was eventually caught. The plaintiff claimed damages in his personal capacity and on behalf of his child. The defendant relied on the indemnity agreement as well as on the defence of consent. The court found that as far as the indemnity is concerned, what was expected here were the usual and normal occurrences which might happen, such as a horse stumbling in a pothole or being startled by some sudden event. As the clause did

not cover misconduct on the part of the horse or negligence on the part of the defendant or its employees, the defendant could not rely on the agreement. With regard to consent, the court found that there was no evidence that either the plaintiff or his daughter appreciated or consented to the risk that the horse had a tendency to misbehave and bolt; a valid consent was therefore absent and this defence consequently also failed (Neethling, 1991).

In *Gross v Sweet* (64AD 2d 774, 407 NYS 2d 254, SC, AD, 1978) a parachutist sustained a broken leg during a jump and brought action against a parachute training school and its owner for recovery of damages. The plaintiff received about one hour of on-land training before being taken 2800 feet into the air for the jump. The appeal court reiterated the law concerning waivers as follows:

**“It is well established that while agreements intended to absolve a party from liability for its own negligence are closely scrutinized and strictly construed, they will be enforced by the courts absent some special legal relationship between the parties or some overriding public interest. This rule has been consistently followed in cases of patrons signing agreements which would exempt amusement facilities, including auto racetracks, from liability for negligence. However, under such circumstances, the courts insist that there be a clear understanding between the parties, which plainly and precisely defines the limitation of liability the party attempting to avoid responsibility seeks to obtain.”**

The court held that the release did “not relieve the defendants from negligence in the performance of their instructions or from injuries arising out of improper and incorrect instructions”. This seems to conform with South African law (Labuschagne & Skea, 1999).

### **Contributory Negligence**

Contributory negligence is an important factor in considering a defence of a negligent action. This defence is invoked when a plaintiff contributes to his/her injury or damage to such an extent that the plaintiff breaches the expected standard of conduct (Peterson & Hronek, 1992; Scott, 1988). According to Nygaard & Boone (1989), contributory negligence is an act or omission amounting to lack of ordinary care on the part of the

complaining party, which, concurring with the defendant's negligence, is a proximate cause or substantial factor in the subsequent injury. It is conducted by a plaintiff which is below the standard to which s/he is legally required to conform for her/his own protection. Contributory negligence is an affirmative defence which must be alleged and proved by the defendant. If a coach insists on the use of protective equipment by his/her players, then the failure to use the protective equipment by a player may be the basis for the defence of contributory negligence (Nygaard & Boone, 1989).

According to South African theorists (Van der Walt, 1997; Parmanand, 1987), contributory negligence arises where, in deviating "from the norm of the *bonus paterfamilias*," the plaintiff by his acts or omissions fails to exercise reasonable care in his own interest and so incurs patrimonial loss. In *Lampert v Hefer* (1955 2 SA 507 A) the judge showed how *volenti* and contributory negligence sometimes overlap.

Parmanand (1987) elucidates some of the differences between *volenti* and contributory negligence. In assumption of risk the plaintiff is either complacent about a risk he knows of, or passively reconciles himself to it. He is aware that patrimonial loss may follow, but may be reckless as to such consequences. In contributory negligence, the plaintiff, in failing to exercise reasonable care in his own interests, may be unaware of a future situation that will cause him patrimonial loss. Another difference is that a successful defence of assumption of risk excludes wrongfulness and any claim by the plaintiff, whereas contributory negligence does not exclude wrongfulness and only serves to reduce the claim (Parmanand, 1987).

The following example illustrates the relationship between *volenti* in sports injury cases and contributory negligence. A plaintiff engages in a fencing contest with foils that do not have protective tips and also without himself wearing protective gear. In the event of an injury, the defendant may prove an absence of fault by himself in that the plaintiff's assumption cancelled his negligence. Alternatively, while the plaintiff's act remains wrongful, the defendant may yet be shown to be at fault eg. for continuing with the duel knowing full well that his opponent was exposing himself to danger in contravention of

the accepted rules of the sport. In this instance the defendant may rely on the defence of contributory negligence (Parmanand, 1987).

In cases where either *volenti* or contributory negligence is relevant, if the plaintiff's fault is greater than the defendant's, then judgement should be against him. This is so because his greater wrong, in the form of negligence or intention, negates that of the defendant. Thus, while the defendant's conduct remains wrongful, the court still favours him. Where the defendant's fault is greater than the plaintiff's, the court should apportion damages in relation to the plaintiff's degree of fault which may include intent. Put simply, while community convictions still regard the transaction as wrongful, the defendant, despite his fault, is not held completely accountable (Parmanand, 1987).

In America, in most states the doctrine of contributory negligence has been outdated and replaced by comparative negligence rules. Under comparative negligence statutes, negligence of the plaintiff and defendant is measured in terms of percentage, and any damages allowed are diminished in proportion to the amount of negligence attributable to the plaintiff, provided his/her fault is less than the defendant's (Nygaard & Boone, 1989).

In South Africa too, the doctrine of contributory negligence was extremely difficult to apply. Artificial exceptions to and qualifications of the rule were developed which made any precise definition of its content and limits difficult. The Apportionment of Damages Act (34 of 1956) was passed in 1956. This abolished the common law doctrine of contributory negligence, and introduced the principle of apportionment of liability. This more flexible and equitable principle was in accordance with the respective degrees of fault of the parties in relation to the harm (Neethling et al., 1999; Van der Walt & Midgley, 1997).

Thus contributory negligence cannot be raised as a defence to an action. The purpose of the Act is to ensure that a plaintiff's claim should not be undermined by the fact that he or she was partly to blame for the loss. A plaintiff's negligence merely serves to reduce the extent of the defendant's liability; it does not cancel such liability altogether. Liability for



the loss is shared by those responsible for it (Neethling et al., 1999; Van der Walt & Midgley, 1997).

### **“Act of God”**

Although quite rare and outdated, the defence of an “act of God” usually refers to conditions caused by natural elements. The courts would not allow legal action to be pursued because a sports manager, club or agency is not required to provide warning for natural elements they would be unable to predict eg. earthquakes, sudden weather changes or lightning (Peterson & Hronek, 1992). According to Neethling et al. (1999), a person acting out of necessity should also have a ground of justification in South African law. However, the position is not clear in South African positive law, and necessity was not treated as a separate ground of justification in Roman law or by common law writers. As one of the guidelines to determine if necessity is present, the authors suggest that the question at issue is whether a state of necessity really exists, and not whether it has been caused by human action, animals, or forces of nature.

### **Vicarious Liability/ *Respondeat Superior***

The doctrine of *respondeat superior* states that the superior (employer) is responsible for the negligence of his employees. However, this doctrine does not relieve the employee of responsibility. Instead, it provides the plaintiff with a second place to look for recovery for the results of negligent acts. It is assumed that the employer is better able to pay a judgement than the employee (Carpenter, 1995).

According to Parmanand (1987), this doctrine affirms the common law principles basing liability on personal fault and creates liability in one who is not at fault. The doctrine rests on public policy and so imputes fault vicariously. While it covers intentional and also negligent, delictual acts of the employee, an employer’s liability under this doctrine is limited to compensatory or actual damages (Parmanand, 1987).

Parmanand (1987) finds that there are no grounds to justify applying *respondeat superior* to an employer being held responsible for every act of his employee, especially for athlete assaults against spectators. Vicarious liability is well established in American law and it is now being appropriately extended to sport, especially because of greater professionalism and commercialism and consequent employment opportunities (Parmanand, 1987). The doctrine is illustrated in *Astrid Veenhoven* (NJ 1998, 190; Labuschagne, 1999) which will be more fully discussed later. Here, a gymnastics association was held vicariously liable for a coach's negligence which resulted in serious injury to a gymnast. Thus to found a claim of vicarious liability, the perpetrator must be an employee and the act must have occurred in the course and scope of employment (Neethling et al., 1999; Gardiner et al., 1998; Van der Walt & Midgley, 1997, Van der Merwe and Olivier, 1989). Hence, a sports participant who is paid to play for a team can be considered to be an employee. If the participant commits a delict in the course of this employment with a club, the club can be held vicariously liable.

It follows that the court will look at whether the act was within the scope of activities included in or merely incidental to the employment. If the employee was acting for his own purposes, as opposed to the benefit of his employer, the act will not be within the course of employment and the employer will not be liable for the damage caused (Neethling et al., 1999; Gardiner et al., 1998).

A participant is authorised to play sport according to the rules and within the playing culture of a particular game. Certain elements of foul play may be tolerated as within the course of employment if they are committed in the furtherance of the employer's aims, i.e. to win the game. If an act is of a purely personal nature then the employer will not be liable. For example, if a player commits a delict when tackling, whether the tackle is within the rules of the game or not, the employer will be vicariously liable for the damage as the act is for the benefit of the employer and within the course of employment. That was merely an improper method of performing an authorised act. However, should a player simply punch or attack an opponent he will be acting outside of the scope of his employment. The act is unauthorised and the employer is not responsible for it (Gardiner

et al., 1998). An example would be the incident where Eric Cantona of Manchester United FC executed a kung-fu type kick at the chest of Crystal Palace fan Matthew Simmons as he had just been sent off the field of play. The act was clearly not authorised by his employment contract with that club (Gardiner et al., 1998). Because the doctrine only applies where there is an employer-employee relationship, like in England, it cannot be used by the vast majority of unpaid sports participants in this country. But the doctrine should certainly be extended to include certain categories of sportspersons who satisfy the relationship obligations discussed.

An interesting feature of the doctrine in South Africa law is that where an employee acts with disregard to instructions s/he can forfeit this protection eg. a sportsmistress at a school does not comply with policies of the Education department and the employer, in accordance with her vicarious liability, has compensated the third party and paid the legal costs; these amounts may be recovered from the teacher by the department (Prinsloo & Beckmann in Teachers' Federal Council, 1990).

### **Liability of Sport Managers, Supervisors and Coaches**

The terms Sport Managers, Supervisors and Coaches include those who either manage or instruct and hence have responsibility to control physical exercises, recreational and sports activities in various environments eg. school, gymnasium, university and technikon. These personnel must conform to the standard of a reasonable manager, coach or supervisor ie. the standard of a professional. A coach must give safe and competent instruction in playing skills; s/he must take reasonable precautions to reduce unnecessary danger in the organisation and conduct of the recreational or sport activity involved (Parmanand, 1987). Labuschagne & Skea (1999) state that serious injuries, paralysis and even death of participants in sport are increasing world-wide at an alarming rate. They also find that greater responsibilities are being progressively placed on coaches and other officials to prevent or minimise injuries to athletes.

The standard of care is based on what is known about the prevention and care of injuries and other aspects of coaching. The coach or instructor will be judged not by what he knows, but what he should have known. Ignorance is no excuse in Anglo-American law, and in the law of delict in South Africa. But ignorance can be used as an excuse in South African criminal law. The coach must therefore act in accordance with the knowledge required of them. Teachers owe it to their athletes to be competent in all aspects of coaching. They also have a duty to regularly update their coaching knowledge and to keep themselves informed of new developments. Lawsuits have been brought against coaches for not teaching skills properly, failing to adequately supervise activities and for failure to carry out first aid procedures (Labuschagne & Skea, 1999; Australian Coaching Council, n.d.)

According to the Australian Coaching Council (n.d.), the following is a “must” list based on the legal responsibilities of the coach:

1. Provide a safe environment
2. Activities must be adequately planned
3. Athletes must be evaluated for injury or incapacity
4. Young athletes must not be mismatched
5. Safe and proper equipment should be provided
6. Athletes must be warned of the inherent risks of the sport
7. Activities must be closely supervised
8. Coaches should know first aid
9. Develop clear, written rules for training and general conduct
10. Teachers should keep adequate records

Labuschagne & Skea (1999) maintain that the first and perhaps most critical factor in determining whether a coach is liable for the injuries of his player is whether the coach has fulfilled the duty to exercise reasonable care for the protection of the athlete. In essence coaches have a duty to exercise reasonable care to prevent foreseeable risks of harm to participants. This level of care which a coach or instructor owes to athletes and other participants will vary from activity to activity, but the standard by which that care is

measured will always be the same: a coach must take reasonable care to avoid the creating of a foreseeable risk of harm to others. In German legal terminology, the coach has a “Garantenpflicht”, that is a duty to guarantee that participants will not be subjected to unreasonable risk of harm (Labuschagne & Skea, 1999).

It is expected that these duties might come as a surprise to the vast majority of officials who give their time in a voluntary capacity in an attempt to foster and develop sport among people in South Africa.

These principles are also applied by the Dutch courts, particularly as in the Appeal Court case of *Astrid Veenhoven v Christelijke Gymnastiek Vereeniging Oranje-Nassau Emmen* and *Anja Hildebrands* (NJ 1998, 190), and also *Jan Brevoord v Smit* (NJ 1985, 736), which will be discussed later.

### **Facilities, Equipment and Organisation**

A manager of a recreation or sport centre, playing fields or swimming pool could become responsible in law, if by his negligence in relation to the building or pool, one of the participants is injured.

The premises and equipment used by the coach/educator must be reasonably safe and suitable for the activity. The use of equipment must be properly instructed to the athletes and care must be taken to see to it that the instructions are followed. A coach may be held liable for an injury if he does not require a participant to use the available equipment and use it properly (Labuschagne & Skea, 1999).

If a player does not have the proper equipment, the coach may have a duty to prevent him/ her from participating, or even cancelling or rescheduling a game if several players do not have the equipment. A coach has a duty to insure that equipment and uniform properly fit the individual athlete. Litigation of this type normally only arises when there is a reasonably foreseeable chance that ill-fitting equipment will cause injury. Coaches

should therefore follow certain procedures to inspect equipment before starting any activity in order to prevent the use of defective equipment (Labuschagne & Skea, 1999). Any sport event must be organised with due consideration to safety of the players and spectators. Precautionary measures should be taken to avoid collisions caused by overcrowding or traffic circulation (Parmanand, 1987). The equipment and playing area must be safe, eg. windows should be shatterproof and translucent; there must be no protrusions from the walls; protective padding and matting or separation barriers should be used, where the circumstances involved demand them. (Baley & Matthews, 1989). In many English cases, the trainer and his employer were held liable because the equipment was inappropriate (Prinsloo, 1991). In *Povey v Governors of Rydale School* (1970 1 All ER 841), for example, it was found that a gymnast was injured because he was not adequately informed about the practice of gymnastics and because the landing mat was inadequate.

In *Tonkin v Gunn*, 1988 (Opie, 1994) a scuba diving instructor was liable for death of a novice pupil, who succumbed to saltwater asphyxia. The airhose mouthpiece was loose fitting. There was a hole in the rubber mouth grip and the air pressure delivered by the regulator was well below the recommended minimum. All of these points ought to have been checked by a reasonable instructor before the novice entered the water.

In *Baker v Briarcliff School District* (613 NYS 2d 660; AD 2 Dept, 1994) a sixteen year old hockey player was injured when she was struck in the face with a hockey stick. The player sued the coach for failing to instruct the team as to the importance of wearing mouth guards and for failing to ensure that the players were wearing them. The court, in declining summary judgement in favour of the coach, held that he was fully aware that she was not wearing a mouth guard and that no pre-practice check of safety equipment was made. Periodic inspection and care to correct defects will not only protect the institution and the coach from liability but, more importantly, it will safeguard the most important person, the participant (Labuschagne & Skea, 1999).

The following list consisting of policies regarding the safety of facilities, equipment and supplies is recommended by the American Alliance for Health, Physical Education, Recreation and Dance (A.A.H.P.E.R.D.):

- i. Facilities, equipment and supplies should be designed for hard use, thus reducing their accident potential
  - ii. In the design, layout and selection of facilities, equipment and supplies, the age level, sex, maturity and skill level of participants should be considered
  - iii. The surfacing of various areas of playgrounds-asphalt , turf, gravel or other material should be appropriate for the activities
  - iv. Schools (and tertiary institutions) should require protective equipment and should insist on its use in appropriate activities in the program
  - v. Personal and protective equipment must be carefully fitted to ensure maximum safety for each participant. This is especially true in vigorous body-contact activities and applies to all levels of activity.
  - vi. Sufficient equipment should be purchased to ensure immediate replacement in case of damage or wear in activities presenting hazards to participants
- (Baley & Matthews, 1989).

### **Attractive Nuisance**

Anglo-American law allows for the fact that children require a greater degree of care from the occupier than adults do. A lucid statement is: “An occupier must be prepared for children to be less careful than adults” (Scott, 1988:40). Under this doctrine of attractive nuisance, a person who possesses a facility that is used for recreation or sport may be held liable for injuries to students if their presence should have been reasonably anticipated and there is a likelihood that a student would be enticed into trespassing by the artificial condition (Kaiser, 1986). In practice this means that the occupier must take pains to keep an “allurement” out of their way (Scott, 1988). However, the words “attractive nuisance” are seldom used by English and American courts since they have been replaced by the “foreseeability doctrine,” but the important principle still remains:

Children fit into a separate category when it comes to the trespass category of visitors (Peterson & Hronek, 1992). In South African law, this doctrine is generally unknown.

In South African law, it is a well-known principle that all the relevant circumstances of a case must be considered as a whole when deciding whether a wrongdoer's conduct was negligent. One of the important factors that are taken into account in such an investigation is as follows:

“Greater care is also expected when a person deals with individuals who suffer from some *disability or incapacity*, such as deaf-mutes, the blind, children, intoxicated persons, etcetera.” Someone who knows or is reasonably expected to be aware of the special circumstances is required to act with exceptional care (Neethling et al., 1999: 144).

Hazardous equipment that may attract students, such as bows and arrows, climbing ropes, trampolines, tackling dummies, apparatus in a multigym and scuba equipment must be safely secured or made inoperative in order that students not be attracted to use it in the absence of proper supervision. A swimming pool that is unlocked or lacking supervision is an attractive nuisance (Jensen, 1988). In England, in one case the injury was a young person's hand caught in a moving lift and in another it happened after sliding down a grassy slope with broken glass at the bottom. Also, it is over 60 years since Glasgow Corporation were held liable for the death of a 7 year old boy who ate from brightly coloured but poisonous berries in a public park. The principle is still active and reinforced in the English courts: “allurements” are to be looked at through children's spectacles (Scott, 1988).

American courts have generally held that the doctrine applies to artificial or manmade conditions and not to natural conditions. Recovery would be denied if the child knew of the condition and fully understood the danger. The important factor in determining comprehension of danger is the age and experience of the child. It is the appreciation of danger that bars recovery rather than mere knowledge of the condition itself. Expectedly,



most cases have involved young children usually under twelve years of age (Kaiser, 1986).

The author believes that this doctrine should also be considered for application to South African law as well. It has relevance to the present study in that tertiary institutions are visited quite often by children for various reasons. Some of them may be trespassers, while others may be involved in sports programs on campuses or on other legitimate business eg. physical fitness evaluations, speech & hearing evaluations, psychological assessments etc. Further the American 2<sup>nd</sup> Restatement of Torts § 339 does not limit the doctrine to “young” children, obviously the older the child the greater the comprehension and understanding of dangers (Kaiser, 1986). Educators, coaches, managers and proprietors of facilities or others involved in their recreation should be ever vigilant for dangerous conditions and should rectify them immediately.

### **Instruction and Supervision**

The coach/supervisor must exercise reasonable care in controlling and supervising activities. S/he must anticipate and warn against danger and prevent participants from undertaking unreasonably dangerous conduct. For example, in *Robertson v Hobart Police and Citizens Youth Club Inc.* 1984 (Opie, 1994), a twelve year old child broke her arm while executing a “half-turntable” manoeuvre on a trampoline. The gymnasium owner was held liable because the child had not been instructed in the proper technique of “killing” the bounce of the mat and how to avoid landing so that the weight was taken on her arms. Especially with novices who can be expected to be unaware of and ill-prepared to deal with the inherent risks of a sport, it is the coach’s obligation to inform them of those risks and to equip them with the skills to encounter the risks in a reasonably safe manner (Opie, 1994).

A further example would be that a qualified swimming coach must give proficient training in swimming techniques as well as supervise his swimming class properly. This principle was applied in an American case and also applies in South African Law

(Prinsloo, 1991). *Morehouse College v Russel* (109 Ga App 301,136 SE 2d 179 1964) was concerned with a swimming class which was offered to inexperienced swimmers. The professor of physical education entrusted a class to two members of the swimming team who were not qualified coaches. In the professor's absence a student drowned. The court held that the professor was negligent in entrusting the swimming class to incompetent people.

In the Dutch case of *Astrid Veenhoven v Christelijke Gymnastiek Vereeniging Oranje Nassau Emmen* (NJ 1998, 190), Astrid was executing a "dislocation" on the rings under the supervision of Anja Hildebrands who was in the employ of the aforementioned gymnastics association. At that stage she did not know much about the rings. During a practice session, the gymnasts were divided into three groups. Anja was supervising another group and Astrid was in the group being supervised by Ruud Willems. Ruud was a trained gymnast but he had not executed the dislocation before himself. Astrid was an experienced gymnast who could control the dislocation well and as such a fall was not foreseeable. Under the rings, landing mats were used for safety. Astrid fell to the floor on her head out of the mats. Her father brought a claim against the association and Hildebrands for damages as a result of the fall which led to a neurological disorder. The appeal was upheld on the grounds that the defendants failed to provide the necessary safety precautions to prevent the fall. In this regard the court looked at the following:

- i. Hildebrands did not have any training in ring exercises and as a result was not experienced enough to train the gymnasts or to train other coaches.
- ii. Willems had not performed the exercise in question before and was therefore not aware of the specific dangers with regard to that exercise and did not provide the required care.
- iii. There should have been two spotters in this specific exercise.
- iv. The high level of concentration required for this exercise was reduced by the distraction of the three groups practising simultaneously.
- v. Since Astrid fell on her head alongside the mats it is a fair conclusion that there were insufficient mats on the floor.

From these five points, the court decided that there was a causal relationship between Hildebrands' failure to provide the standard of care and the resultant fall. Therefore, Hildebrands and the Association were held liable for damages for the injuries sustained by Astrid.

A coach must give competent and professional instruction in how to perform an activity. The background, abilities, and experience of participants must be taken into account. The courts have ruled that a coach has the duty to bring a student along slowly and progressively. Liability has been found where a student was permitted to do a forward somersault off equipment at tryouts for a gymnastics team without first demonstrating ability to execute skills leading to this move (Baley & Matthews, 1989).

S/he should not encourage injured athletes to play on where it is quite clear that they should not do so or when they complain of pain (Clement, 1988). This implies the need to temporarily adjust the players' participation. The problem confronting coaches/ trainers is to know when a player is ready to return to action after an injury. They have to be very careful about permitting a player to return to a game too soon after injury. According to Nygaard & Boone (1985), it is better to err on the conservative side rather than aggravate an injury by returning the athlete to play too soon (Labuschagne & Skea, 1999).

Negligently adopting an improper technique should also be discouraged so as to prevent athletes from harming themselves. The coach also has a duty to make certain that the players are properly matched. Liability has been found where a much larger girl participating in a sport severely injured a much smaller girl. In *Zipper v Ocean Ice Palace* (NJ Super Ct Law Div Dec 6, 1993; Labuschagne & Skea 1999) a thirteen year old hockey player attended a hockey camp with other players who were between sixteen and eighteen years old. The plaintiff's team played against the counsellors and instructors. He was injured by a nineteen year old player in the game and sued the hockey rink for negligent mismatch of participants. The trial established that the plaintiff's leg pads were made for competition among players of his age group and skill, and that they were not

made to absorb shots from players of superior skill and ability. The mismatch in the age and skill of the two players created an unreasonable hazardous condition and the defendants were held liable for allowing two players of such varied skills and size to compete against one another (Labuschagne & Skea, 1999). This concept includes the duty to ensure that participants are positioned far enough apart to avoid collisions (Baley & Matthews, 1989; Clement, 1988).

Particular care should be accorded to participants who are disabled. The coach should also guard against causing injuries by his own participation in the activity, which would lower his standard of supervision. According to Clement (1988), educators or coaches should be warned to consider their size and skill before joining class participants or young sport team members. In an English case (*Affutu-Nartoy v Clarke*; Prinsloo, 1991), the trainer was held liable because he, in order to illustrate a tackle in rugby, himself tackled a pupil and injured him.

When it comes to inadequate supervision the basic test is whether supervision was reasonable in the specific circumstances, and whether the supervisor's conduct caused the injury involved. If the injury would have occurred despite the coach's presence and reasonable conduct, he cannot be held liable (Clement, 1988). For example, if the student who drowned in the *Morehouse* case had suffered a fatal heart attack in the water, the professor would not have been held liable despite his lack of supervision, because there was no causal connection between his omission and the student's death – the student would have died regardless of the supervisor's presence (Potgieter, 1991).

A trainer who performs an action of which he is not capable can be held liable for an injury which arises from his conduct. In the American case of *Mogabgab v Orleans Parish School Board* (239 So 2d 456 1970), a player became ill during a practice session. The player was covered with a blanket and his condition was discussed, but the trainer refused to call a doctor. The player was later admitted to hospital where he died. The court found that the trainer was liable because he had refused proper medical treatment and had himself administered first aid inappropriately. According to the evidence the

player would have survived if he had received reasonable medical help immediately. The conclusions drawn from this case also apply to South African law, that is, when there is any doubt with regard to the nature of serious injury, a coach should take no chances, but should call for professional help. A coach should not act outside his expertise concerning first aid and medical treatment. Unnecessary delays in summoning medical assistance can lead to serious consequences for the injured athlete and to the liability of the coach (Prinsloo, 1991).

This rationale is also applied by the Dutch courts, as will appear from the *Jan Brevoord v Smit case* (NJ 1985, 736). Jan Brevoord was a college student doing gymnastics under the supervision of the educator, Mr. Smit. There were two mini trampolines set four metres apart and parallel to each other together with the required landing mats. There were two independent rows of students facing the trampolines executing their compulsory jumps. Thereafter, they were required to do a jump of their own choice. At this point Smit was at the one landing area while Brevoord was at the other trampoline. Brevoord attempted the so called "Death Spring." He failed to execute it correctly, resulting in his contacting the mat too early to absorb the impact. He could not move immediately following the jump. A shortwhile later, while still laying on the mat, he asked his fellow pupils to turn him onto his back. Thereafter, they carried him and lay him down on a "bridge." On the instruction of Smit, the students dressed him in his track-suit. A doctor was summoned and he was transferred to hospital by ambulance. The injuries sustained as a result of the fall left him quadriplegic.

The court found Smit to be negligent. From the decision it is not clear whether it was based on Smit's conduct before or after the jump. Although Smit could not be expected to render the same medical care as a doctor, he should nevertheless have foreseen the possibility of neck or back injury.

There is a duty to protect players from unsafe activity, be it horseplay in the locker room or overly aggressive, rough, unsafe play on the field (Baley & Matthews, 1989). When it comes to dangerous sports, Prinsloo (1991) states that in addition to prior information

about it, training techniques in the sport are essential. In the Australian case of *Larson v Independent School District* (289 NW 2d 112 1979), a coach was held liable for serious injury to a gymnast during a headspring, because he had not allowed the necessary preparatory exercises to be done. Prinsloo (1991) mentions that a coach who teaches his team a tactic which may hold serious danger for the opponents can be held liable if an opponent is injured during the application of such a technique. However, a coach cannot be held accountable for the sheer aggressiveness of his team (which he did not instigate) or for a faulty technique which he did not teach his players (Prinsloo, 1991).

Encouraging aggression which injures the athletes or an opposing athlete might also expose an official or coach to liability. In another extreme situation, coaches or officials who supply athletes with substances which could injure them, or encourage the use of such substances, might be liable criminally and delictually for subsequent harm (Labuschagne & Skea, 1999).

Opie (1994) mentions the duty of the coach to challenge the athlete. Just how hard does the law permit the coach to push the athlete towards greatness or merely improvement? This will largely depend on recognised safe practices within sport. Although one may accept that sometimes fiery exhortation will be essential eg. “No pain, no gain” and “No guts, no glory”, this can be taken too far. Coaches must be made aware that they cannot do what they like, ONLY what is RIGHT (Opie, 1994). Hence, if a coach pushes an athlete to the point of total exhaustion, which can sometimes result in death or possible injuries, the coach will be held liable (Labuschagne & Skea, 1999).

### **Medical Care**

The supervisor should be alert to injury or illness and prohibit participation where necessary. In emergency situations the coach must provide reasonable first aid but must be very careful not to perform any action of which he is not capable because unreasonable acts or omissions in medical treatment which aggravate the injured person's condition can lead to legal liability, as in the case of *Halper v Vayo*, 1991 (Labuschagne

& Skea, 1999). In this Illinois case, a high school coach was found liable for moving a wrestler after he sustained a severe knee injury. He had also pulled the wrestler's leg and manipulated his knee in an attempt to treat the injury. He also failed to contact the proper medical authorities or the wrestler's parents after the injury occurred. In this regard a coach should take no chances but should promptly summon professional help (Prinsloo, 1991; Clement, 1988; Parmanand, 1987).

The case of *Mogabgab* cited earlier illustrates the liability of the supervisor with regard to prompt medical assistance. The doctrine of vicarious liability discussed earlier also applies to the area of medical care of supervisors. In this regard the Australian case of *O'Brien v Mitchel College of Advanced Education* (unreported, Supreme Court of New South Wales, 1985-11-17) confirms the responsibility. A college was held vicariously liable for the injury suffered by an opponent as a result of a dangerous manoeuvre which the team coach taught his forwards: the forwards exercised collective pressure on the opponent in a V-formation (the "flying-wedge"), causing injury to the opponent.

Labuschagne & Skea (1999) have summarised the basic duties of a coach as a first aider as follows:

- i. Protect the individual from any further harm. Injured players should not be dragged away from a field so that practice may continue, especially if a head, neck or back injury is suspected or if the participant is unconscious.
- ii. Attempt to maintain or restore life to the injured player. Artificial respiration and anti-choking treatment must be administered when necessary.
- iii. Comfort and reassure the individual.
- iv. Immediately activate the emergency medical system. This duty requires that those needing further medical treatment should have access to it. It should include transportation of injured players and contact with a physician and parents or family of the players.

#### **3.6.4 Liability of Match Officials for Player Violence and Injuries**

It is widely accepted that sport officials are an indispensable cornerstone in any organised sport program in order to ensure adherence to rules and general safety. In this group of officials would be referees, judges, umpires, stewards, adjudicators, linesmen and other field officials.

An official is liable for an injury or other harm to a participant because of his unlawful and culpable behaviour. The general principle applicable to match officials is that they must act in the manner a reasonable official would do within his sport and at his level. Another example of unlawful conduct is an official who does not in any way apply the rules of his sport with regard to prevention or cessation of dangerous play (Prinsloo, 1991).

An official must possess the basic competencies required to assume control of play in the sport. The competence entails knowledge and correct application of rules, as well as unbiased and careful conduct in the interests of fairness to, and the safety of the participants. This duty has been enhanced in many sports such as athletics, tennis, cricket, soccer, horse-racing, and rugby by electronic equipment used to promote accurate observation of facts and fair decisions. It is submitted that their use in modern sport also creates a dilemma for officials who have to make split-second decisions which could be reversed by further scrutiny of electronic evidence.

In this regard, glaring umpire errors in the delicately balanced series between England and South Africa served as the catalyst to hasten the advent of computerised umpiring in cricket. The pressures of the international game, exacerbated by the intervention of advanced television technology have made the need for almost perfect umpiring decisions imperative. A reporter stated the following:

**“Professor Tim Noakes, the Cape Town- based world authority, has unveiled technology at his Sport Science Institute at Newlands that he believes will solve the game’s most vexing problem – umpire error. It involves using two high-speed digital cameras, able to capture images 30 times faster than any video camera, which feed their pictures into a computer which then calculates the exact path of the ball. Through his careful experiments Noakes is convinced the use of the camera-computer system will eradicate incorrect decisions involving leg before wicket and**



bat-pad or gloved catches; as well as indicating whether anything save the bat has come into contact with the ball.”

(Sunday Times, August 9, 1998)

The technology could presently be used to solve 85% of the problem, and shortly it is expected to be increased to 100%.

Knowledge of first aid is not part of an official's competence. If s/he is trained in first aid or happens to be a doctor and treats an injured participant, s/he does so in their personal capacity and not in the capacity of an official. An official who is not trained in first aid or medicine should not render first aid or medical service to an injured player. If s/he aggravates an injury through her/his conduct, s/he can be delictually liable (Prinsloo, 1991).

Prior to 1996, little judicial thought had been given to the potential liability of officials. Following the decision in *Smoldon v Nolan & Whitworth* (The Times, 18 Dec., 1996; Gardiner et al., 1998) a previously unexplored area of liability was opened up:

**“The plaintiff was playing in the front row of the scrum in an under-19s colts rugby fixture. During the course of the game, the scrum had collapsed what was found to be an abnormally high number of times. In colts fixtures, a special procedure for engaging the scrum was part of the rules. This was supposed to ensure greater safety for the players involved in scrums at junior levels. It was found by the court that the referee had not enforced the correct procedure for engagement and that this was one of the reasons for the high number of collapsed scrums. In one of the collapsed scrums, the plaintiff suffered a broken neck, leaving him paralysed.**

**The court held that the law was as stated in *Condon v Basi* and *Elliott v Saunders*; namely that the standard of the care is that of negligence in all the circumstances. The duty imposed on the referee is to exercise that degree of care for the safety of the players which is appropriate in the circumstances. There are no grounds of public policy which operate to include liability in the case of sports officials.**

**The role played by the rules of the game, especially by the special rules relating to the engagement of scrums, was only evidence from which could be drawn the inference that the referee had breached his duty. The court held that the referee had failed to exercise responsible care and skill in the prevention of the collapses by sufficient instruction to the front rows and in the use of the special engagement procedures for colts.”**

The effect of the judge's decision could be that if a referee negligently allows breaches of the safety rules, as opposed to merely the playing rules of a game then a player who is injured as a consequence of those breaches may bring a civil action against the referee.

Gardiner et al. (1998) indicate that the consequences of this decision are potentially very

extensive should a referee fail to send a player off for an offence and the player later causes an injury to an opponent, the referee could be held partly liable for the defendant committing the foul, since if he had followed the rules strictly, the defendant would not have been on the field of play to commit the foul. The state of the playing surface creates a further problem for the referees. Should it be found that a pitch was too hard, too wet or uneven and s/he should have not allowed the game to commence, any player injured by the referee negligently proceeding with the game on an unsafe surface could hold the referee liable (Gardiner et al., 1998).

A significant question to consider is whether an official's faulty decision can be challenged in court if it is unrelated to injury but causes the team to lose. In the American case *Bain v Gillespie* (357 NW 2d 47 1984, quoted by Prinsloo, 1991), a referee's controversial decision was contested because it allegedly caused the result and the losing teams loss of business. The application was refused because the court would find itself in an unchartered area, if it were to test every controversial decision by a referee and also since the task of the referee is to apply the rules during a game, not to create a market place for people. An Alabama supreme court declared in another case that lower courts "should stay out of these matters on the field" (Prinsloo, 1991). In the Australian case of *Sinclair v Cleary* (1946 St R Qd 74, quoted by Prinsloo, 1991), a racehorse owner claimed damages by alleging the following: that the judge was negligent in performing his duties and had nominated the wrong horse as the winner; that the club was liable because it had appointed a negligent judge; and that the club was vicariously liable for the judge's negligence. The court ruled that the club cannot be vicariously liable for the judge's conduct because a judge acts independently and a club may not interfere in his decisions; that the judge has no legal obligation towards anyone who is affected by his decision (except when his conduct results in injury to someone); that there was no contractual obligation between the judge and the horse owner.

According to Prinsloo (1991), parts of these American and Australian judgements would certainly have the support of South African sportspersons, such as the court's non interference in referee's decisions which allegedly affect the result or score of matches;

that the rules of the law of delict are not easily applicable to a referee's decisions (except in the case of injury). It could be expected that our courts would adopt a similar stance (Prinsloo, 1991).

### 3.6.5 Liability of Occupiers and Organisers/ Promoters

This is an important branch of the law for all leisure service managers. Occupiers and organisers/ promoters of sports and recreational events are persons who exercise control over facilities and/or equipment because they own, lease or occupy such facilities in some or other form. They have a duty of care towards spectators and participants, because the properties they manage are designed to be visited and used by the public.

In England, they have a code of law contained in the Occupier's Liability Act of 1957 which deals with lawful visitors on the occupier's land and also the complementary Act of 1984, in relation to unlawful visitors or trespassers on that land. This is a subject where it may be said that broadly speaking, the law reflects common sense. A swimming pool manager will feel more responsible for paying customers than for random strollers in the grounds. Nevertheless, the courts have uncovered many complicated issues in this branch of the law which must be unravelled. Sports grounds have their own special problems. They have been the subject of two Acts of Parliament, The Safety of Sports Grounds Act of 1975 and 1987, the latter after the tragedies at the Bradford football ground and the Heysel Stadium (Scott, 1988).

An occupier may be held delictually liable if a faulty field, item of equipment or stadium leads to the injury of a spectator or participant. Further, if the occupier enters into a contract with the spectator or participant, s/he may be held contractually liable (Prinsloo, 1991). The premises and equipment must be constructed and maintained with the safety of the users in mind (Parmanand, 1987).

Participants must not be allowed to compete in such an unusual manner as to endanger spectators and the occupier must control visitors on the premises so as to protect others from injuries caused by their hazardous conduct (Parmanand, 1987).

Two English cases that may be relevant in illustrating these principles will be presented. In *Latchford v Spedeworth International Ltd.*, 1984 (Scott, 1988), the plaintiff was a racing driver who successfully sued the managers of Wimbledon Stadium after suffering injury during hot rod racing events. There were two concrete flower beds, potentially dangerous to drivers, near the inner edge of the track. The stadium owner used a series of small tyres on the ground to mark the boundary of the racing track. During a race there was a collision and the tyres were displaced, one jammed under the rear axle of the plaintiff's car, causing it to jam. His car went out of control; the plaintiff suffered a head-on collision with the concrete flower beds. The court held that though the plaintiff was familiar with the stadium and accepted the risks of the proximity of the flower beds to the track, he did not have "a full appreciation of the nature and extent of the risk, because of his ignorance of the peril created by the use of small tyres". Large tyres would have been safer as markers.

In *Harrison v Vincent*, 1982 (Scott, 1988), the ground organisers were found liable for an obstruction in a slip road constructed as part of a motor cycle racing circuit. A driver in danger was forced to turn into this slip road and an accident occurred when the plaintiff struck a stationary recovery vehicle in this situation. The obstruction was only 30-40 metres from the course, whereas international requirements called for the slip road to be clear for 100 metres adjacent to the circuit. The court held that it should have been foreseeable that the obstruction was a potential source of danger.

Parmanand (1987) cited several examples from American law where successful claims were made against proprietors for recovery of damages: when hit by a ball thrown by other patrons at a swimming pool (*Boardman v Ottinger* 161 Ore 202; 88 P 2d 967 1939); when injured at a roller-skating rink by a drunk party (*Martin v Philadelphia Gardens Inc* 348 Pa 232; 35 A 2d 317 1944); when hit in the eye by a "spit ball" at a

theatre (*Pfeifer v Standard Gateway Theatre Inc* 259 Wis 333; 48 NW 2d 505 1951); and when set on fire by another patron at a theatre (*Antinucci v Hellman* 5 App Div 2d 634; 174 NYS 2d 343 3d Dep't 1958).

There are a few South African cases which are relevant in this regard. In *Cape Town Municipality v Payne* (1923 AD 207) a spectator at a sports meeting was injured when a plank broke under him while he was walking on the pavilion. The municipality was held liable for the injury. The court held that the municipality had negligently failed to fulfil its duty to take reasonable steps to ensure the safety of spectators.

In 1969 about 250 spectators were injured when parts of a seventy foot temporary pavilion at Loftus Versveld in Pretoria collapsed just after the Northern Transvaal-Wallabies match. The claims of a number of the plaintiffs against the Northern Transvaal Rugby Union and the South African Scaffolding Company (Pty) Ltd were settled out of court. In 1976 a girl spectator was seriously injured in an inter-provincial ice hockey match between Natal and Eastern Province at the Durban Ice Drome. In 1977 five people were injured when woodwork erected over new toilets being built at Durban's Curries Fountain gave way beneath the weight of more than 50 spectators at a soccer match between Cape Town Spurs and Berea (Parmanand, 1987).

In *Van Wyk v Thrills Incorporated (Pty) Ltd* (1978 2 SA 641 A) a spectator was killed at a "hot rod" race at Wembley Stadium in Johannesburg. The man stood near the entrance gate for cars when a car crashed against the gate which sprung open and killed him. The plaintiff claimed that the promoter was responsible for her husband's death because he did not take the necessary precautions for the safety of the spectators. Apparently the spectators were repeatedly warned not to stand near the gate. The deceased, who attended these races regularly, was aware of the warnings and the danger. Evidence showed that the gate was reinforced to prevent it from flying open in the event of a collision. Nevertheless, the gate inexplicably sprang open when hit by a car. The appeal court found that the promoter had taken reasonable precautions and that he was not liable. This

decision thus reaffirmed the test of reasonable precaution which an occupier must take on sports fields with regard to the safety of spectators.

Prinsloo (1991) and Potgieter (1991) both correctly submit that any possible negligence on the part of the promoter in the Van Wyk case was cancelled by the fact that the deceased intentionally exposed himself to the danger of which he was aware. Contributory intentional conduct by the plaintiff cancels the defendant's negligence, causing a claim to fail.

*Bolton v Stone* (1951 AC 850; Grayson, 1994) is a well known English case where an occupier was sought to be held liable. Here a cricket ball hit out of an oval, over a high fence and onto a public road struck and injured a lady resident. Evidence showed that in thirty years cricket balls had been hit over the high fence six times. The court held that in the circumstances the risk of causing injuries in such a way was so small that the reasonable man would not have foreseen it. The defendant was thus not negligent. In the contrasting case of *Castle v St Augustine's Links* (1922 38 TLR 615; Prinsloo, 1991) golf balls frequently landed on the highway next to the golf course and damaged the windscreens of motor cars. In this instance harm was regarded as reasonably foreseeable. Prinsloo (1991) submits that the application of reasonable foreseeability would hold good for South African law.

Potgieter (1991) maintains that although the examples from foreign legal systems are not necessarily applicable in all respects to South African law, they illustrate situations which could come before local courts and should sensitize occupiers and promoters of possible legal pitfalls and improve their attempts to prevent and avoid injury by exercising reasonable care.

### 3.6.6 First Aid and Medical Care

According to Prinsloo (1991), the general principles and rules of the law of delict are also valid for a paramedic, physiotherapist or doctor who treats a participant in sport. Their

conduct must meet the standard of a reasonable paramedic, physiotherapist or doctor. It is important that these persons act only within the limits of their competence.

According to Sharp (Gray, 1993), sport leaders had two obligations toward those injured in sport programs:

- To render emergency first aid assistance until medical personnel arrive
- To exercise reasonable care in procuring medical treatment for the injured party (ie. develop emergency procedures for timely medical assistance and adhere to those procedures).

Prinsloo (1991) states that sports organisations should make their agreements in such a manner that doctors act independently, thus excluding the organisations vicarious liability for the doctor's conduct. In the Canadian case of *Robitaille v Vancouver Hockey Club* (1981 124 DLR 3<sup>rd</sup> 228), a hockey club was held vicariously liable for the doctor's negligent conduct. A player was injured seriously because the doctor had ignored his earlier injuries. According to the evidence the club exercised considerable control over the doctor: the club decided which cases would receive medical treatment; the doctor had to report back to the club; and the doctor's primary responsibility was towards the club (Prinsloo, 1991).

In the American case *Stineman v Fontbonne College* (664 F 2d 1082 1981; Gray, 1993) an intercollegiate softball player was awarded damages as a result of being struck in the eye with a ball thrown by a team-mate. The player, who had been deaf since infancy and relied on her eyesight to lip-read, was given ice by her coaches and ordered to rest. The plaintiff subsequently suffered total loss of vision in the eye. The doctor's evidence indicated that, when treated promptly, such a condition has a 90 percent or greater rate of success. The court found that the extent of the plaintiff's injury was caused by the failure to provide adequate medical assistance.

Gray (1993) suggests that sport and physical activity leaders should consider the following strategies for providing adequate medical care:

## CHAPTER FOUR

- (i) Know the health and physical condition of program participants
- (ii) Obtain appropriate written permission, commonly referred to as consent – to-treat
- (iii) Be able to offer appropriate first aid to injured participants
- (iv) Have necessary first aid materials and supplies available in a first aid kit readily accessible
- (v) Develop a system for accurately reporting the important information related to injuries
- (vi) Develop a medical emergency plan for all individuals in the organisation to follow
- (vii) Where feasible, make use of certified athletic trainers/ biokineticists
- (viii) On certain occasions, have a medical team available for immediate response.

The theoretical framework will be continued in chapter four, wherein the remaining sections on administrative issues, constitutional and legislative issues and risk management will be dealt with.