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TERTIARY SPORT AND RECREATION: PLAYING IT SAFE

by

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SYNOPSIS

TITLE	:	Tertiary Sport and Recreation: Playing It Safe
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This study was undertaken to evaluate the risk management practices in sport and recreation at tertiary institutions in South Africa. Because of the growing emphasis on safety in sport, the aim was to determine: to what extent sport management staff understood legal liability issues affecting sport and recreation; to what extent they conducted their affairs in a professional manner by utilizing what specific risk reduction strategies to prevent or reduce injuries. Because of a paucity of scientific research in this field in South Africa, and because there was no evidence of a body of knowledge that has developed locally, a secondary aim was to set out and explain the various legal aspects from various legal systems concerning sport that are suitable for the needs of personnel in this country. A range of personnel are involved in the whole business of sport and recreation. They include facility managers, coaches, referees, activity leaders, sport officers, promoters, educators, sport and recreation directors, club managers, participants and spectators.

The methodology employed involved descriptive research. The secondary aim of investigating what legal issues are relevant to sport, from a sport perspective, was accomplished by an analysis of case law, journal articles and published reference works on the topic. The quantitative assessment of risk management practices was achieved by utilizing an instrument developed by Penman and Adams (1980), called "Assessing Athletic and Physical Education Programs". A pilot study was conducted on two universities and two technikons to validate the instrument. The sample for the study

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consisted of forty tertiary institutions. A profile analysis of the respondents was done to identify their strengths and weaknesses.

The literature review established that there is a growing interest in the academic study of the legal regulation of modern day sport and recreation. Further, "Sports Law" is now a legitimate subject in the United States, Britain, Canada, Australia, New Zealand and South Africa. The commercialized nature and sophistication of modern sport has necessitated the law's involvement in sport.

An indispensable part of the literature review was a content analysis of risk management practices. The most frequently listed risk management concerns that surfaced over the past two decades were categorized into the following specific areas: supervision and instruction; equipment and facilities; medical care; travel and transportation; insurance; and civil rights. The most recommended approach to identify and reduce risk was the use of printed forms to record whatever had been done and to provide evidence as a solid defense against liability. The legal theory was analyzed and discussed under the following broad categories: negligence issues; constitutional issues; legislative issues; administrative issues; and risk management theory.

The profile analyses revealed a normal distribution of scores in the general liability category. The results showed that the status of institutions in respect of being previously disadvantaged or advantaged was not a good indicator of vulnerability to legal liability. It was found that far too many safety issues were not addressed by a significant number of respondents. Also, about a quarter of the institutions were exposing themselves to a serious risk of liability.

The category of equipment and facilities appeared to be most frequently addressed in a formal manner. However, not all institutions provided hazard-free facilities for both athletes and spectators. A category that appeared problematic was medical aspects.

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Almost half of the respondents gave below average attention to pre-season, in-season and post-season medical considerations.

The category that showed the severest weaknesses dealt with the management of records and information on athletes. This category had the lowest average score indicating that there appeared to be either a lack of awareness of how this category impacts on legal liability in sport or that there were serious constraints with respect to human resources in sport management services at most institutions. This category reflected the largest scope for improvement of practices relating to the maintenance of records and information of athletes.

This study revealed that there was an urgent need for a comprehensive legal framework in sport law, and that the legal profession should investigate this deficiency very seriously. Further, safety in modern day sport is of paramount concern. This study has helped to develop the body of knowledge in sport law in South Africa. Sport and recreation managers were generally not aware of their legal responsibilities. Many of the institutions were clearly exposing themselves and their employers (vicariously) to serious risk of litigation by breaching the legal standard of care expected of them. Based on the results of the study, recommendations were made: to improve the legal literacy of sport management personnel; to improve the standard of care in sport and recreation; to implement risk management as a vital planning tool in the drive to reducing injuries; to incorporate sport law in professional preparation programmes; and to conduct further research.

KEY WORDS:

Sport Law	Safety	Civil Liability
Negligence	Injuries	Risk Management

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CHAPTER ONE

INTRODUCTION

1.1 RATIONALE FOR THE STUDY

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

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

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

vii. Dedicated sports channels on television and the rapid growth of satellite television

viii. Increased leisure time allowing more people to participate in recreation and sport

ix. An increase in sports participation by females

x. The formation of the organisation known as Women and Sport, South Africa (W.A.S.S.A.)

xi. The restructuring of the educational system and recurriculation, whereby the teaching of lifetime sports in schools, technikons, colleges and universities have resulted in more people, male and female, continuing participation in recreational activities after graduation

xii. The promulgation of the South African Sports Commission Act (Act No. 109 of 1998) and the National Sport and Recreation Act (Act No. 110 of 1998).

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

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

i. Sport is a microcosm of society, a reflection of the larger society. Law that affects society, therefore, will affect sport (Nygaard & Boone, 1989). The modern social philosophy amounts to a "me first" approach to life : this principle is expressed in legal matters by a higher tendency to litigate as a means of dispute resolution.

ii. Society has an expectation that those who place themselves in positions involving risk and potential liability, will insure themselves; and that there is an insurance company in the background which will meet the bill, not the defendant.

iii. The availability of legal aid to injured sportspersons /spectators to litigate their claims for compensation.

iv. The community is more "aware" and information communication is comprehensive and almost instantaneous.

v. The law of the land does not cease at the touch-line or fence or at the door of the committee room, contrary to what some people believe. Sport does not exist in a vacuum; like all other social activities, it is under the ultimate control of the law of the land (Trisley,1990). Participants, institutions and officials are amenable to both private and criminal law (Labuschagne & Skea, 1999).

vi. Commercialisation of sport, for example through sponsorship and endorsements, marketing and merchandising operations, has converted modern sport into big business (Berry & Wong, 1986). For instance, the tobacco industry in South Africa spends R40 million per year sponsoring sport and cultural events (Sunday Times, August 9, 1998). The media coverage of elite sport primarily by television has helped change its financial image (Gardiner et al., 1998; Labuschagne, 1998; Gouws, 1997).

According to Moore (1997), the increasing commercialism in sport has culminated "in the pivotal role which it now enjoys", "but there is a danger of looking at sport through rose-coloured spectacles". He maintains that: "The playing-field has undoubtedly changed, but it is still essentially level for those who abide by the rules."

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

play in sport? According to Gardiner et al.:

> **"This is a contentious issue. Clearly there are areas of sport where the law needs to intervene and its role is uncontroversial. However, there are areas where this intervention is contested"**
> (Gardiner et al., 1998:6).

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

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

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

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

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

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

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

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

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

> **'Michael Strahan, the Giants' Pro Bowl defensive end, was chasing down Washington Redskins running back Terry Allen, his eyes locked on the target. Wide receiver Michael Westbrook, running in the opposite direction with a full head of steam, hit Strahan with a vicious crack-back block that knocked the nearly 285-pound Strahan off his feet. Then Westbrook stood over Strahan and celebrated, pointing a finger in his face. "It was such a cheap shot," Strahan said. "He could have killed me. But that's life in the N.F.L."**
>
> **That life is more violent than ever. While Strahan was not injured on that play, many doctors, team trainers and National Football League team executives agree that the increases in the size and speed of the players today have led to record numbers of severe injuries. Then there is the violence that officials and fans do not see, shrouded by a massive cloak of bodies weighing thousands of pounds. Kicks in the groin, punches in the stomach, gouged eyes and bitten fingers and arms are all common in the pileups after tackles.**
>
> **Strahan and some 1,500 fellow players have spent the summer in intense, almost militaristic training camps preparing for the exhilarating but brutal ritual that is the N.F.L. season, which begins today. Players train for a game that is more violent than any other organized sport, one in which, to be effective, they must reach a peak of aggressiveness at least 16 times during the season – regardless of the effect it has on them off the field'**
>
> (The New York Times, Sports Sunday, September 6, 1998).

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

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

1.2 PURPOSE OF THE STUDY

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

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

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

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

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

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

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

1.3 CRITICAL QUESTIONS

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

i. Are sport managers aware of their legal responsibilities?

ii. Which risk management practices are most frequently addressed formally, informally or not addressed at all?

iii. Can a value be obtained for each institution to assess the overall manner in which risk management practices are being applied?

1.4 LIMITATIONS

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

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

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

1.5 DELIMITATIONS

i. The investigation will include Universities and Technikons in South Africa, but not colleges of education.

ii. The areas of criminal liability and contractual liability in sport will not be covered by this study.

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

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

1.6 ASSUMPTIONS

The following were the assumptions of this study:

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

1.7 HYPOTHESES

The following were the hypotheses for the study :

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

1.8 METHODOLOGY

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

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

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

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

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

1.8.1 THE QUESTIONNAIRE

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

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

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

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

The subcategories under general liability were as follows:

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

The category of Equipment and Facilities was subdivided as follows:

A. Equipment
B. Facilities

The category of Medical Aspects consisted of the following subcategories:

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

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

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

This could be illustrated in the example that follows.

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

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

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

1.8.2 PILOT STUDY

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

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

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

1.8.3 FIELDWORK

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

1.8.4 RETURNS

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

1.9 DEFINITION OF TERMS

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

i. Sport Law : The body of knowledge that deals with legal issues pertinent to recreation and sport programs

ii. Risk Management : An integrated strategy for both conducting safe, equitable programs and reducing the potential for loss arising from successful legal claims against the recreation and sport program, its individual employees and administrators

iii. Formally Addressed : The use of the printed form to deal with or verify a behaviour

iv. Informally Addressed : The use of the verbal form or any other non-printed form to deal with or verify a behaviour.

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

1.10 GLOSSARY

Accused : the person charged with the offence

Assumption of risk : when a person voluntarily submits to exposure of the risks knowing the danger

Boni mores : good values

Breach of duty : failure to perform a specified legal duty owed to another

Civil action : action instituted to protect a private right, as contrasted with a criminal action which protects the right of the state

Civil rights : the rights of all citizens, guaranteed by the constitution

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

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

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CHAPTER TWO

REVIEW OF LITERATURE

2.1 INTRODUCTION

The purpose of this chapter is to present a background of the seriousness of legal liability problems associated with tertiary sport programmes; to provide a review of the legal principles associated with sport law; and to provide a brief review of studies related to this study in content and methodology.

The author attempted to summarise previous research and to critically review their results and conclusions by comparing them to the writings of recognised sport law experts and commentators. This process assisted in determining what studies had been already completed in the focus area and to what extent the discipline had developed abroad and locally.

The preliminary literature search also served to determine that there was no study of a similar nature being undertaken locally in the field of sport and leisure management sciences. The review also included accounts of research that are allied to the problem, although they were somewhat peripheral in nature. This assisted the researcher to place the current investigation in the proper context.

There are a number of reasons why an investigation of safety in sport in South Africa is relevant and imperative. In summary, these are as follows:

(i) The country has adopted a new constitution (Act 108 of 1996) which regulates all social activities, including sport.
(ii) The bill of rights enshrines the rights of all people in the country.
(iii) The re-entry of the country into the international sports arena. Players, management and spectators have to be aware of legal issues and responsibilities.

(iv) There is a growing interest in the academic study of the legal regulation of sport (Gardiner et al., 1998).

(v) "Sports Law" or "Sport and the Law" has now arrived as a legitimate legal subject in Britain, United States of America, Canada, Australia, New Zealand and South Africa. As from 1999 a module on Sports Law will be offered as part of the LLB. Degree at the University of Pretoria and as part of the undergraduate program in Sport Science at the University of Durban-Westville.

(vi) There is increasing importance on the role of law in contemporary sport and a growing body of statutory and case law specific to sport. Reference has already been made in chapter one to the South African Sports Commission Act (Act No. 109 of 1998) and the National Sport and Recreation Act (Act No. 110 of 1998).

2.2 REVIEW OF LITERATURE

Van der Merwe (1975) conducted a study on "precautionary measures that should be taken by teachers of Physical Education in the prevention of injuries." The study clarified the legal liability of the Physical Education teacher, particularly with regard to gymnastics lessons.

Prior to this investigation there was no documented research on the topic in the country. However, there existed Education Department circulars that gave directions to teachers of the subject. The precise methodology used in the study was not outlined, apart from the fact that it "was based on self-observation through self-participation." A questionnaire was used to elicit information on accidents and injuries resulting from Physical Education activities. The study sample and sampling procedure were not described, but was delimited to schools in the Free State Province. Van der Merwe provides a valuable entry point in an investigation of the field of sport law in South Africa. However, his research is contextually limited in that it confines itself to legal principles that apply to the subject of Physical Education as it is taught in schools.

In this investigation the scope of the study will be extended to include physical education, sport and recreational activities. Tertiary educational institutions will be sampled because it is felt that many more relevant legal principles would be applicable to sport at this level. Also, because of adult participation, variety of programmes, national and international tours and professional management, tertiary sport more closely resembles community sport, thus allowing for generalizations to be made where similar circumstances exist.

The Human Sciences Research Council (H.S.R.C.) completed a national sports investigation in 1980 (H.S.R.C.,1980). The law committee had been briefed to conduct a jurisprudential investigation into sports legislation. Report number one was entitled: "The Report of the Law Committee on Legislation hampering the normalization of Sports Relations in the Republic of South Africa." It can therefore be concluded that this study was narrowed in focus to one problem area which centered around discriminatory legislation and other official enactments and decisions which hampered the normalization of sporting relations and the achievement of autonomy in sport. Further, the investigation was conducted only at national level. Provincial and municipal legislation and enactments and their impact on sport were not researched (H.S.R.C.,1980: Report No. 1).

Relevant legislation, ordinances, proclamations, policy statements, official documents, parliamentary and senate reports, congress reports, official circulars, press and research reports, books and other relevant information sources were scrutinized.

Interviews were held with senior officials of the then Department of National Education (Branch: Sport Advancement), the then Department of Cooperation and Development, national sporting bodies and persons and institutions (H.S.R.C., 1980).

The study was delimited to an analysis of, and investigation into four acts of parliament, which formed the major obstacles to the normalization of sporting relations. These acts were as follows:

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(i) **The Group Areas Act,** No.36 of 1966, as amended;

(ii) **The Liquor Act,** No. 87 of 1977, as amended;

(iii) **The Reservation of Separate Amenities Act,** No. 49 of 1953, as amended;

(iii) **The Blacks (Urban Areas) Consolidation Act,** No.25 of 1945, as amended.

The following concepts were dealt with:

- the right to participate in sport
- discrimination in sport
- sporting autonomy
- the relation between sport and politics
- legislation which places curbs on sport
- sports policy
- multi-nationalism in sport
- the normalization of sport and sporting relations
- basic rules of interpretation of statutes.

(H.S.R.C., 1980).

Based on findings in the aforementioned areas, recommendations were made. The major recommendation was that the state should not use sport as a political instrument to justify the ideology of apartheid.

Tempelhoff (1983) conducted a study on sport as a recreational activity at South African English medium universities. The purpose was to ascertain the strengths and weaknesses in administrative principles at these institutions. The author had adopted the following procedures:

(i) documenting the contribution of sport to the holistic development of the individual

(ii) tracing the historical development of universities and the role of sport in these institutions

(iii) determining what the sports management policies and practices were in selected Afrikaans medium and English medium universities.

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The field of sport safety and risk management was only investigated in respect of insurances, transport, indemnities and general safety. The body of knowledge in this field has developed significantly over the past sixteen years since the completion of this study. Further, the study did not focus on the legal bases upon which sport is managed. The era in which the study was undertaken and the sample used has little relevance in post-apartheid South Africa. This is so because of constitutional changes that affect the way in which both universities and sport function today. Also, universities today do not compete among themselves in tertiary sport at national and international levels. Colleges of Education and Technikons also belong to the same sport union as universities do, namely South African Student Sports Union (SASSU). As a consequence, universities and technikons will comprise the present study sample.

Parmanand (1987) published the most comprehensive investigation to-date in South Africa. His research focus was sport injuries in the Civil Law. The methodology involved library research into two of the main sources of law in any country, viz legislation and case law. Constitutional issues in sport arising from human rights were not included in this study.

Parmanand's study established that there was a dearth of sports injury litigation amongst participants in South Africa due to a number of factors, particularly the following:

(i) The strong feeling of camaraderie amongst athletes, their adherence to the macho-man syndrome, and their ill-founded belief that "cowboys don't cry".

(ii) The belief that violence is part of the game dissuades players from even contemplating legal action.

(iii) It is simply not sporting to seek judicial relief.

(Parmanand, 1987)

He found that South Africa did not have a body of sport law. In the few cases that had been presented to the courts, decisions were based mainly upon ordinary common law

principles relating to negligence. He also criticized the local courts for depending on Anglo American cases as persuasive authority. He found that the several problems that plagued this field of law, in most countries, arose from the judges and juries who tried strictly to interpret and manipulate laws which had evolved without the problem of sport injury litigation in mind. His study thus aimed to add to the body of knowledge of sports law proper.

Parmanand's approach was to focus on the consent ***(volenti non fit iniuria)*** principle which he found received the widest respect and acceptance internationally. The investigation primarily considered the following aspects:

(i) injuries to participants inter-se;

(ii) injuries between participants and spectators.

A major objective was "to identify those situations occasioning delictual liability for a sports injury received and to make recommendations to promote more safety in sport." The liability of coaches and instructors for improper instruction was very briefly discussed, while contractual issues and product liability for defective equipment were excluded (Parmanand, 1987).

A particular strength of the foregoing study was the fact that the researcher viewed injuries in sport and the South African positive law in a historical perspective. The ***volenti*** principle was traced in Roman Law, Canon Law, Roman Dutch Law and South African Case Law. A comparative view of sport injury litigation and the ***volenti*** defence was provided across the U.S.A., Canada, England, Scotland, Australia and New Zealand. The study also included a valuable section on evaluation, conclusions and recommendations to promote safety in sport.

The Teachers' Federal Council (1990) published a position paper titled, "The Juridical Implications of Sport Injuries." This was submitted to the Department of Education and Culture for consideration, and the Directorate: Legal Services had agreed with the validity of the relevant legal principles. The purpose of the publication was to stress the particular obligation of sports related injury prevention among the youth. Another aim

was to enlighten and advise educators about the legal regulation of education, in particular physical education and school sport.

The increased violence in sport was highlighted. A distinction was made between intentional violence, outside the rules of the game and injuries caused by unintentional violence, within the normal course of the game, played according to the rules. It was emphasized that the sports injuries were potentially the subject of both civil and criminal suits.

According to the Federal Council's (1990) investigation, the two most important aspects were: (i) **negligence**; and (ii) **incompetence**. The formal sources of the law of education were identified as legislation, judicial precedent (case law) and common law. The importance of subordinate legislation in the form of departmental orders, circulars, manuals and other rules was outlined (Teachers' Federal Council, 1990). The investigation revealed that complete safety measures were prescribed and that it was a requirement for each school to have a clear policy regarding safety. It was also required that an efficient safety program would provide for the execution of such policy in all potentially dangerous situations. Specific reference was made to the most common dangers occurring during:

- the transport of pupils
- injuries on the school grounds, the sports fields, in the swimming pool, and the physical education class.

The issue of the requirement of "competent teachers" was clarified by reference to appropriate case law. Relevant case law (*Knouwds v Administrator*, Cape, 1981) was quoted to confirm the strict duty of school heads and educators to take precautionary measures to avoid injuries and accidents in schools. The principle of **negligence** was discussed, as a prerequisite for liability. Ignorance regarding instructions and lack of skill on the part of educators was also explained. The principles of **consent** and **vicarious liability** of the employer were also elucidated.

This investigation has relevance to the present study in that many common legal principles were highlighted and emphasized upon as legal duties of personnel involved in physical education and sports activities. It explained and clarified the cardinal issues involved in legal liability in the South African context by referring to appropriate South African legal authorities and case law. However, in view of the contextual limitation, the author of this study intended to investigate the situation in the wider context of recreation and sport at tertiary institutions. The reasons for selecting tertiary institutions have already been discussed.

In 1991, the then **South African Association for Recreation and Tourism (S.A.A.R.T.)** was responsible for organising a symposium on Recreation, Sport and the Law at the University of Pretoria. This was the first occasion where the topic was professionally addressed. A collection of twelve papers, each covering a different aspect of the topic, comprised the report of the proceedings. These papers will be initially reviewed individually, and summative comments will be based on the entire proceedings (SAASSPER, 1991).

Scott (In SAASSPER, 1991) delivered a research paper on the topic "Knowledge of the Law: The real value for the recreation and sport practitioner." In introducing and defining the concept of law, he established the rationale for accepting the law as a social phenomenon embracing almost all human activity. He demonstrated that the law was applicable to all forms of recreation and sport. The researcher concluded that a definite body of recreation and sport law did exist, but that such a body had not then been widely recognised in South Africa.

The researcher discussed the four main sources of law. The purpose was to arouse an interest in this latent branch of law, and to provide information that would have been of practical value. Scott identified the need for systematic study and research in this applied field. He believed that the need was not to train and equip recreation practitioners to become lawyers, but to create a culture wherein the awareness existed that "legal norms

should always be heeded when embarking on any activity in the field of sport and recreation"(Scott, In SAASSPER, 1991:5).

The author suggested ways in which this need should be addressed, and how South African law could be adapted to "serve the recreation and sporting community fruitfully"(Scott, In SAASSPER, 1991:5).

Viljoen (In SAASSPER, 1991) presented a paper on "Sport and Human Rights or Playing Ball the Constitutional Way." He defined human rights and explained how it is intertwined with the real world of sport. He discussed the connection of human rights to politics in society and clearly showed the inextricable link between sport and politics in South Africa during apartheid rule.

The researcher also discussed the influence of human rights in society, how human rights are enforced in individual states, what the prospects were of South Africa getting a Bill of Rights in the future. He elaborated on how a South African Bill of Rights would affect sport, sport administration and players. The researcher concluded that the fields or examples were not limited. Many of the fundamental rights dealt with in the Bill of Rights could be invoked and applied to sport. He also expected policies being formulated in the future to address the discrimination of the past.

Potgieter (In SAASSPER, 1991) delivered a paper on "Negligence: When Supervising, Coaching or Organising Meetings." He discussed the possible legal liability of supervisors, coaches and organisers of sport meetings for their negligent acts or omissions. The intentional or negligent behaviour of participants in sport and recreational activities were excluded.

Central to the discussion was the doctrine of "the reasonable man." He covered the two legs on which the test for negligence rests. The investigator emphasised the fact that "a person who by his negligent or careless behaviour causes damage to another may be liable to compensate such loss. This principle also applies to supervisors, coaches and

organisers of sports meetings; the fact that they are participating in sport does not protect them against liability" (Potgieter, In SAASSPER, 1991:1).

Facilities and organisation, instruction and supervision, and medical care were the three areas covered as the coach or supervisor's responsibility. Also discussed was the responsibility of organisers or promoters of sports or recreational events to ensure the safety of participants and spectators. Relevant South African and foreign case law were referred to. The researcher concluded that South Africa's imminent re-entry into the arena of international sport would provide a powerful stimulus to South African sport and recreational activities. He warned that because of the resultant increase in participation and interest in sport and recreation all people involved should not forego reasonable care and circumspection. He urged that haste and impatience in sport and recreation be kept under tight control to prevent or reduce injuries (Potgieter, In SAASPER, 1991).

Neethling (In SAASSPER, 1991) investigated "Aspects of consent to injury and indemnity agreements." He explained the "*volenti non fit iniuria*" principle, the characteristics of consent and requirements for valid consent. The differences between an indemnity agreement and consent to injury were discussed. Important principles emanating from indemnity agreements that are very common in the area of school sporting and recreational activities were identified and analysed. Relevant case law was referred to. Neethling's conclusion was that the application of legal principles concerning consent to injury or assumption of risk and indemnity agreements is not an easy task. His view was that South African courts justifiably approached such defences with caution (Neethling, In SAASSPER, 1991).

Maré (In SAASPER, 1991) researched the issue of "Drug misuse in sport." She considered whether sportsmen and sportswomen should be permitted through the use of medicines or drugs to extend the boundaries of performance. He defined the term "drug" and referred to the two relevant statutes in South Africa, namely the Medicines and Related Substances Control Act No. 101 of 1965 and the Abuse of Dependence-Producing Substances and Rehabilitation Centres Act No. 41 of 1971.

According to Maré (In SAASPER, 1991), if the rules that sport bodies adopt as their own rules are not in conflict with the law or against public policy, the law will not intervene, but sports rules cannot amend, qualify or repeal the law. It was within these broad limits that each organisation was free to decide whether or not doping should be prohibited in its own sport and if so, what drugs should be banned.

The investigation also considered the following issues:

- ignorance of a sports organisation's doping rules
- doctored food and drink
- duty to comply with doping rules
- prohibited substances used for therapeutic purposes
- supply of medicines or drugs and testing procedures.

Klopper (In SAASPER, 1991) presented a paper on "Road Sports and Activities and Transportation," which outlined the legal principles applicable to road related sporting events and other activities. The following questions were discussed:

- What laws / legal rules govern the organising of a sport event on a public road and what procedures are to be adopted to obtain the required consent?
- What is the legal position of a participant when injured during a road event either as participant or as passenger?
- What is the legal position of the transporter of a participant?
- What is the legal position of an organiser of a sport event with respect to a participant or a spectator injured during such an event?

The author concluded with a list of guidelines for competitors and organisers of sport and recreational events (Klopper, In SAASPER, 1991).

Viljoen, H.P. (In SAASPER, 1991) investigated aspects of administrative law that applied to recreation and sport. He discussed the legal standing of sport bodies and clubs as voluntary associations; meetings, votes and decisions; appeal and review;

administrative law and the rules of natural justice; the contents of the rules of natural justice; the rights of sports people that are protected by the courts.

Franzsen (In SAASSPER, 1991) delivered a paper on "Insurance and Claims." He covered the general principles of insurance, life insurance, personal accident insurance, personal liability insurance, property insurance, travel insurance and claims.

Visser (In SAASPER, 1991) discussed "Some elementary legal principles regarding fundraising, sponsorships, lotteries, competitions, copyright and written material and music." "The Liquor Act and its application" was discussed by **Botha** (In SAASPER, 1991). "Specific statutory measures pertaining to animals, tourism, forestry, parks, grounds and the environment" was investigated by **Brink** (In SAASPER, 1991). "Contracts and Agreements: rights and responsibilities of both parties, contracting out, etc." was researched by **Grové** (In SAASPER, 1991).

The symposium proceedings thus covered a range of relevant legal principles applicable to the field of recreation and sport. However, while most of the issues would still be relevant in South Africa, many of the anticipated changes have already occurred. South Africa has entered the international arena of recreation and sport. It is well known that the country has become a formidable force in rugby and cricket internationally. As mentioned in the earlier chapter, the country has adopted a new constitution including a Bill of Rights. New legislation, which would regulate the behaviour of all people involved with sport has already been promulgated (The South African Sports Commission Act No. 109 of 1998; The National Sport and Recreation Act No. 110 of 1998; South African Institute for Drug Free Sport Act No.14 of 1997). There have been many further developments in the field since 1991, precipitated by increasing professionalisation and commercialisation of sport and leisure. The courts have tried many new cases. Thus research into the area of sport law in the context of the "New South Africa" becomes essential.

This study therefore seeks to clarify the legal position in respect of sport laws where the law of delict is applicable. It will focus on what is actually being done or not being done in recreation and sport and what needs to be done to manage risks and to reduce the incidence of injuries and the possibility of litigation.

Rushing (1986), in his doctoral dissertation titled "The Development of a Self-Appraisal Instrument to Evaluate the Legal Vulnerability of Secondary School Athletic Programs," extensively reviewed the literature related to sports law publications from 1958 to 1986 covering 118 references.

He formulated seven areas of concern: student rights, supervision, medical care, instruction, equipment and facilities, travel and transportation, and insurance. He selected 235 standards and recommended practices within those areas which were identified as being important to maintaining a safe and legally sound secondary school athletic program. A rating process which utilized predetermined criteria was employed by a panel of experts to establish content validity (Rushing, 1986).

He conducted a field test in fourteen secondary schools in North Dakota, U.S.A. The purpose of the field test was to obtain a measure of reliability and secondly to refine the instrument until it could best function as an evaluation tool.

The reliability of the instrument was established by the Pearson product-moment correlations obtained between the scoring of two evaluators within each of the school systems and one evaluator outside the school system. All except two of the twenty four correlations were significant at the .05 level.

It was concluded that a valid and reliable self-appraisal instrument appropriate for use in evaluating the legal vulnerability of secondary school athletic programs had been developed. Such an instrument serves as an invaluable evaluative device in the American school system and more particularly in the state of Dakota. The reason for this is that laws in America differ from state to state. What Rushing's study signifies for research in

South Africa is that such an appraisal instrument is of paramount importance to determine legal vulnerability in sport and recreation departments of education institutions.

Girvan (1990) investigated "The development of an instrument to assess how risk management practices are addressed in intercollegiate athletic programs" in Idaho, U.S.A. An extensive literature review was undertaken, beginning with a description of risk management, followed by a historical sketch of the entrance of risk management into the realm of sports. The advantages of including risk management into athletic programs were described. The review concluded with a description of the risk management practices that experts suggest should be part of an athletic department's risk management program. These practices were as follows:

- Supervision and instruction
- Equipment and Facilities
- Medical Care
- Travel and Transportation
- Insurance
- Civil Rights

The questionnaire used was an adaptation of the instrument developed by Rushing (1986) and validated by expert panelists, and a pilot study was done to further validate the applicability of the instrument. The target population was colleges and universities. The final risk management practices survey contained forty four items. Frequency data of the forty four risk management practices explained the manner in which the practices were addressed. A mean value was obtained for each institution to assess the generalized manner in which risk management practices were addressed.

The author concluded that a valid instrument had been developed to assess the manner in which risk management practices were being addressed. The applicability and use of the instrument was clearly demonstrated. The investigator also found that the questionnaire with the highest mean, showing the least items formally addressed, was also the one that

reported no formal review of risks and no personnel attending to risk review (Girvan, 1990).

It was recommended by Girvan that the results could help establish the need for risk management committees in athletic departments or the need for a professional risk management review. The risk management practices section of the questionnaire could become a device for self-evaluation, a checklist to assess a program's areas of neglect and areas that are being addressed appropriately.

The foregoing investigation is relevant to the present study in that the purposes and the target groups are very similar. The study sample was small and confined to an American inter-collegiate sport system. The issues investigated were regulated by American laws relating to sport. These may not be applicable to South African sport as South African laws relating to sport are based on Roman law and Roman-Dutch law. Further, many of the issues would be affected by the American legal system and legislature which are quite different in South Africa. The procedures and methods utilized gave the author of the present study valuable direction to research the aforementioned areas of sport law.

Gouws (1997) included a chapter on sport law in his book on "Sport Management." Unfortunately, the author dealt very cursorily with the following aspects:

- factors that may prevent legal action in sport
- liability
- negligence
- contract law.

The foregoing issues were presented factually as responsibilities of a sport manager, without any explanation as to the reasons for doing so. There were no references made to case law, legislation or to the constitution. Except for the section on contract law, in the entire chapter only one dated American reference work was acknowledged. The author failed to provide an analysis or an evaluation of the law in sport.

Labuschagne and Skea (1999) wrote an article on the "Liability of a coach for a sport participant's injury". Part of their research was undertaken in 1997 at the Ludwig-Maximilians Universität in Munich, Germany. A further part was undertaken in 1998 at the Northwestern University in Chicago (U.S.A.).

The authors established that it is a legal requirement that coaches and other officials assume responsibility to prevent or minimise injuries to athletes. If they do not meet certain requirements, they could be held delictually, and even criminally liable. It is also a legal obligation of schools and other educational institutions to take care that athletes and students do not participate in sport activities in conditions where there is an unacceptably high risk of injury.

The theory of negligence is outlined in this research. The standard of care expected of coaches is clearly explained. In keeping with the discussions in appropriate and relevant case law and legal commentaries, the following specific duties of coaches are discussed and analysed in a logical and progressive manner:

- supervision
- training and instruction
- proper use of facilities and equipment
- providing prompt and proper medical care
- knowledge of participants
- matching and equating participants
- warning of latent dangers

A very relevant legal consideration mentioned is that each particular duty is determined by the specific circumstances surrounding the activity. The duty to take care normally varies with the age, skill and experience level of the participants in addition to the nature and tempo of the sport. The authors provide significant and substantial commentary on the raised duty of coaches created by the changing nature and demands of modern sport. It is appropriate that the coach's duty to keep up-to-date in all facets of the specific sport, sport medicine and scientific progress has been highlighted.

The authors concluded that while coaches experience anxiety because of legal exposure, the development of sport has also changed and developed the legal mechanisms available to coaches to protect themselves. Their solution is for coaches to be familiar with their duties, and hence refraining from the kind of conduct that potentially exposes them to liability. Effective risk management and continuing coach education are suggested as the best means to accomplish this. The authors correctly suggest that the courts balance their role of protecting coaches against the competing forces that make sport available to society for entertainment as well as athletic purposes. Probably the best mechanism coaches can use to equip themselves legally in preparation for sporting events is preparation, knowledge and anticipation of foreseeable consequences (Labuschagne & Skea, 1999).

2.3 CONTENT ANALYSIS OF RISK MANAGEMENT PRACTICES

The topic of sport risk management began appearing in the literature in 1982 and by 1986, books by sport law experts surfaced (Kaiser, 1986; Parmanand, 1987; Clement, 1988). The potential for litigation permeates all of society, including collegiate and university sport. It is therefore relevant to determine the measures a sport department can take to prevent or reduce lawsuits.

To identity the chief concerns and practices that athletic departments should address to reduce risks, eighteen articles, journals and books published by sport law experts between 1975 and 1998 were analysed. Results are given in Table 2.

Articles that focussed on a single topic, such as insurance, were not included. The most frequently listed risk management practices were categorized into specific areas: supervision and instruction; equipment and facilities; medical care; travel and transportation; insurance; and civil rights (Rushing, 1986; Girvan, 1990).

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BOOKS USED		Staff Training	Instruction Methods	Ability Grouping	Warning of Injuries	Rule Conformance	Activity Supervision	Public Relations	Hiring Qual. Personnal	Crowd Control	**Equip. & Facilities**	Emergencies Proced.	Pre-partic.Phys Exam	Injury Report	Return to Activity	**Travel & Transport**	Liability	Accident/Catastropy	**Civil Rights**	Written form
		SUPERVISION & INSTRUCTION										MEDICAL CARE					INSUR.			APPROACH
Gardiner et al.,	1998	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Carpenter,	1995	✓	✓		✓		✓		✓		✓	✓					✓	✓	✓	✓
Grayson,	1994	✓	✓			✓	✓		✓		✓	✓					✓		✓	✓
Marquette Law S.J.,	1993	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓		✓	✓	✓	✓
Opie,	1992	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓				✓			✓
Peterson & Hronek,	1992	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓			✓	✓	✓	✓
AAHPERD,	1992	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓			✓	✓	✓	✓	✓
U.P. Symposium,	1991		✓	✓	✓		✓		✓		✓	✓				✓	✓	✓	✓	✓
Girvan,	1990	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓		✓	✓		✓	✓
Trisley,	1990	✓	✓	✓	✓	✓	✓		✓	✓	✓						✓	✓		✓
Nygaard & Boone,	1989	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓			✓	✓	✓	✓	✓
Baley & Mathews,	1989	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓				✓	✓	✓	✓	✓
Clement,	1988		✓	✓	✓	✓	✓				✓	✓		✓			✓		✓	✓
Parmanand,	1987	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓	✓	✓	✓	✓
Kaiser,	1986		✓		✓	✓	✓		✓		✓	✓	✓			✓	✓	✓	✓	✓
Rushing,	1986	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Tempelhoff,	1983				✓		✓	✓	✓		✓					✓	✓	✓		✓
Van der Merwe,	1975	✓	✓	✓	✓	✓	✓		✓		✓	✓	✓	✓			✓	✓	✓	✓

TABLE 2: CONTENT ANALYSIS OF RISK MANAGEMENT PRACTICES

The analysis revealed that the use of printed documentation was overwhelmingly recommended. Therefore, the category "Use of Written Form" was then added to the matrix to determine its suggested frequency by the authors (Girvan, 1993).

The content analysis (Table 2) revealed that instruction to staff, from staff to students, and from staff to the community dominated the literature. Nine specific concerns surfaced in this area, with virtually every author addressing at least four aspects of supervision and instruction. Staff must be trained to adopt existing legal standards (Carpenter, 1995). Qualified personnel must be hired to utilize safe teaching methods and to provide safe environments. The active supervision of activities was cited by all authors. The responsibility to adequately warn participants and spectators of the risk of injuries was discussed by all but one writer. The matching of participants in sport was mentioned by most of the writers. The importance of educating the public in reducing litigation cannot be underestimated (Gardiner et al., 1998; Peterson & Hronek, 1992; Girvan, 1990; Parmanand, 1987).

The duty to provide safe facilities for athletes and spectators and proper equipment for athletes was another area that was outlined by all authors.

All but two of the authors recognized the importance of well-defined emergency procedures for an accident or injury to athletes. Only half the researchers saw the necessity for accurately compiled injury reports based on facts. Even fewer (4) authors discussed the issue of medical permission to return to activity following an injury incurred by an athlete.

Eleven of the authors mentioned safe travel and transportation as important concerns, while all discussed the need for insurance, emphasizing liability rather than accident/catastrophic insurance.

The majority of authors indicated civil rights, including discrimination, free speech, search and seizure procedures, due process, drug testing, privacy and policies for hiring

and terminating personnel. According to Girvan (1993), this could well become a much greater loss for athletic programmes than recovery for the treatment of serious injuries. The one approach recommended by every author to identify and reduce risk was the use of printed forms to record what had been done and to provide evidence as a solid defense against liability (Carpenter, 1995; Opie, 1992; AAHPERD, 1992; Trisley, 1990; Tempelhoff, 1983).

The courts demand that any practice used to reduce risk be verified in writing to provide any protection. The writing could take a variety of forms eg. checklists, log-sheets, handbooks, manuals and record of events. Documentation should cover accident reporting, medical history, staff meetings, coach/instructor certification, hiring procedures, requests for equipment repair etc. Even the documentation of the risk management plan is important.

2.4 CONCLUSION

The analysis not only revealed areas of concerns to be addressed by sport departments, but also the prominent concerns that have surfaced over the past two decades. They are a sign of the times and those that have created problems for managers of sport programmes. An awareness of current risk management concerns and practices would help everyone involved in sport, especially sport officers and directors.

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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

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

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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

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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.

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

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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

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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 Billinghurst* (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 A11 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).

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 looses 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.

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(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

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the loss is shared by those responsible for it (Neethling et a., 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 (Neetling 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, ie. 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) sate 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 A11 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 2nd 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" maneouvre 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 lead 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 stationery 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

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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'e 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 3rd 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:

(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.

CHAPTER FOUR

ADMINISTRATIVE ISSUES, LEGISLATIVE ISSUES AND RISK MANAGEMENT

4.1 ADMINISTRATIVE ISSUES

4.1.1 Introduction

Most sports clubs and organisations function as an incorporated association (universitas), which has legal personality separate from that of its members. The rights and responsibilities accrue to the whole organisation and not to individuals. The universitas can own property independent of its members. The members have a common objective such as sport, religion, politics, but the primary aim must not be the making and sharing of profits. Whether or not an association is a universitas will depend on its constitution, its objectives and its activities. It can sue or be sued (Lupton, nd; Viljoen, 1991).

The organisation's constitution determines the nature and scope of its existence and activities, prescribes the powers of the office bearers, regulates the rights of members and describes the procedural aspects. In the unreported case of *Koschade v Suid-Afrikaanse Amateur Skermbond* (TPD M 2507/1978) a purported meeting was declared illegal by the Supreme Court. The chairman of the SA Amateur Fencing Association sat in his office and telephoned each member of the executive. After discussing a matter individually with each member, he drew up what he called the minutes of the "meeting" and signed it. The minutes were furnished to the court as proof of the decision taken at the meeting. The court ruled that as the executive members did not come together and were not present in each other's company when the decision was taken, the meeting and therefore the decision taken at the meeting was illegal (Viljoen, 1991).

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4.1.2 Principles of Natural Justice (*Audi alteram partem)*

Sporting organisations must comply with the principles of natural justice when taking disciplinary action against a player or member. Principles of natural justice would afford a charged person a proper hearing and an opportunity of producing evidence and challenging allegations made against him/her. The tribunal is required to listen fairly to both sides and observe the principles of fair play, but strict court procedure is not required. The tribunal is under obligation to act honestly and in good faith (Prinsloo, 1991).

A jockey appeared before an internal tribunal on an allegation of bribing an apprentice jockey in *Turner v Jockey Club of South Africa* (1974 3 SA 633 A 646). He approached the Supreme Court after the internal tribunal found him guilty and two appeal tribunals confirmed the internal tribunal's decision. The court held that the internal tribunal did not afford Turner a fair and impartial hearing and that the tribunal's finding was invalid because the principles of natural justice were violated. The appellant was not informed of all the evidence against him to enable him to deal with it. Also, where the decision of a tribunal is vitiated by a disregard of the principles of natural justice, the matter cannot be corrected by the appeal proceedings before a higher tribunal, but only by a complete rehearing of the matter (Prinsloo, 1991).

One of the general rules is that no one can be a judge in his/her own case. Any person who has an interest in the subject matter of the dispute or the slightest pecuniary interest cannot act as a tribunal member. Because of this principle, the tribunal in *Barnard v Jockey Club of South Africa* (1984 2 SA 35 W 42 46 47) was found to be improperly constituted because it included a partner of the firm of attorneys representing a party in the case before the tribunal.

Any one who refuses to attend a meeting after having been given the opportunity to state his case cannot later assert that the principles of natural justice had been disregarded (*cf. Kenana v Mangope* 1978 2 SA 322 T). A member of a sports organisation is not entitled

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to legal representation unless the internal rules make provision for it (cf. Turner case, 653).

The rules of any organisation may deem the decision of a domestic tribunal as final. Despite this provision, if the tribunal disregarded its own rules of the principles of natural justice, the courts may still interfere (*Jockey Club of South Africa v Feldman* 1942 AD 340 350-351). This was confirmed in *Middelburgrugbyklub v Suid-Oos Transvaalse Rugby - Unie* (1978 1 SA 484 T). The Supreme Court declared the decisions of the disciplinary committee to suspend a player for four matches, as well as the decision that the club should forfeit two points for using the player within the prohibited time invalid. The first decision was invalid since no written report by the referee was available at the trial as required by the domestic rules. The decision of the retrial, three weeks after the first decision, could not stand because the sent-off player should have been tried within seven days as prescribed by the domestic rules. Further, there was no provision for a retrial.

The injunction granted to a player in *Jones and Another v Welsh Rugby Football Union,* 1997 (The Times, 6 March: Moore, 1997) indicates a willingness on the part of British courts to become involved in disciplinary procedures which were previously regarded as the exclusive preserve of sporting bodies. The case represents a significant development in the intervention by the courts in disciplinary sanctions imposed by sporting bodies. Jones was sent off whilst playing for his club, Ebb Vale, after a fight with an opponent during a game against Swansea. He claimed that the four-week suspension imposed by the Welsh Rugby Union's disciplinary committee was unfair. He had a bad stammer and his handicap prevented him from putting his case effectively. Also, the committee's rules did not allow for legal representation, the questioning of evidence, or the playing of the match video before the hearing.

Judge Ebsworth observed that for many years sporting decisions had been made from "wet and windy" touchlines, but the modern professional game meant that such rulings now affected many people who earned their living from the game. The judge stated that

Jones had been given "no real rights" and that the punishment was of "unreasonable length". She said that it was "naïve" to argue that the decisions of disciplinary committees could not be challenged in court because the sanctions imposed now had economic results on those affected. She also said that since a player had to be registered with the Welsh Rugby Union and was subject to its disciplinary code, there was a form of control between the two (Moore, 1997).

A clear solution to the perceived problem of increasing judicial interference in sport is for the various governing bodies to ensure that they have in place disciplinary procedures which respect both the Rule of Law and the rules of natural justice.

4.1.3 Travel and Transportation

Introduction

It is common practise for participants or teams to be transported to and from their homes, educational institutions or clubs to participate in sport. Sometimes accidents do happen and individuals may be injured or killed. There is one common denominator in all of these situations - all the injuries are sustained as a result of the negligent and unlawful driving of a motor vehicle. According to Pittman (1993), "safety must be the primary concern when considering transportation options - lack of careful planning could have serious results."

When these situations result in injuries and damages, these damages must be recovered through a third party claim. This is in terms of the provisions of the Road Accident Fund Act, 56 of 1996. The claim would be from the Road Accident Fund (R.A.F.Act 56 of 1996).

The following questions that arise from these situations are contained in the act:

- When can a third party claim be instituted?
- What are the requirements of such a claim?

- What damages may be recovered with a third party claim?
- Are there any exclusions or restrictions?

It is recommended that sport directors, managers, coaches and others involved in sport have a working knowledge of the Act, and consult attorneys whenever necessary. It must be stressed that there is a need to seek expert legal advice in these circumstances, as is done in the medical field where expert medical advice is sought.

Implications for Sporting Events

Claim Limited

Where the competitor is conveyed by an organiser (eg. in a kombi or bus) and s/he is injured or killed by the exclusive negligence of the driver of the vehicle in which s/he was travelling at the time, the claim for damages in the majority of cases will then be restricted to certain defined expenses (loss of income, loss of support, hospital and nursing expenses, medical services and goods) amounting to a maximum of R25 000. The exception here is where the bus is owned by a professional club which is a separate legal entity from its members and the transport was used in the course of the club's business (cf. *Mohan and Others v Santam Insurance Co. Ltd.* 1983 4 SA 221 N). The claimant will not be entitled to recover any damages for pain and suffering, disfigurement, loss of amenities etc. Where the injuries are caused by the contributory negligence of the driver of the vehicle and the driver of another vehicle, full damages may be recovered from the fund (Klopper, 1991).

Claim Excluded

Where a parent transports a school sports team in his kombi and his children are members of a team, their claims will be totally excluded as they are both members of his household, he being the head of that household (the claims of the other members of the team being limited as in the preceding section). Whether they are actually members of the head of the household would depend on the facts of each

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case (cf. *IGI v Reineke* 1976 1 SA 591 A); *Masombuka v Constantia Versekeringsmaatskappy* 1987 1 SA 525 T). The same applies where a child seconds his parent/guardian during a sport event from a vehicle and the parent is a passenger and is injured or killed while his child is driving. Here the injuries must be caused by the negligence of the vehicle in which the competitors are being conveyed. In the case where the motor vehicle in which the participants are conveyed is involved in an accident with another vehicle, full damages can be recovered from the appointed agent of the other vehicle (Klopper, 1991).

Minimising Transportation Risks

Whenever possible, participants should be transported by a public carrier. A public carrier (public transport) carries passengers or goods without refusal if the approved fare is paid. He presents himself to the public as engaged in the business of transportation of persons or property from place to place for compensation, and he offers his services to the public generally (Nygaard & Boone, 1989). A public carrier is held to higher standards concerning the condition of the vehicles and the qualifications of the driver than is a private vehicle. When a public carrier is used, the transport company assumes the risk, should the driver be negligent. In this way the risk of liability is transferred to the public carrier. Another choice of conveyance is a private carrier. A private carrier differs from a public carrier in that a private carrier transports only in particular instances and only those whom they choose to contract with. They have more discretion as to who their clients may be. Whatever carrier may be used, it is important that the carrier assume responsibility for the qualifications of the drivers, for the condition of the vehicles, and for the provision of insurance for their passengers (Ibid, p.366).

Since public and private carriers tend to be the more expensive option, many governmental organisations opt for other modes of transport. The college kombi or university bus is a commonly used organisation/agency vehicle. They are the next best choice if public or private carriers cannot be obtained. In this way, if the driver is found to be solely negligent, then the claimant may claim up to a maximum of R25,000 from

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the fund. It is very important that agency vehicles meet all the appropriate provincial and local standards for such vehicles.

If a private vehicle or organisation's vehicle is used for the transportation of students, it is common for the driver to be required to have the appropriate licence for the class of vehicle.

Another common option is that some individuals choose to or are asked to use their own personal vehicles for transportation. If this is the practise, drivers should ensure that their vehicle insurance is valid. Many policies exclude from their liability section vehicles used for the regular conveyance of others (as in a lift-club). Those who must use their vehicles to transport students or players should seek clarity from their insurance agents. They must be certain that motor vehicle insurance covers all intended and expected uses (Ibid, p.367).

A great deal of pre-planning is certainly required and by implication should discourage coaches, physical educators and the like from allowing their athletes to casually travel with others, even their parents. All transportation arrangements must be finalised beforehand, and according to set policies.

Air Travel

As mentioned in chapter one, leisure time is on the increase and so is the globalisation of sport. Even education is keeping in line with the demands of the public, and educational institutions are participating in international competition.

On December 13, 1977, the University of Evansville chartered a plane from Indianapolis to Nashville. Together with the five crew members and twelve basketball players there were a sportscaster, the sports-information director, the assistant athletic director, an assistant business manager, three student managers, the president of the charter service and the coach. Due to bad weather the flight was delayed for two hours. The plane

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finally took off and crashed shortly after being airborne. All were killed. The weather was not the reason for the crash. Apparently the luggage and equipment distribution was off-balance and caused control problems (Baley & Matthews, 1989).

Other air disasters have claimed the lives of athletes from California Polytechnic Institute, Wichita State University and Marshall University. Further, a chartered jet crashed en route to the World Figure Skating Championships in Prague, Czechoslovakia in 1961. Sixty one passengers were killed, including all 18 members of the U.S. Team. In 1968 four members of Lamar University track team died in a crash of a flight returning from Iowa. While the real tragedy of these disasters is the loss of life, its effects are far reaching. They are compounded by traumatic experiences and memories as well as monetary loss. After the Evansville crash, two damage suites, each claiming $7 million were filed (Baley & Matthews, 1989).

In addition to consent and indemnities as well as medical and life insurances being taken care of, sports organisations and institutions must develop contingency plans to combat the devastating losses. In America, at least four major professional sport organisations have done this by specifying a manner for creating new professional expansion teams. At Marshall University the process of rebuilding a good team took about three years. Thus smaller organisations and institutions such as colleges should develop some type of contingency plan, especially in light of the fact that, on average, air disasters that kill an entire team or nearly an entire team occur every three years (Baley & Matthews, 1989).

4.2 CONSTITUTIONAL AND LEGISLATIVE ISSUES

4.2.1 HUMAN RIGHTS

Human rights refers to certain basic rights which a person possesses by virtue of being born a human. The function of good government is to keep the rights of all its citizens in a collective "trust". To enable the government to work towards the common good, citizens are required to "hand over" certain rights. The state sometimes infringes upon

individual rights when there are clashes of individual interest. Certain rights eg. the right to life, freedom and property cannot be encroached upon (Viljoen, 1991). The right to freedom and property may be limited, but only in terms of law of general application, provided that the limitation is reasonable and justifiable.

In 1945 the United Nations was formed. One of its aims was "to reaffirm faith in fundamental human rights". The Universal Declaration of Human Rights was adopted in 1948. The states subscribing to it were not bound, it was an expression of an ideal to strive towards. In Africa, the African Charter was adopted (Viljoen, 1991).

In a democracy, the constitution is the highest law of the land. The constitution of the Republic of South Africa (Act 108 of 1996) in section two states the following:

> **"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."**

Section three (subsection two) reads as follows:

> **"All citizens are-**
> **a) equally entitled to the rights, privileges and benefits of citizenship;**
> **b) Equally subject to the duties and responsibilities of citizenship."**

In South Africa human rights are written down as the Bill of Rights which forms Chapter two of the Constitution. Courts are expected to interpret the constitution, which contains basic rights. Acts by parliament or the actions of government can be declared unconstitutional, and can be revoked or scrapped.

Section 7 (Subsections 1 & 2) reads as follows:

1. **"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."**
2. **"The state must respect, promote and fulfil the rights in the Bill of Rights."**

The following sections of the Bill of Rights are also relevant to an understanding of how it affects sport, sport management and participants.

Section 9 (Subsection 1) states that:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

In America, the Fourteenth Amendment guarantees due process and equal protection under the law to all its citizens. Most disputes between professional athletes and their clubs, leagues, or associations do not involve constitutional questions. However, some athletic events are sanctioned under the auspices of a state created body. The requirements of due process and equal protection are accordingly imposed. Muhammad Ali used these circumstances to his advantage in contesting the denial of a boxing licence by the New York State authorities because he refused to serve in the armed forces (*Ali v State Athletic Commission of New York*, 316 F. Supp. 1246 (S.D.N.Y. 1970). The commission's records revealed at least 244 instances in recent years where it had granted, renewed, or reinstated boxing licences to applicants who had been convicted of one or more felonies, misdemeanours or military offences involving moral turpitude. By denying Ali a license, while granting licences to hundreds of other applicants convicted of crimes and military offences, the Commission's actions were deemed to be intentional, arbitrary and unreasonable discrimination, not the even-handed administration of the law which the Fourteenth Amendment required to guarantee equal protection under the law (Berry and Wong, 1986).

Section 10 reads as follows:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

This would signify that sport participants and spectators, be they children or adults, are required to be treated with respect and dignity by any one in authority in a sport environment.

Section 12 (Subsection 1 & 2) provides that:

1) **"Everyone has the right to freedom and security of the person, which includes the right -**

   a) not be deprived of freedom arbitrarily or without just cause;
   b) not to be detained without trial;
   c) to be free from all forms of violence from either public or private sources;
   d) not to be tortured in any way; and
   e) not to be treated or punished in a cruel, inhuman or degrading way."

2) **"Everyone has the right to bodily and psychological integrity, which includes the right -**

a) **to make decisions concerning reproduction;**

b) **to security in and control over the body; and**

c) **not be subjected to medical or scientific experiments without their informed consent."**

Clause (c) of subsection 1 is particularly relevant in the sport environment. It is this right that is usually violated by violent and dangerous play situations, by crowd violence and because of negligence by one or more people involved in sport. Clause (e) is significant because it regulates the manner in which punishments in sport could be imposed when rules are transgressed.

Section 2 can be applied to the sportsperson and to the general sport environment. The sportsperson has a right to feel safe and secure both physically and psychologically. It implies that spectators and officials or coaches cannot place demands on sportspersons that are beyond their capacity. Coaches, for instance, should not send an injured player back into the field of play for the sake of winning a game, when the player has not recovered adequately. Clause (c) regulates the phenomenon of scientific experimentation into sport, and to an extent, the issue of drug testing.
Section 24(a) is relevant in that:

> **"Everyone has the right to an environment that is not harmful to their health and well-being."**

This section has implications for sport and recreation spaces, fields, halls and stadia. It gives rights to everyone exposed to the sport environment to safe playing and sanitary facilities. It could be also interpreted to deter sport coaches and officials from abusing participants, for example children, either physically, mentally, or sexually. It could be applied to all of the previous circumstances discussed where safety is a critical factor.

The general right to "play sport" is not embodied in the constitution. Sport is rather regarded as part of a person's cultural rights. Sport, like music and dance, are part of any nation's cultural heritage. Sport, therefore, cannot be isolated as a fundamental right, because it would lead to several problems that are beyond the scope of this discussion. In this regard Section 30 reads as follows:

> **"Everyone has the right to use the language and to participate in the cultural life their choice, but no one exercising these rights may do so in a manner**

inconsistent with any provisions of the Bill of Rights."

4.2.2 DISCRIMINATION BASED ON RACE AND SEX

Much of South African sports history has been tainted by racially enforced discrimination. However, the 1996 constitution has been founded on the values of non-racialism and non-sexism (section 1). Thus discrimination on the basis of race and sex has been outlawed and all people have to be treated equally. By comparison, in the U.S.A the Fourteenth Amendment, a part of their Bill of Rights guarantees equal protection under the law to all citizens. In *Harvey v Morgan* (1954; Viljoen, 1991) a black boxer had applied for a permit to fight a white boxer. The licensing commission had relied on a statutory provision which precluded any boxing or wrestling match between black and white persons. In defending the provision, the commission maintained that racial separation was necessary to prevent riotous disturbances. The court rejected the argument and held that evidence indicated that black and white persons could compete without such incidents occurring. The statute was invalidated.

Sexual discrimination too has been outlawed; no discrimination based on gender is allowed. In America the equal protection clause of the Fourteenth Amendment, Title IX of the Education Amendment of 1972, and various state equal rights statutes provide protection and avenues of redress for discrimination. They have been used most often in sport (Clement, 1993). Generally, female scholastic athletes have used the Fourteenth Amendment to gain entry to sports; collegiate athletes have used Title IX for the same purpose. Both collegiate and scholastic female athletes have used the state equal rights statutes (Clement, 1993).

In the United States, one area in which students have asserted gender equality constitutional claims has related to sports teams. Thus, for example, in one case a court ruled that it was unconstitutional for a school board to deny girls the right to join a boys' tennis team and a cross-country skiing team where no such teams had been established for female students (*Brenden v Independent School District*, 342 F. Supp. 1224 (D. Min.

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1972), aff'd 477 F. 2d 1292 (8th Cir. 1973).

In another case, a court ruled that female students were entitled to participate in any sport for which there was a boys' team, but not a girls' team (*Reed v Nebraska School Activities Association*, 341 F. Supp. 258 (Neb. 1972). In yet another case, a court ruled that two girls who tried out and were placed on a boys' basketball team were entitled to remain on the team, even after the school board had created a separate girls' basketball team (*Yellow Springs Exempted Village School District Board of Education v Ohio High School Athletic Association*, 43 F. Supp. 753 (Ohio 1978)).

A significant development in U.S. law is that monetary compensation for lost opportunities may now be awarded (*Franklin v Gwinnet County Public Schools*, 117 L. Ed. 2d 208 1992). Prior to the Franklin case, Title nine violation complaints resulted in an investigation. If a violation was found, then the institution was required to make the necessary changes in policy, procedures, and practices. No monetary damages were allowed (Harrison et al., 1996).

This kind of American gender equality case was considered by the Canadian courts in a 1986 Charter case. In a sex discrimination challenge that had important implications for the public education system, a young Ontario girl initiated a constitutional challenge against a provincial sports organisation (*Justine Blainey v Ontario Hockey Association et al.*, 1986, 54 OR (2d) 513 (CA); leave to appeal denied by the Supreme Court of Canada (1986), 58 OR (2d) 274).

The Blainey case involved a twelve year old girl who was prevented from playing on a boy's hockey team. Blainey's lawyers alleged that the gender-specific membership endorsed by the association violated section 15 of the Charter. Secondly, it was argued that the Ontario Human Rights Code provides that its prohibitions against sex discrimination are inapplicable "where membership in an athletic organisation or participation in an athletic activity is restricted to persons of the same sex." The court of Appeal ruled that the provisions of the Ontario Human Rights Code exempting athletic

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activity from the Code's general equality rights guarantees were unconstitutional and, therefore, of no force and effect. It ruled in Justine's favour. The court stated that participation in athletics is an important development of "health, character and discipline." Although the court noted that in the field of athletic activity, distinctions that have a different impact on participants by reason of their sex may be reasonable if there is a valid purpose for such a distinction, there was no such purpose established in this case (Sussel, 1995).

Justine's battle for equal athletic opportunities did not end here. After the Appeal court ruling, she was offered a position playing on a hockey team that purported to offer separate but equal athletic opportunities for female hockey players. She challenged this alternative, on the grounds that the women's hockey team did not provide equal and acceptable opportunities. The women's league offered approximately 50% less ice time, had only two levels of play (the men's team had five), had a shorter playing season, prohibited body checking, and had other inferior qualities, including less media coverage. The Human Rights Board of Inquiry reviewing her complaints found in favour of Justine and ruled that refusal to allow the girl to play on a men's hockey team was contrary to the Ontario Human Rights Code (Sussel, 1995).

In the *Haffer* case, (1982; Clement, 1993) plaintiffs were Temple University women participating in sport and those who had been deterred from participating because of sex discrimination. Their claims focused on three basic areas: the extent to which Temple afforded women students fewer "opportunities to compete" in intercollegiate athletics; the alleged disparity in resources allocated to the men's and women's intercollegiate programs; and the alleged disparity in the allocation of financial aid to male and female students. The complaint alleged discrimination in opportunities to compete, expenditures, recruiting, coaching, travel and daily facilities and services, housing and dining facilities, academic tutoring and publicity. These actions were in violation of the Fourteenth Amendment and the Pennsylvania Equal Rights Amendment. The case was settled in favour of the plaintiffs in all areas except meals, tutoring, facilities and scheduling.

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In another American case, *Blair v Washington State University*, 1987, the decision was similar to the Haffer case, except that the trial court chose to exclude football in the equity calculation. The plaintiff appealed the football decision. The Supreme Court of Washington reversed the decision requiring that football be included in all calculations for finance and participation (Clement, 1993).

According to Clement (1993), the First, Fourth and Fourteenth Amendments to the U.S. constitution influenced daily decisions. To create a quality learning environment, the professionals must foster freedom without disruption, secure individual rights without infringing on the rights of others, and establish gender equity (Clement, 1993).

The issue of private clubs (those reserved exclusively/predominantly to one race) also could be potentially influenced by the "equal protection" clause (Section 9) in the S.A. Bill of Rights. For instance, in the American case of *Wesley v City of Savannah* (1969; Viljoen, 1991) a private golf association hosted an amateur golf tournament. The club was opened to whites only. The tournament was held on a municipally owned course. Only club members (whites) were allowed to compete. The court found that the Equal Protection Clause was violated. It was unlawful to exclude blacks from publicly owned facilities. Since the tournament was held on a public golf course, it had to be open to all. However, the court did not rule that the club had to be open to all.

In England, The Sex Discrimination Act, 1975 prohibits discrimination on the basis of gender (Section 1) and on the basis that the person is married (section 3). Discrimination against a married mother or father would violate Section 3 as married persons will find it considerably harder to meet a requirement to be childless. There is no express provision in the Act giving similar protection to single parents (Gardiner et al., 1998).

The Race Relations Act 1976 in England prohibits discrimination on racial grounds or by virtue of a person's membership of a racial group. The term 'Racial' covers colour, race, nationality or ethnic or national origins. The scope of unlawful discrimination in

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employment covers arrangements for recruiting employees; refusal of employment, the terms on which employment is offered; opportunities for promotion or training; access to benefits, facilities or services and dismissal. In this context employment is of obvious importance in sport, as it covers any competition or sponsorship deal which involves a sports person entering a contract to perform, whether in a match or a marketing activity (Gardiner et al., 1998).

The Sex Discrimination Act 1995 and the Race Relations Act 1976 operate on similar principles in dealing with direct and indirect discrimination. In *James v Eastleigh Borough Council* (1990 ICR 554), the House of Lords decided that Mr. James was directly discriminated against when he was charged a higher price than his wife for admission to a swimming pool because she was a pensioner and he was not although both were aged sixty one (Gardiner et al., 1998).

The statutory concept of indirect discrimination was clarified in *Perera v Civil Service Commission* (1983 ICR 428). Perera was Sri Lankan by birth and well qualified. He had applied unsuccessfully on numerous occasions to progress in his career in the Civil Service. He found that the interview panel took into account, amongst other things, experience in the U.K. and whether the candidate had British nationality. The court rejected his claim as these factors were not "musts". They may have been taken into account by the employer but they were not an absolute bar to his selection (Gardiner et al., 1998).

Both the Sex Discrimination Act and the Race Relations Act inherently prohibit positive discrimination. It would be unlawful for instance for a professional club deliberately to seek to increase the number of employees (players) from ethnic groups under represented in the sport or club concerned (Gardiner et al., 1998).

Globally, the under-representation of women in decision-making and leadership positions in sport is clearly evident at all levels of sport and recreation. This under-representation is evident in all walks of life and is a global problem influencing the lives of millions of

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women. At the fourth United Nations Conference on Women in 1995, a statement referring to **decision-making** was made in the report as follows:

> **"Women's empowerment and their full participation on the basis of equality in spheres of society, including participation in the decision-making process, and access to power are fundamental for the achievement of equality development and peace."** (W.A.S.S.A., 1998a: 1, 2)

The aforesaid was previously acknowledged in the Brighton Declaration on Women and Sport at the first World Conference on "Women, Sport and the Challenge of Change" held in May 1994. One of the principles set out in the declaration is:

> **"Women are under-represented in the leadership and decision-making of all sport-related organisations. Those responsible for these areas should develop policies and programmes and design structures which increase the number of women decision-makers, administrators and sport personnel at all levels with special attention given to recruitment, development and retention."**
> (W.A.S.S.A., 1998a: 2)

These principles were adopted by South Africa.

At the I.O.C. World Conference on Women and Sport in Lausanne, Switzerland in 1996, the I.O.C., the International Federation and National Olympic Committees were urged to consider the issue of gender equality in all their policies, programmes and procedures, and to recognise the special needs of women so that they may play a full and active part in sport.

Flor (1998), the chairperson of the U.N. Commission on Status of Women stated:

> **"Today, many people continue to belittle the topic of women and sport. It is to the United Nation's credit that it firmly located the issue where it belongs - in the human rights context. Over two decades, the international community confirmed time and again explicitly in UN documents that the principle of non-discrimination encompasses the right of all women and girls to engage in sport, physical and recreational activity on an equal basis with men and boys."**
> (W.A.S.S.A., 1998 a, c: 3, 4)

The Zone VI women's forum on women and sport recommended to the Supreme Council of Sport in Africa that there should be equal representation within all their sub-committees.

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South Africa has demonstrated the rights of women through its recognition of the empowerment of women, which is entrenched in section nine of the Bill of Rights.

The White Paper on Sport and Recreation states that:
The Department of Sport and Recreation (D.S.R.) acknowledges the important role that women and girls can play in "getting the nation to play" in order to facilitate positive, healthy lifestyles. Gender equality and the right of women to participate is paramount.

The National Sports Council also has launched an Affirmative Action Policy in which they expect federations to have forty percent representation by women at all levels.

While the aforesaid initiatives in the country are laudable, the implementation of these objectives is lacking. For the moment sport remains segregated on the basis of gender, especially where it is played as a professional game. The situation is compounded by media interest and hence national and international prestige because the "big bucks" remain focussed on the game as played by men.

It is in the light of these developments that Women and Sport South Africa (W.A.S.S.A.) was formed in December 1996. It consists of a National Steering Council for Women and Sport which must be regarded as a key initiative in the Government's strategy to advance opportunities and to ensure gender equity for women's sport and recreation (W.A.S.S.A., 1998 b). W.A.S.S.A.'s mission is:

> **"To develop a culture where all girls and women will have equal opportunities, equal access and equal support in sport and recreation at all levels and in all capacities as decision-makers, administrators, coaches, technical officials as well as participants so that women and girls may develop and achieve their full potential and enjoy the benefits that sport and recreation have to offer."**
>
> (W.A.S.S.A., 1996:2)

In this regard W.A.S.S.A. has formulated a 'National Strategy, 1997 - 2000' document. The strategy addresses the following key areas for action:

1. Resources
2. Capacity Building
3. Participation
4. Awareness
5. Research and Information (W.A.S.S.A., 1996).

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WASSA has been given recognition by being allocated seats on the Board of the S.A Sports Commission. WASSA has made representations to the South African National Boxing Control Commission to change its constitution, which prohibits females from participating in any tournament as a boxer or wrestler. In its motivation W.A.S.S.A. rightly stated the following:

> **"If action is not taken within boxing I can assure you that we will start to see court cases similar to the case recently in the UK where the British Board of Boxing Control was taken on by a female boxer who was turned down for a professional licence. She was backed by the Equal Opportunities Commission and was successful in winning her case."** (W.A.S.S.A., 1998c: 4)

It might not be appropriate for all sports to be desegregated, especially those where physical strength is at the core of the sport. But women should at least be given the opportunity to compete on equal terms where skill with hands or feet is the essence of the game. Traditional attitudes towards women that need to be changed do not only persist as far as players, coaches and managers are concerned, but also when it comes to referees and officials.

4.2.3 DUE PROCESS

Amongst the other requirements for administrative validity which could be grouped under the broad concept of "lawfulness", is the important constitutional right to procedural fairness which has been given special recognition in both the interim and final constitutions.
Section 33 of the SA Bill of Rights promises that no life, freedom or property interest can be terminated without due process or just administrative action. The subsection reads as follows:

> **1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.**
> **2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.**
> **3) National Legislation must be enacted to give effect to these rights, and must -**
> **a) provide for the review of administrative action by a court or where appropriate, an independent and impartial tribunal;**
> **b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and**
> **c) promote an efficient administration.**

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The common-law rules of natural justice, which are similar in scope, content and application to the right to procedural fairness guaranteed by the Constitution, have always applied to the proceedings of all administrative investigations and hearings. However, before the interim Constitution these rules could be excluded by statute, although the courts were generally reluctant to exclude them in the absence of an express provision to this effect. The latest approach of our courts in this regard was illustrated in *Ramburan v Minister of Housing* (H.O.D.) 1995 1 SA 353 (D), where the court held that

> **"the denial of the constitutional right to procedural fairness is a fatal irregularity and invalidates the administrative action in question."**

This does not mean that this right is absolute and may never be limited. It could be limited provided that the criteria laid down in section 36 of the Constitution have been met. However, Burns and Bray (1998) are of the view that, given the injustices of the past, there will be very few instances which will justify a limitation to this right.

The South African courts have clearly stated that procedural fairness should not be regarded as a codification of pre-constitutional law, or be confined to the principles of natural justice. For instance, in *Van Huyssteen N O v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (C) the judge stated that:

> **"the right to procedurally fair administrative action must be given a 'generous interpretation' to give individuals the full measure of the fundamental rights included in the Bill of Rights."**

Thus the constitutional right to procedural fairness s 33(1) of the final Constitution is more comprehensive than the rules of natural justice and may encompass aspects of fair procedure not yet addressed at common law (Burns and Bray, 1998).

The courts and legal writers have generally accepted that the common-law rules of natural justice have crystalized into two principles, namely:

- audi alteram partem (hear the other side)

- nemo iudex in sua propria causa (no one may be a judge in his/her own cause)

These principles will be elucidated further after the next paragraph.

According to Carpenter (1995), of the three interests protected by the due process clauses (life, liberty and property), the interest most frequently involved in sports-related due process cases is a property interest. Sport managers have a property interest in their jobs or occupations. An athlete has a property interest in an education or in a scholarship. None of these interest may be terminated without some level of due process (Carpenter, 1995).

Professionals in recreation and sport should be aware of the steps that are generally acceptable in procedural due process and should seek legal advice in formulating policy for a particular situation. The following are the rights that individuals have:

1. a right to be informed of all charges and complaints brought against them,
   c.f. Minister van Landbou v Heatherdale Farms 1970 (4) SA 184 (T) ;
   NISEC(Edms) Bpk v Western Cape Provincial Tender Board 1997 3 BCLR 367 (C)
2. a right to a hearing,
3. a right to secure counsel,
   c.f. Omar v Minister of Law and Order 1986 (3) SA 306 (C)
4. adequate time to prepare to respond to the complaint,
   c.f. *Turner v Jockey Club* 1974 (3) SA 633 (A) ;
   Van der Merwe v Slabbert 1998 6 BCLR 697 (N)
5. opportunity to present their side of the issue,
   c.f. *Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad* 1959 (3) SA 651 (A)
6. opportunity to call witnesses and to cross-examine opposing witnesses and parties,

c.f. *Bell v Van Rensburg* 1971 (3) SA 693 (C) ;

Geneeskundige en Tandheelkundige Raad v Kruger 1972 (3) SA 318 (A)

7. opportunity for a fair trial .

(Burns and Bray, 1998; Clement, 1988).

4.2.4 DRUG TESTING

Modern professional sport is highly commercialised in nature. With greater prizes being offered the temptation for sport competitors to use performance enhancing drugs is correspondingly greater. Gardiner et al. (1998) are of the opinion that it can be argued that a higher level of positive doping tests brings a sport into disrepute and a consequent downturn in popularity and revenue. However, the rumour that a blind eye is being turned to the failed test of top sports performers is ultimately far more damaging. The courts, in their reluctance to interfere with the decisions of the National Federations, have offered sports the opportunity to conduct their disciplinary procedures without fear of continual legal intervention. However, the law will ultimately always provide a remedy and so there rests a heavy burden on sports managers to ensure that the rules of National Federations remain fair and reasonable and that they are applied equitably and consistently (Gardiner et al., 1998).

The discovery that high school baseball players were using marijuana gave rise to the American case of *Schaill v Tippecanoe County Social Corporation* (1988). A formal program of random urine testing of student athletes was instituted by the School Corporation. The testing program required parents and students to such testing to consent at the beginning of the season. A positive test meant suspension for thirty percent of the season. Two students claimed that the testing protocol was unconstitutional. They relied on the Fourth Amendment to the U.S. constitution which stated that

> **"the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."**

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The court found the program to be constitutional. It balanced the students' right to privacy with the government's interest in combatting the drug problem. The court found that the students had a reduced expectation of privacy in connection with the urine tests performed within the school. They were not visually observed; it happened in the atmosphere of sport and "communal undress;" They had a choice to participate or not to. The government's interest outweighed theirs. Athletes serve as role models and have to set an example in fighting this social problem (Viljoen, 1991).

The leniency of punishment for offenders has attracted severe criticism. Ben Johnson, the Canadian sprinter who was stripped of his Olympic gold medal in Seoul only served a two year ban. He was not only permitted to compete in the Barcelona Olympics, but also to earn considerable revenue from his return. Since his reinstatement Johnson tested positive again and was banned for life. The IAAF subsequently introduced a policy of automatically banning athletes found to be using drugs or involved in irregularities during testing for four years. However, it appears that that as punishments tend to become more severe they have resulted in the exposure of serious loopholes (Collins, 1993).

Petr Korda tested positive for the steroid nandrolone in December 1998. He failed to explain how the substance got into his body. However, he was allowed to play in the first Grand Slam event in Melbourne, because of loopholes in International Tennis Federation (I.T.F.) rules. Jim Courier, the former number one player in the world stated that "What needs to be changed now is the loophole. A player is responsible for his body and what is in it" (The New York Times, Sunday, January 17, 1999).

In 1992 Katerina Krabbe, the world 100 and 200 metre champion, and two other German athletes were suspended for four years as a result of irregularities arising from drug tests during training in South Africa. It was suspected that the same person had provided all three samples. But Krabbe and her colleagues successfully challenged their suspension on the basis that South Africa was not a member of the IAAF and that there had been delays in getting urine samples to an accredited laboratory.

Lawyers can play an important role in ensuring the continued absence of legal intervention. National Federations will retain the discretion to deal with breaches of internal rules by drafting National Governing Body regulations and interpreting them rigorously in domestic hearings. Sports regulations are complex. The IAAF rules deal with a wide range of situations from testing at competitions to testing in an athlete's own home out of season. They attempt to ensure an unimpeachable chain of custody, a fair hearing and reasonable sanctions. But on some occasions, the athlete, having exhausted the sport's domestic regulations, may still consider herself/himself unjustly treated and then seek recourse to the law of the land (Gardiner et al., 1998).

In South Africa specific legislation dealing with the area of drugs in sport has been enacted by parliament. The "South African Institute for Drug Free Sport Act" No. 14 of 1997 has the following intention:

> **"To promote the participation in sport free from the use of prohibited substances or methods intended to artificially enhance performance, thereby rendering impermissible doping practices which are contrary to the principles of fair play and medical ethics in the interest of the health and well-being of sportspersons; and to provide for matters connected therewith."**
>
> Government Gazette, 23 May 1997)

The Institute, which is established as a corporate body has adopted as its slogan "Don't cheat yourself." Its policy document demonstrates its commitment to achieving a drug-free sporting society within South Africa. The Institute is responsible for the dissemination of information relating to penalties to be imposed in respect of positive dope testing amongst sportspersons, as well as the selection of sportspersons who are required to provide samples for dope testing, and to ensure that South Africa complies with international agreements and arrangements concerning the use of drugs and doping in sport (Policy Document, SAIDS).

The Institute is the only body capable of requesting and implementing drug testing in sport in the Republic of South Africa. It is the only body which can authorise the

University of Free State Pharmacology Department to conduct such tests. This department houses the only accredited laboratory in Africa in terms of the International Olympic Committee's rules and codes (Policy Document, SAIDS). The Institute has published a booklet called "Doping in Sport" in May 1998. It serves as a guideline with regard to the following aspects:

- Banned Drugs in Sport
- Drug Testing Procedures
- Permitted medications
- Disciplinary procedures and penalties
- Appeal procedure

The institute ensures that penalties imposed are not in contradiction to the sports governing body at domestic, national and international level. It also avoids penalties that conflict with the laws of the land and in particular with penalties prescribed by the International Sports Federation Doping Control Regulations. The institute has established an appeal board to constitute a hearing and to decide upon disputes. These provisions are in keeping with the due process rights of sportsmen and women as delineated in the constitution.

The areas and examples discussed are not the only ones that physical activity professionals need to be cognisant of. Many of the fundamental rights dealt with in the Bill of Rights may be invoked and applied to sport. Examples may be the right to human dignity, the right of disabled persons to be treated equally and rights related to facilities. According to Section 9 (Subsection 2) of the Bill of Rights:

> **"Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."**

4.2.5 NATIONAL SPORT AND RECREATION ACT

The National Sport and Recreation Bill has been enacted by parliament and it has become operative as the National Sport and Recreation Act, Number 110 of 1998. The purposes of the act are stated as follows:

> **"To provide for the promotion and development of sport and recreation and the co-ordination of the relationship between the Sports Commission, national and recreation federations and other agencies, to provide for measures aimed at correcting imbalances in sport and recreation; to provide for dispute resolution mechanisms in sport and recreation; to empower the Minister to make regulations; and to provide for matters connected therewith."**

The following clauses are contained in the act:

- Promotion and development of sport and recreation in the Republic
- Intergovernmental liaison and co-operation with other countries
- Determination of sport and recreation policy
- Membership of Sports Commission
- National and recreation federations
- Training of sport and recreation leaders
- Resources for sport and recreation
- Programmes to promote equity in sport and recreation
- Funding of sport and recreation
- National colours and incentives for sport achievers and recreation practitioners
- Environment and sport and recreation
- Dispute resolution
- Regulations
- Delegation of duties, powers and functions by Minister and C.E.O.

The act allows the minister to determine policy that would help to "cement the sports unification process." Hence, segregated sport and sport structures based on racial lines, as

was the case in the pre-1994 era, would be contrary to South African sport policy. The act also empowers the minister of recreation and sport to institute "necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process". These clauses of the act are not just about developing and advancing sport. They have to be seen in the context of social redress, a duty that the constitution places on both the state and private organisations to procure advancement and to create opportunities in the spheres of social and cultural life of men and women who have hitherto been disadvantaged by discrimination. Refusals to do so would certainly be contrary to the spirit of fairness and the foundation stones upon which the South African constitution has been developed. In this regard clause 5.2, dealing with membership of the newly formed Sports Commission states that:

> **"No membership shall be granted to a sports and recreation federation which permits or tolerates a system or practice of discrimination based on gender, race, disability, religion or creed."** (National Sport and Recreation Act: 4)

To date, legislation that has a direct impact on recreation and sport has resulted in major reforms. However, South Africa, being a relatively new democracy, still has to witness many further changes. Many heated debates on the "lilly-whiteness" of national sport teams, the inequitable distribution of male coaches and sport managers, amongst other examples, still feature in boardrooms.

With regard to the issue of resources for recreation and sport the act empowers the Sports Commission to "ensure that special consideration is given to the accessibility of such facilities to sports people and spectators with disabilities", when planning facilities. The act outlines specific strategies to promote equity in recreation and sport. Clause 9.2(e) stipulates that the sports commission must ensure that:

(i) women;
(ii) the youth attending school and those no longer attending school;
(iii) the disabled;
(iv) senior citizens; and
(v) neglected rural areas

receive priority regarding programmes for development and the delivery of sport and recreation. (National Sport and Recreation Act: 8)

In conformity with the question of ensuring resource equity, Section 10.1(d) of the act stipulates that when it comes to funding, the Sports Commission must:

> **"increase the profile and increase financial assistance to volunteers, women, senior citizens, neglected rural areas and the disabled, in sport and recreation."**
> (National Sport and Recreation Act: 8)

This standpoint is further enhanced by clause 10.3, which specifies that:

> **"No funding will be provided to national or recreation federations where no development programmes exist or where federations exclude persons from the disadvantaged groups, particularly women and people with disabilities from participating at top level of sport."** (National Sport and Recreation Act: 8)

The act also specifies the procedures to be followed in dispute resolution and upholds the constitutional principle of due process.

It is noteworthy that provision has been made for the establishment of a Sports Commission whose function would be to promote and develop sport and recreation in the Republic. The act requires sport to resolve its disputes internally or with its governing body and only when unable to resolve such dispute, to refer it to the Sports Commission.

4.2.6 SOUTH AFRICAN SPORTS COMMISSION ACT

The South African Sports Commission Bill also has been proclaimed in Parliament as The South African Sports Commission Act, Number 109 of 1998. This act provides for the establishment of a South African Sports Commission and for the Commission's powers with regard to sports management and development as well as enhancing recreation. The Commission will have a juristic personality.

The act also makes provision for the objects, powers and duties of the Commission (clauses 12 and 13) as well as the procedures to be followed at meetings of the Commission (clause 14). Amongst the various objectives of the Commission, the

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following two clauses are particularly relevant to the foregoing discussion on legislative reforms in sport in South Africa :

> **"12.1(b) to co-ordinate the provision of facilities and community centres in disadvantaged areas in consultation with the relevant national, provincial, local authority as well as sport and recreation organisations;**
> **12.1(k) to promote equal opportunities and to achieve non-discrimination in sport as well as to ensure that sports structures are unified and democratised at all levels."** (S.A. Sports Commission Act: 7; 8)

The commission allows for each provincial department of sport and recreation to be represented on it by one person. As provincial sport and recreation fall within the ambit of the provincial legislatures, they may in turn pass legislation for provincial sport commissions to manage sport and recreation in the respective provinces. In terms of Schedule 5 of the Constitution local sports facilities fall within the exclusive legislative competence of the provincial legislature. This implies that provincial departments are also competent to include local sports facilities in their legislation.

4.2.7 CONCLUDING REMARKS ON CONSTITUTIONAL AND LEGISLATIVE ISSUES

The examples cited and the preceding discussion show how the state utilises different mechanisms to regulate areas of sporting activity. The legitimacy and scope of the law's intervention is not always obvious. It is clear though that the law does have a role to play, but this will have to be supplemented by other regulatory mechanisms such as awareness campaigns, education and acceptable codes of practice. Gardiner et al. (1998) are of the view that there is a strong argument that the use of legislation can be seen as diverting attention and resources from educational and social policy initiatives which might more successfully eliminate the causes of the problem. The author concurs with this view. In England, football stadiums have become one of the most regulated public spaces. The danger here is that this regulatory approach to social problems by means of the law will increasingly create environments and situations where the basic rights of freedom of expression and movement is overtly suppressed through the law. Yasser (1993) also

advocates certain reforms in the regulations governing present day university athletes in the United States. He states that:

> **"The life of the big-time college athlete is regulated to a far greater degree than the life of the average college student. Athletes are engulfed by a complex regulatory scheme from the moment they arrive on campus. The athlete's life is managed and controlled in what can perhaps best be described as a militaristic fashion. Regulations which could be viewed as entirely inappropriate for 'civilians' are commonplace for athlete."** (Yasser, 1993: 141).

Quite often law is made to hastily deal with what is perceived as an urgent problem. Panic law is invariably bad law. What may be more advisable would be the use of awareness campaigns. South Africans could easily facilitate campaigns like "Let's Bowl Discrimination Out Of Sport", "Let's Hit Racism For Six" in cricket, or "Let's Kick Discrimination Out Of Soccer".

4.3 RISK MANAGEMENT

4.3.1 INTRODUCTION

The trend towards increased litigation and the willingness to sue sport and leisure service providers has already been documented in earlier chapters of this study. As mentioned earlier in this chapter, the purpose is to develop an awareness of legal liability among sport and leisure service providers and in this section, to help them take the lead aggressively in managing risk within their organisation.

The concept of risk management may be new to many sportspersons and managers. Although the origin of management of risks for public agencies is fairly recent, the practice has been used in the private sector for many years (Kaiser, 1986). In South Africa, as in many westernised countries, the earliest organisations to practise risk management were insurance companies and banks. Their techniques have been adopted by industries and modified and applied by hospitals, universities, schools and several other organisations. The size, type and complexity of the organisation determines the

emphasis on a risk management program. Some agencies have a staff devoted exclusively to risk management and in others it may be an additional duty of a business manager or other officer. To the best of the author's knowledge the first time the term risk management appeared in South African sport was when the country's 2006 Soccer World Cup bid committee panicked after a crowd stampeded prior to the Kaizer Chiefs - Orlando pirates match at Ellis Park on 10th October 1998 (Sunday Times 18th October'1998). According to the Committee's chief executive, and chairman, the trouble, during which ten people were injured and cars were stoned, was a timely warning "to refocus and develop security structures to match the best in the world." To this end they engaged the services of "American **risk management** consultant Warren Harper - who helped plan the Atlanta Olympic games in 1996 - to address problem areas and assist in selling South Africa's bid" (Sunday Times, 18 Oct. '98).

4.3.2 WHAT IS RISK MANAGEMENT

Risk Management is a method of offering quality sport and leisure experiences with maximum protection for participants and adequate safeguards under the law for leaders, administrators, and organisations offering the services (Peterson & Hronek, 1992). Risk can be defined as anything that negatively affects the participant's experience. As indicated earlier in the chapter, there are two types of risks in sport: inherent risks and unacceptable risks. It is the unacceptable non-inherent risks and their resultant injuries that injured athletes and their parents or families are not willing to accept eg. a coach takes an unacceptable risk when a player who is clearly injured wants to come out of the game and yet the coach insists s/he continue playing - which in turn causes the injury to become a permanent disability (Greenberg & Gray, 1992).

Management involves the planning, organising, controlling and leading (teaching, instructing and inspiring) others to achieve the purpose of the organisation. In sport, this purpose is to enhance the quality of life for the participants. The primary concerns of the student athlete and the sports bureau/union are physical injury as well as the resultant mental, emotional or social strain. The goal of a risk management program is thus to

effectively minimise any risk of harm to the student athlete. Successful risk management in sports sufficiently controls the risks in order to ensure that the benefits can exceed the risks of sport participation. In other words, the goal of risk management is to maintain the highest reduction of injury possible. It is not possible to eliminate all sports injuries, except those which are preventable (Greenberg & Gray, 1992).

4.3.3 THE RISK MANAGEMENT PROCESS

From an economic point of view the objective of risk management is to efficiently conserve the assets and financial resources of the organisation and to achieve financial stability by reducing the potential for financial loss. Financial stability is especially significant at present to both public and private recreation and sport enterprises in South Africa owing to an ailing economy, high inflation and declining revenues. At tertiary institutions this situation is exacerbated by cuts in Government subsidies, downsizing and rationalisation, the demands for low student fees and dwindling of reserve funds. An unplanned financial loss could have significant consequences for their programmes.

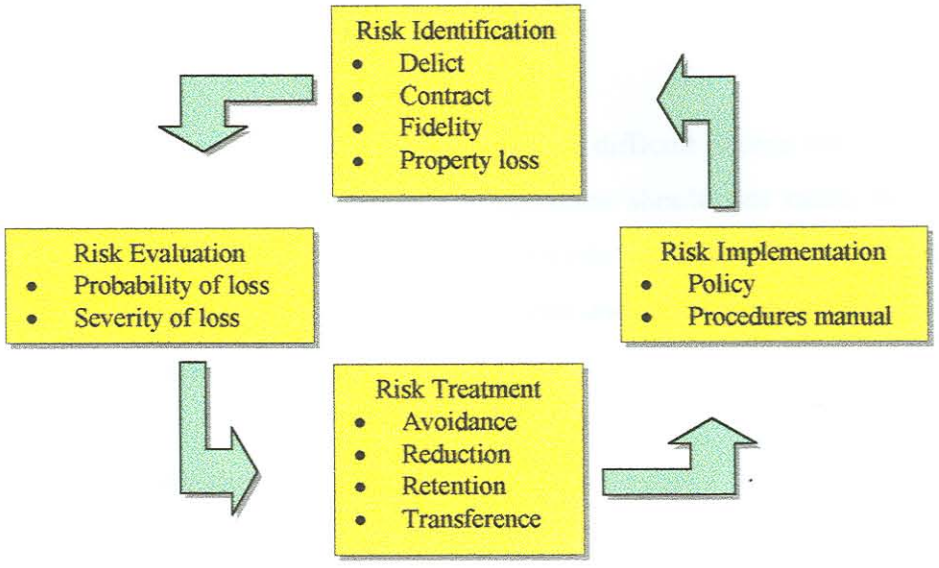
As outlined in figure 1, risk management is a complete, continuous process. The idea of a continuous process is that once a danger has been identified, targeted and corrected, the situation must be evaluated again periodically to ensure that the danger does not recur or that new dangers do not appear. Thus, it is a dynamic process and reviewed regularly (Nygaard & Boone, 1989). The risk management process encompasses the following four phases: identification, evaluation, selection and implementation.

IDENTIFICATION OF RISKS

The first step is to identify all areas of exposure to risk, potential risks must be identified before the risk becomes an incident or accident. Because of the vast extent of topics that

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Figure 1: THE RISK MANAGEMENT PROCESS (Kaiser, 1986: 229)



professionals should consider, it is impossible to compile an exclusive list here. However, a few places to begin looking for risks in sport and physical activity are the following:

- Facilities and Equipment
- Staffing and Supervision
- Participant Population
- Policies and Procedures
- Program Offerings

Facilities and Equipment

Outdated equipment, areas of deferred maintenance, structural designs of facilities or layout of activity areas unsuitable for modern day sports, security of unused equipment, and security from unauthorised entry are all worthy of close and continuing review (Carpenter, 1995).

A protocol for the routine cleaning and checking of facilities and equipment should exist. Unsafe conditions should be rectified urgently and equipment needing repair should be taken out of use immediately. Frequency of inspection, results and the name of the individual should be documented (Clement, 1988).

Often budgetary constraints leave managers with a difficult choice between maintaining safety or continuing a program at all. Pragmatism should not cause the manager to overlook his/her legal duty to participants. There is no escape from owing the duty of providing safe facilities and equipment to students and athletes regardless of the realities of budget cuts (Carpenter, 1995).

Staffing and Supervision

Qualified activity leaders, educators and coaches should be utilised. While certification is not a guarantee against negligence claims it would reduce their probability or frequency. Proper certification also makes it easier for the supervisor to demonstrate that proper care had been taken in the hiring process if s/he has been accused of hiring incompetent teachers or coaches. Certification carries the assumption that the leader or coach had been suitably trained in prudent, non-negligent techniques and perceptions.

Administrators need to conduct periodic observation of activity leaders to determine whether they are performing their duties according to the expected standard of care. Administrators who ignore student or athlete complaints would be omitting an important source of identification of risks (Carpenter, 1995).

Participant Population

Depending on such factors as class/group size, fitness levels, skill levels and age, risks will vary. While some athletes within a group are difficult to control, others would listen closely and behave acceptably. These types of differences, amongst others alter the level

of risk. Teachers, coaches and administrators need to identify the risks, as they might exist in a particular group of participants. (Carpenter, 1995).

Policies and Procedures

Policies and procedures should be developed for such obligations as coping with medical emergencies and frequency of equipment inspections. The lack of appropriate policies and procedures usually indicates that the staff has not been thorough in its efforts to foresee risks (Carpenter, 1995).

Program Offerings

Physical activities and sports appropriate for some people may not be appropriate for others. The timing and location of various activities could also influence the level of risks. Supervision duties should consider the specific programming requirements as well as the requirements for expertise, experience and related qualifications (Carpenter, 1995).

RISK EVALUATION

Once the risks have been identified they need to be evaluated. Some questions that need to be answered are: which risks are life threatening, which are remediable, and which are likely to cause injuries. Should liability be incurred for a specific risk, what would be the extent of the financial risk or risk to the reputation of the program? What options exist to decrease risks and what do they cost in time, money and administrative supervision? Such information is crucial to choosing different options for managing risks.

RISK TREATMENT

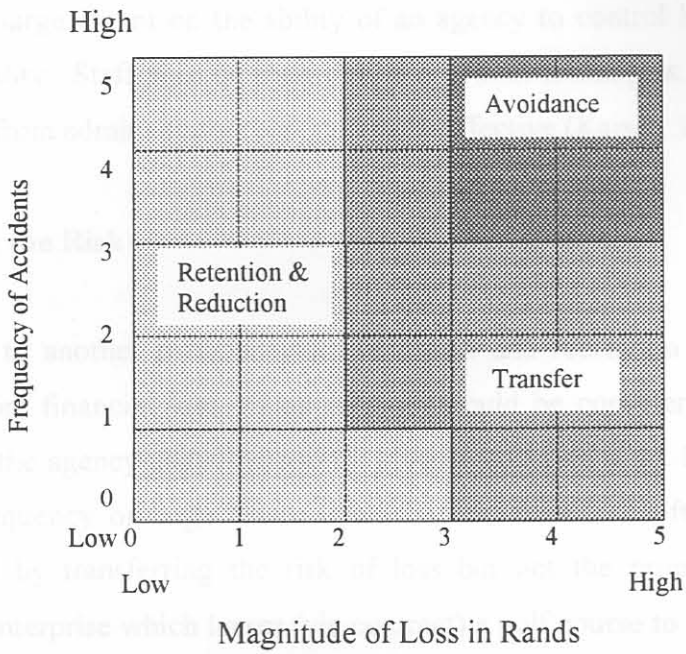
How to treat or control risks is the third essential step in successful risk management programming. Liability can be controlled by:

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- Avoidance
- Retention
- Reduction
- Transference

Selection of a method is based on the frequency of the occurrence and severity of loss. These rules are incorporated and illustrated in the figure below.

Fig. 2: RISK MEASURES MATRIX (Kaiser, 1986: 231)



Avoiding or Eliminating the Activity or Program

Most of the time the activity or program has value to the agency. If it provides no meaningful role in the total operation of the agency, it should be eliminated. The value of the activity has to be balanced against the costs of insurance. The threat of a suit or the assessment of potential loss should never lead a professional to agree to an inferior

system of program delivery. If a particular activity or piece of equipment is the best method available, that activity or equipment should continue in use (Clement, 1988).

Retaining the Risk

Retention is a form of self-insurance whereby the enterprise assumes a certain level of losses. Retention occurs when the organisation identifies the risk, considers other methods of taking precautions, and decides to pay any losses out of its own resources. This usually occurs when the maximum possible loss is so small that the agency can absorb it in the operating budget, or the probability of loss is so low that it can be ignored, or it is not possible to transfer the risks. The success of a risk retention program depends to a large extent on the ability of an agency to control losses and to maintain financial stability. Staff must be trained in loss control techniques. It needs a significant commitment from administrators and staff to be effective (Kaiser, 1986).

Transferring the Risk

Shifting risk to another party provides the sport and recreation organisation with the protection from financial loss. This method should be considered when the financial capability of the agency cannot support a given amount of loss. Hence risks associated with high frequency or large losses could be transferred. Shifting the risk could be accomplished by transferring the risk of loss but not the property or activity. For instance, an enterprise which leases (via contract) a golf course to someone else transfers the facility and the corresponding risk. A transfer of only the risk of loss may be attained by buying accident insurance covering loss associated with the operation of the golf course. With either the contract or the insurance approach a variety of methods are available. Some of the more commonly used methods include leasing of land/facilities to others, contracting/subcontracting the performance of certain services and programs to independent contractors, purchase of liability insurance, use of surety bonds to guarantee performance and the use of waivers/indemnities (Kaiser, 1986).

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Risk Reduction

The purpose of loss prevention and reduction methods counteract risk by lowering the chance that a loss will occur or by reducing its severity if it does occur. Even organisations that are insured may use this technique to reduce costs, especially from uninsured coverage or policy exclusions.

Controlling risk involves tackling accident occurrence frequency and minimising the rand amount of the loss associated with accident. Reducing the likelihood of an accident can be accompanied by:

1. developing safety rules for the operation of facilities and equipment and diligently adhering to those roles
2. conducting periodic safety inspections for all facility and equipment
3. aggressively using preventive maintenance techniques on vehicles, equipment, areas and facilities
4. training all employees in safety practices, first aid, emergency procedures and preventive maintenance

Since accidents related to facilities and equipment account for the majority of injuries in parks, recreation and sports, the safety of equipment and facilities must be a regular focus of the risk management program. Further examples of accident-frequency reduction programs include physical examinations for employees, immediate first-aid for persons injured on the premises, fire alarms, speed limits for vehicles, transfer of accident prone employees, and prohibiting employees with poor driving records from operating vehicles (Kaiser, 1986).

Minimising the amount of financial loss from accidents is a second alternative in risk reduction. These programs take effect in advance of the loss, while it is happening, or shortly thereafter. For example, automatic sprinklers in community centres are designed to minimise a fire loss. Public relations programs may also be used to minimise financial

loss from accidents. The intention of such a program is to convey to an injured victim and his/her family that the agency and its staff acted as responsible, prudent professionals in reducing risks of harm and that sometimes unavoidable accidents do still take place (Kaiser 1986). According to Opie (1994), every effort should be made to avoid situations where the athlete is made to feel isolated so that s/he feels that no one will listen unless legal proceedings are taken.

Avoiding such a situation may demand little more than some ordinary friendliness, support from fellow team members and leaders and efforts to make the athlete feel involved in the sport during any period of convalescence.

RISK MANAGEMENT IMPLEMENTATION

The implementation of a risk management plan involves a policy commitment from the agency's governing body coupled with establishments of the requisite administrative procedures. Necessary forms and documents must be prepared and distributed to all levels within the organisation. The administrative ingredients are similar to other programs, namely a trained and motivated staff (Kaiser, 1986).

4.3.4 RISK MANAGEMENT CONSIDERATIONS

A risk manager cannot move around an enterprise assessing every potential problem area and demand that it be rectified. Most organisations do not have the resources to act in such a manner. However, there should be some definite considerations that a risk manager makes to help decide what to do in a particular situation.

S/he must weigh the costs of the transfer or the reduction against the projected cost saving. This is very difficult to predict. The best solution would be to inspect the past records and files of the agency over the years and determine definite problem areas and the severity of the areas. If an accident keeps recurring and it surfaces in relatively the same area all the time, it could be considered a problem area. A comparison to other

organisations of the same size will often reveal potential danger areas as well. The cost of eliminating a danger area is usually less expensive than incurring the cost of damage should the risk materialise. A good risk management program does not costs, it saves. A wise risk manager will minimise the potential for litigation (Nygaard & Boone, 1989).

In essence, there are six general areas with which risk managers must be very familiar in order to minimise the potential for danger. These general factors are:

1. Supervision and administration
2. Equipment and facilities
3. Medical treatment
4. Travel and transportation
5. Activity preparedness
6. Constitutional and Statutory issues

A simple checklist should be developed to evaluate an area or a situation quickly and accurately. Such a checklist should be used periodically and repeatedly for an area. The advice of an outsider/consultant can sometimes provide insight to a situation to which local individuals are seemingly too close. A capable risk manager will save the organisation far more money than may be spent by ignoring risky situations (Nygaard & Boone, 1989).

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CHAPTER FIVE

ANALYSIS AND DISCUSSION OF RESULTS

5.1 ANALYTICAL PROCEDURES

The primary purpose of assessing the legal aspects related to recreation and sport programmes at tertiary institutions was to improve the existing position, to create an awareness of legal aspects and safety in these applied fields and to thereby improve the delivery of the service. Although one of the subsidiary aims of the investigation was to explore whether a final numerical quantity, indicating the status of the management of legal aspects, could be arrived at, such a figure would not have a statistically meaningful value. In other words, it does not allow a comparison with the management of sport and recreation across institutions. It appears to be more desirable, when the purpose is to improve the existing situation, to simply analyze what exists and from that assessment to recommend improvements. After changes have been implemented, a subsequent assessment can be made to determine if, in fact, an improvement has occurred. The instrument utilized in this study consequently has its greatest value when analyzing improvement within a program rather than when comparing programmes.

A profile analysis has been decided upon as most appropriate for assessment. With a profile, obvious strengths and weaknesses can be identified, and any point on the profile can be compared with subsequent evaluations. The profile analysis gives a graphic picture of the total status and, in addition, each subcategory can be examined (Penman & Adams, 1980).

The investigator assigned different weights to the four categories, because all the areas under evaluation were not regarded to be of equal importance. Issues concerning general

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liability were assigned a weight of 40% because it was found in the literature that these were the areas in recreation and sport that most often invoked the law (Collins, 1993; Girvan & Girvan, 1993; Parmanand, 1987). Issues relating to equipment and facilities were regarded as second most important and were given a weight of 30%. Medical aspects were weighted as third most important at 20% and records and information were weighted as fourth most important at 10%. It is important that if any comparison of the composite scores is to be undertaken in the future, either by researchers or sport managers at these tertiary institutions, these weights must remain constant.

The weights add up to one hundred. Since each category has a rating of 1-7, there is a maximum possible weighted score of 700. This maximum possible score is divided into the total weighted category score in order to arrive at a composite score. This composite score could be used for comparison purposes and to evaluate improvement. A composite score of 1,0 would represent a perfect program. The category ratings may also be plotted on the profiles and relative importance established for each category as the profile is inspected (Penman & Adams, 1980).

The profiles of each institution are included as part of the appendix. The institutions have not been identified to protect their confidentiality, or they would most probably not have been co-operative in revealing the information required of them.

5.2 GENERAL LIABILITY

Table 3. Average Category Rating : General Liability

Inst.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Ave	6,0	5,3	3,0	4,6	4,7	4,9	1,3	5,4	5,6	2,9	2,3	6,0	2,7	3,6	2,6	3,0	6,0	4,7	3,9	5,3	4,1

AVERAGE: $87,9 \div 21 = 4,2$

Table three reflects that the average category rating was 4,2 , which is generally favourable as it is above the midpoint rating of 4. Ten institutions (48%) emerged to be below the average score of 4,2 , while eleven were above the average in the area of general liability which dealt with insurance, classification and association relations, standard of care, transportation, spectators, supervision and miscellaneous issues. In statistical terms this represents a normal distribution.

Of the eleven respondents that had scored above the average, some were historically black institutions or previously disadvantaged institutions, while a few of the very prominent advantaged universities comprised the below average group. It would thus appear that the fact that some of the institutions were previously disadvantaged does not necessarily reflect a poorer or more vulnerable position with regard to legal liability. The fact that some of the most prominent universities in the country scored below the average could indicate that they have personnel who are not sufficiently aware of legal liability issues and therefore do not have management practices that are legally sound. On the contrary, it is also possible that these institutions have personnel who are more legally literate in sport management matters and were consequently more critical and severe in the rating of the practices of their departments.

Of the eleven institutions (52%) that had above average ratings, there were four institutions (1;9;12;17) that rated very highly (5.6 and above), indicating a formal, structured and thorough approach to general liability issues. Considering that this is the main area of sports law occasioning litigation, it is clear that far too many loopholes are left unaddressed by a significant number of responding institutions (10). Further, at least five respondents (7;10;11;13;15) had extremely low ratings, indicating a serious risk of liability.

Upon closer analysis of the subcategories, by summing up the frequencies of each subcategory rating, a more precise identification of the main problem areas was possible. Sixteen institutions were below the category average of 4,2 when it came to classification and association relations which deals with aspects such as awareness and implementation

of national sport governing body rules, eligibility standards and gender issues. In the context of tertiary level student sport, such a situation is inconceivable and unacceptable practice. Firstly, all of the responding institutions were *bona fide,* registered members of the governing body, namely S.A.S.S.U. (S.A.S.S.U. Website). As such, they had all received Circular 04/99 in January 1999, which was an update on the constitution and regulations. In addition this information is available via the internet on the S.A.S.S.U. website and the majority of these institutions do have access to such a facility.

The preamble to the S.A.S.S.U. constitution consists of the following resolution :

> **"Therefore the sportspersons of South African institutions of tertiary education commit themselves through the medium of sport and sporting contact to the establishment and promotion of a peaceful, united, non-racial, non-sexist and democratic society where all people are equal before the law; where they may compete equally in sporting competition; where the tenets of affirmative action apply, based on the equitable provision and distribution of sporting facilities; where normal democratic principles apply, and where the principles of accountability are upheld"** (S.A.S.S.U. Constitution, 1999:1).

The only logical conclusion that one may therefore arrive at is that sport management personnel are not upholding the basic tenets and founding principles of their national governing body, that they do, not clearly know, understand and appreciate the legal implications of applying the above-mentioned rules in their day-to-day role functions. They are clearly exposing themselves and their employers to serious risk of litigation. The common sense, agreement and co-operation suggested in the theoretical framework (Chapter 3: 50) is lacking. Also, in the light of the discussion on the requirements of activity leaders/supervisors (Chapter 3: 60), the duty to not only exercise reasonable care in whatever they do, but also the need to possess a certain amount of technical knowledge in the activities they supervise, is apparently being breached.

According to Gaskin (1993), experts in the area of sport law stress the importance of establishing, communicating and enforcing rules and regulations. If rules and regulations are established but not communicated, it is as if they do not exist; or if they are established and communicated but not enforced, it is as if there were no regulations. One component cannot exist independently of the other two. All must be demonstrated for a

participant to be held contributorily negligent for an injury resulting from violation of a rule.

Thirteen respondents provided a lower than average standard of care, which essentially deals with employing the services of qualified and knowledgeable, competent coaches, supervisors and sport administrators. Within the general liability category, the standard of care subcategory has been the cause of the majority of negligence cases (Girvan & Girvan,1993).

With regard to transportation of athletes and teams, twelve of the institutions were below the average rating. This subcategory dealt with liability arising from clearly written institution policies relating to safe transportation of athletes to and from tournaments, the use of students' vehicles, the licensing, insurance and roadworthiness of institution-owned and private vehicles. In this regard, the investigator reiterates the warning of Pittman (1993), referred to in chapter 4 (109), that "safety must be the primary concern when considering transportation options – lack of careful planning could have serious results." Twelve of the respondents were also below the average rating when it came to the miscellaneous subcategory, which dealt with issues such as awareness of coaches and sport management staff of delictual liability as it relates to their responsibilities. In this respect, it would appear that professional standards were questionable by reference to the discussion in section Chapter 3 (84), which requires personnel to conform to the standard of a reasonable manager, coach or supervisor ie. the standard of a professional.

5.3 EQUIPMENT AND FACILITIES

Table 4: Average Category Rating : Equipment & Facilities

Inst.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Ave	5,5	6,0	4,0	5,5	4,0	6,5	3,5	6,0	6,0	5,5	2,5	7,0	4,0	6,0	4,0	4,0	7,0	5,0	6,0	6,0	6,0

AVERAGE : 110 ÷ 21 = 5,2

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Table 4 shows that the average category rating in respect of equipment and facilities was 5,2. This is a relatively high average by comparison to the midpoint rating of 4. Thirteen responding institutions (62%) were above the average rating in the category of equipment and facilities. On the other hand there were eight institutions (38%) that were below average. Upon a closer analysis of the subcategories, it was found that when it came to legal issues relating to equipment, eleven of the respondents (52%) were below the average. This area dealt with knowledge of rules relating to protective equipment and their use, purchasing, regular examining and safe storage of equipment.

As outlined in section Chapter 3(86), the premises and equipment utilised must be reasonably safe for the activity. Prinsloo (1991) has indicated that in many English cases, the trainer and his employer were held liable because the equipment was inappropriate. Further, items 4, 5, and 6 of the A.A.H.P.E.R.D. recommendations (Baley & Matthews, 1989) are particularly relevant here and institutions should make every effort to implement them.

Ten of the institutions (48%) were below the category average when it came to their management of facilities. This subcategory dealt with the issue of providing, supervising and maintaining safe facilities, both indoor and outdoor. Girvan & Girvan (1993), in conducting a content analysis of risk management practices, have stated that the provision of a hazard free facility for both athletes and spectators was a concern addressed by every author. Frequent safety audits and daily inspection of facilities and equipment were discussed as necessities.

5.4 MEDICAL ASPECTS

Table 5: Average Category Rating : Medical Aspects

Inst.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Ave	3,7	4,3	2,7	4,3	2,3	2,7	3,7	4,7	5,3	2,7	2,7	5,3	2,7	3,3	2,0	2,0	6,3	3,7	5,0	3,3	4,0

AVERAGE : 76,7 ÷ 21 = 3,7

The average category rating for medical aspects, as indicated by table 5 was 3,7. This is a relatively low average which falls below the midpoint rating of 4. Girvan & Girvan (1993) have indicated that in their content analysis of risk management practices, all except one of the authors mentioned organised medical response. Most of the literature focussed on the necessity of well-defined emergency procedures for accidents and injuries to student athletes. Eleven institutions (52%) were rated above average in this category. On the other hand, ten of the institutions (48%) were below the average in this category which dealt with pre-season, during-season and post-season legal considerations.

Upon careful analysis of the subcategory ratings, it emerged that twelve (57%) of the institutions were below the average with respect to pre-season legal considerations. These dealt with the responsibilities of coaches to have proper first-aid training, to demand physical examinations at the beginning of the season, matching of athletes, sports nutrition advice, prevention and accurate recording of sport injuries. In this regard, Prinsloo (1991) and Parmanand (1987) have enunciated that in emergency situations the coach must provide reasonable first aid, but must be extremely cautious not to perform any action that s/he is not capable of, because unreasonable acts or omissions in medical treatment which aggravate the injured person's condition can lead to legal liability. Coaches should take no chances, but should summon professional medical assistance.

Ten institutions (48%) were below the average when it came to post-contest or post-season legal considerations. These dealt with responsibilities of coaches in so far as they need to secure medical approval for any treatment prescribed and also for further participation following injury or illness.

Thirteen of the respondents (62%), however, gave above average attention to in-season legal considerations. This encompassed the need for clearly written policies being established and adhered to in treating injuries during contests and practices, and the responsibilities of coaches in respect of the following: refraining from administering

dietary supplements, using prudent judgement in emergency situations, having medical assistance readily available and using sequential, progressive conditioning procedures. These strategies for providing adequate medical care to meet the needs of program participants coincide with the suggestions made by Gray (1993).

5.5 RECORDS AND INFORMATION ON ATHLETES

Table 6: Average Category Rating : Records and Information on Athletes

Inst.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Ave	3,7	2,0	2,0	4,3	2,7	1,0	1,0	4,7	5,7	2,0	1,3	3,0	1,7	2,7	3,7	1,0	2,0	2,7	4,3	3,0	1,0

AVERAGE : 55,5 ÷ 21 = 2,6

The average category rating for records and information on athletes was 2,6, as noticed in table 6. This is a very low average, considering the midpoint rating to have been 4. What it reveals is that this category has generally received very poor attention by institutions. This could be related either to a lack of awareness of how this category impacts on legal liability in sport, or to the fact that serious constraints in respect of human resources are experienced by most institutions when it comes to the delivery of sport services. This was confirmed by the governing body (S.A.S.S.U.) secretariat who revealed that there were not enough people to do the job. In other words, neither the governing body nor institutions were compiling records and information on athletes. Notwithstanding the low average, ten of the institutions were rated below the average, indicating a large scope for improvement in maintaining health records, documents from parents and records relating to performance assessments.

Upon further analysis of the subcategory ratings in this section, it was found that fifteen institutions (71%) were below average in respect of maintaining health records, such as pre-season physical assessment data, records of injuries occurring during practices and contests, written records of medical treatment given to athletes and written permission

from a physician, and allowing injured athletes to re-enter competition. Twelve of the respondents (57%) were also below the average when it came to filing documentation from parents. This is a very relevant responsibility of the sport management staff in the light of the discussion in chapter three on defenses to negligence claims. It primarily dealt with filing of consent and indemnity forms, birth certificates, special requests and permission from parents and/ or a physician for previously ill athletes to re-enter competition. Further, ten of the institutions (48%) were below the average in respect of maintaining written evaluations of physical abilities of athletes.

Girvan & Girvan (1993) have stated that in order to identify and reduce risk, the one approach that was mentioned by every author was the use of printed forms to document what had been done and to provide evidence as a solid defense against liability. They maintain that it is no longer enough to follow recommended practices to reduce risks, but to verify those practices in writing to provide protection in the courtroom.

5.6 COMPOSITE SCORES

Table 7: Average Composite Score

Inst.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21
Ave	,74	,71	,45	,68	,54	,65	,34	,77	,81	,51	,33	,84	,43	,60	,43	,41	,85	,63	,68	,70	,62

AVERAGE: 12,72 ÷ 21 = 0,61

The composite score was calculated by summing the weighted category and then dividing by 700 for each institution. A perfect score would be 1,0. The average was then calculated by adding these individual scores and dividing by the number of institutions. Table 7 illustrates that the average composite score was 0,61. Twelve institutions scored above the average composite score, indicating a fairly positive position in terms of addressing the issues related to sport liability and managing risks relatively effectively. However, nine organisations scored below the average, indicating decreasing attention to

sport liability matters and ineffective risk management strategies. What is noteworthy is that two institutions (7&11) scored extremely lowly, with scores far below the average. This implies that there is much room for improvement in matters concerning risk management and that much work lies ahead of the sport management staff at these institutions in preparing effective risk management strategies and plans.

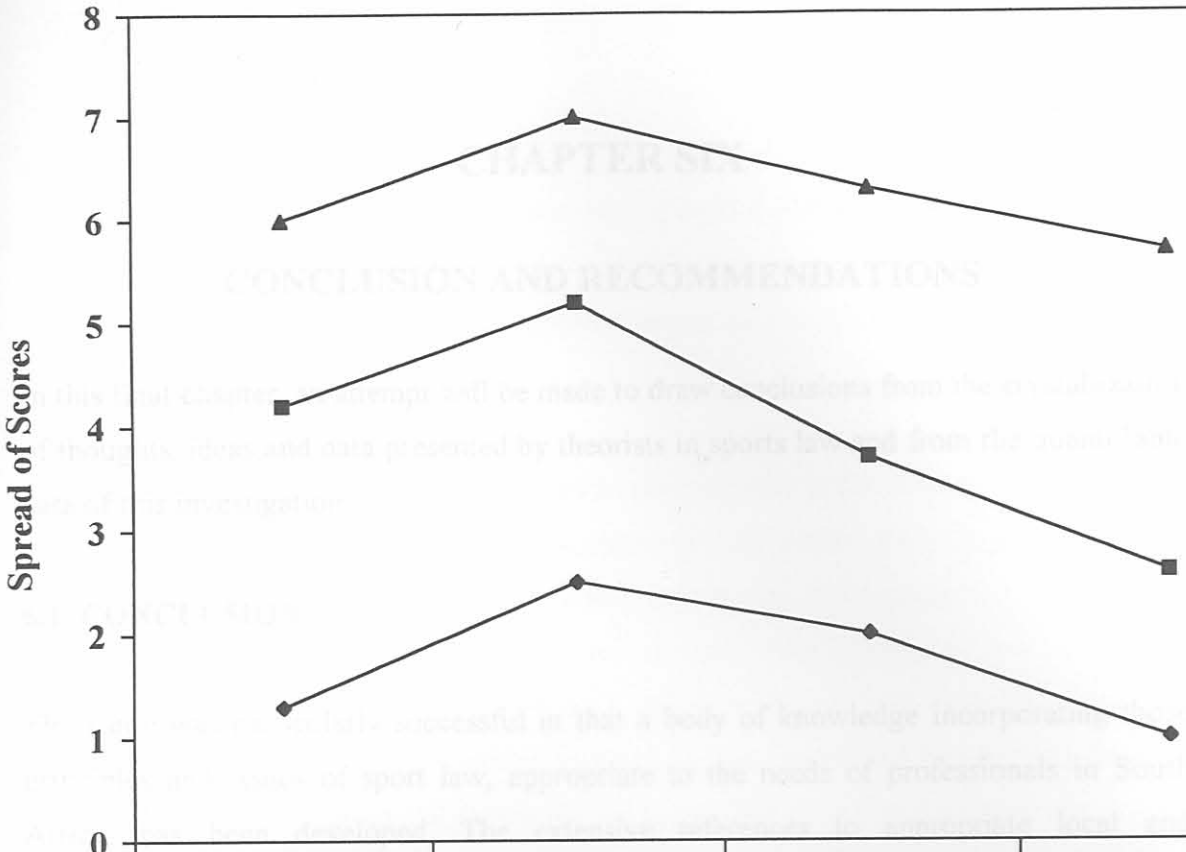
5.7 SPREAD OF SCORES FOR ALL FOUR CATEGORIES

Figure 3 illustrates graphically the minimum, average and maximum rating values across all four categories, namely 1, general liability; 2, equipment and facilities; 3, medical aspects; and 4, records and information on athletes. It is an attempt to statistically understand how the scores were spread between the minimum value of 1 and the absolute maximum value of 7. The graph also indicates in which category areas the institutions appeared to be strong and in which categories weaknesses were apparent.

From the graph it is clear that generally the institutions emerged strongest with their profiles in the category relating to equipment and facilities. The absolute maximum value of 7 was attained by at least two institutions. As discussed under table 4, the average for this category was 5,2, which is a relatively high average, well above the midpoint. Even the lowest value of 2,5 exceeds the lowest value in the other three categories. This is a positive situation in that it would seem that tertiary institutions were generally aware of their legal requirements and responsibilities, and were consciously attending to the provision, supervision and maintenance of a wide spectrum of safe facilities and equipment.

The area with the second greatest strength would be category 1, which relates to general liability. The relatively higher average of 4,2, by comparison to the average of 3,7 for

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	Category 1	Category 2	Category 3	Category 4
Minimum	1.3	2.5	2	1
Average	4.2	5.2	3.7	2.6
Maximum	6	7	6.3	5.7

Figure 3: Range of scores across Four Categories

category three, which dealt with medical aspects, is an indication that more of the institutions scored in the upper reaches with a maximum score of 6 being attained by at least three institutions.

The category that appears to have the severest weaknesses emerges to be category 4, which relates to documentation of information on athletes. The highest score was 5,7, which was attained by one institution, while the lowest score of 1 was obtained by four organisations. The average is relatively very low as well. This is the category that clearly has the greatest room for improvement in the future in tertiary sport programmes.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

In this final chapter, an attempt will be made to draw conclusions from the crystallization of thoughts, ideas and data presented by theorists in sports law and from the quantifiable data of this investigation.

6.1 CONCLUSION

The study was particularly successful in that a body of knowledge incorporating those principles and issues of sport law, appropriate to the needs of professionals in South Africa, has been developed. The extensive references to appropriate local and international case law and legislation, and the simplified but accurately described legal concepts have served to remove much of the mystique and fear surrounding legal concepts. The compilation of the relevant legal considerations will clearly assist professionals in recreation and sport to better understand their legal responsibilities by providing them with basic legal literacy. As such, this study introduces the sporting community to the relationship between sport and the law, and to the possibilities of legal liability in sport.

This study, in the context of the modern day democratic South Africa, will help professionals in a complex and rapidly changing society to understand the workings of the law in relation to their specific circumstances, which Labuschagne & Skea (1999) and Nygaard and Boone (1989) have expressed as no longer desirable, but mandatory. The expectation is that once these professionals are empowered or equipped with basic legal literacy, they will incorporate risk management into public and private recreation, sport and leisure enterprises.

The study has established, through the literature review, that emphasis on safety in modern day sport is of paramount concern. It has also revealed that a comprehensive

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legal framework in sport law is urgently needed. The legal profession should investigate this void very seriously. With an understanding of legal liability in sport and specific risk reduction strategies, professionals will be competent in reducing the rate and severity of injuries, as well as reducing the consequent levels of litigation, which proves to be extremely expensive.

The investigation has fulfilled and occupied a relevant niche in the field of South African sport in general, and sport at educational institutions in particular. As such, because of the absence of a body of knowledge in sport law in the country (Labuschagne & Skea, 1999; Neethling, 1991; Parmanand, 1987), this research study helps to develop such a body of knowledge by providing a compilation of relevant issues and principles and by engendering and recommending further research in this specialized and applied field of the law. The focus on theoretical principles and issues also serves another purpose. It may be used by specialists in the country, such as curriculum developers, authors of reference works, and lecturers who prepare training materials for trainees in the field of sport management, leisure management and human movement sciences.

At this juncture it is significant to address the critical questions posed in the introductory chapter of the study. The first concern was to determine if sport and recreation managers were aware of their legal responsibilities. The specific results which will be presented in the answers to the subsequent questions will support the conclusion that while there appeared to be a general acceptance and understanding of the concern for safety, the legal principles underpinning the concepts of safety and risk management were not fully known, understood and appreciated by them. In the area of general liability, almost half the institutions left many critical issues unaddressed. The subcategories dealing with awareness and implementation of national sport governing body rules, eligibility standards for athletes and gender issues in sport was scored below average by 16 of the 21 institutions. Further, in each of the different subcategories of liability, there were a few very low scores, indicative of a serious risk of liability. Hence, the first hypothesis of this study was rejected.

The second critical question sought to establish which risk management practices were most frequently addressed formally, informally or not addressed at all. Arising out of the general lack of awareness of their professional and legal responsibilities it was found that the governing body rules and regulations and risk management principles were not diligently applied in their daily functions. It can thus be concluded that many of the institutions are clearly exposing themselves and their employers vicariously to serious risk of litigation by breaching the legal standard of care expected of them. The safety of participants when considering transportation was not given primary concern by more than 50% of the respondents, and an equal proportion of the respondents did not measure up to the required professional standards.

The category of equipment and facilities appeared to be most frequently addressed in a formal manner. However, one cannot conclude that all institutions provided hazard-free facilities for both athletes and spectators. Another category that appeared problematic was medical aspects. Almost half of the respondents accorded below average attention to pre-season, in-season and post-season legal considerations. This finding is in concert with the results of Van Heerden (1996), who emphasized that of all the identified prophylactic measures to reduce the risk of injury, adequate health care which stresses the pre-participation physical evaluation and continuous injury surveillance of participants, should be the cornerstone of preventive sports-medical care.

The category that appeared to be least addressed dealt with the management of records and information on athletics. The very low average score of 2,6 revealed that there appeared to be either a lack of awareness of how this category impacts on legal liability in sport or that there were serious constraints with respect to human resources in sport management services at most institutions. This category reflected the largest scope for improvement of practices relating to the maintenance of health records, documents from parents and records relating to performance assessments. This finding supports the much earlier concern of Tempelhoff (1983), that sports offices at universities were under-staffed, facilities were limited, coaching needs were inadequate and financial assistance

for the promotion of all of the aforementioned was insufficient. In view of the findings of this study, the second hypothesis was also rejected.

The third critical question was to ascertain whether a value could be obtained for each responding institution in order to assess the overall manner in which risk management practices were being applied. The results of the study show that this has been achieved (see section 5.6: Chapter 5). The value of a profile analysis has also been elucidated in chapter 5, and the profiles together with the composite score for each appear in the appendix. Hence, the third hypothesis of the investigation was accepted.

6.2 RECOMMENDATIONS

The following recommendations are based on the results of the study and include recommendations for future risk management planning and for further research in sports law. It is recommended that:

1. Because of the constraints of the present investigation, and the fact that the data was gathered by questionnaires that were completed by one individual, the instrument should be used by an evaluation team or committee rather than only one individual. The team should be composed of individuals with varying degrees of responsibility such as a combination of coaches and administrators. One person could thereafter summarize the scores. Such a corporate evaluation will minimize individual bias and a more valid and complete appraisal can be made.

2. Further research extends the sample to include colleges of education as this investigation was delimited to universities and technikons.

3. The evaluation instrument should be used initially in a formative process, that is, a process that has improvement of the existing position as its primary intent. Such a self-appraisal process would enable the management to identify areas in which

university and technikon personnel need more information and thus promote workshops, seminars and /or in-service training programmes which would strengthen the areas.

4. The instrument be used in further research to determine if composite scores on this instrument correspond to the incidence of injuries and /or lawsuits within the country.

5. To solve the perceived problem of increasing judicial interference in sport, the various governing bodies should ensure that they have set in place disciplinary procedures which respect both the rule of law and the rules of natural justice.

6. Sport personnel who are uncertain about any legal issue should seek expert legal advice and not rely on the contents of this study as authority. While every care has been exercised to present and discuss legal issues and principles occurring in sport and recreation accurately, each situation is different and only an expert is qualified to analyse specific cases and to offer advice.

7. Sport officials, coaches, directors and managers have a working knowledge of the Road Accident Fund Act, and consult attorneys whenever necessary.

8. The instrument be printed by the national student sport governing body (S.A.S.S.U.) and made available to its member institutions. It could be a valuable addition to the current information on its website.

9. Workshops, seminars and/or in-service training programmes be developed for the standards and recommended practices as a basis for presenting the legal aspects of sport participation at tertiary level.

10. In addition to its constitution, S.A.S.S.U. should develop a handbook explaining constitutional provisions, rules, regulations and safety measures in a manner that is

simple to understand and put into practice in the daily functions carried out by sport management staff.

11. S.A.S.S.U. should increase its permanent, full-time staff complement. For quality programmes, it has been shown that quality management staff is a prerequisite. A national risk management officer should be appointed to develop effective risk management measures to reduce or prevent injuries and any consequential litigation. This appointee could also be tasked with the responsibility of compiling a national register of student sport injuries to generate reliable, statistical data, to trace the trends in sports injuries.

12. Tertiary institutions should assign a knowledgeable and competent member of their sport centre staff the responsibility to initiate and co-ordinate the development of risk management plans for intramural activities. This person should also be responsible for the development of specific policies regarding safety precautions such as transportation, insurance, emergency accident plans, supervision and instruction, and the maintenance of records.

13. All tertiary institutions and organisations should make it mandatory that complete written records are maintained; that every aspect of the daily functions of sport management staff is reduced to writing and filed. Apart from contributing to efficient organisation, such records provide vital proof of risk reduction steps taken and could be used as a defense against claims of negligence.

14. The study of sport law becomes an integral part of the professional preparation programmes of coaches, officials, physical educators, sport and leisure managers and anyone who makes sport their career .

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6.3 CONCLUDING REMARKS

It is generally accepted that the environments in which we spend the most time have the greatest impact on our values and beliefs. Because athletes dedicate much time immersed in the culture of sport and many hours practising and fine-tuning their sport skills, the values and beliefs they hold are often shaped by those with whom they work and the environment in which they play and train. Therefore, as we are on the threshold of a new millenium, sport and leisure managers should strive to provide positive learning environments and experiences, because nowhere is it more apparent than in the sport milieu, that participants and spectators alike model the behaviours of their heroes and heroines, either positively or negatively and this powerfully impacts on their actions and what they may believe as true and right. A start to inculcating positive behaviour in sport would involve nothing more than treating others with dignity, respect and common decency. If common decency can be used as a beginning, the future of sport in South African society as a vehicle to support and foster ethical and moral practices amongst others, becomes brighter.

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REFERENCES

AUSTRALIAN COACHING COUNCIL (n.d.). A Coach's Legal Responsibilities. **Beginning Coaching, Level 1 Coach's Manual**.

BALEY JA, MATTHEWS DL (1989). **Law and Liability in Athletics, Physical Education and Recreation** (2nd ed.). Iowa: WmC. Brown.

BOTHA DJ (1991). The Liquor Act and Its Application. **Proceedings: Symposium on Recreation, Sport and the Law.** Pretoria: SAASSPER.

BRINK PD (1991). Specific Statutory Measures Pertaining to Animals, Tourism, Forestry, Parks, Grounds and The Environment. **Proceedings: Symposium on Recreation, Sport and the Law.** Pretoria: SAASSPER.

BURNS Y, BRAY E (1998). **Constitutional Law: Tutorial Letter**; ADL 101-J/LWC 404-A/502. Pretoria: UNISA.

CARPENTER LJ (1995). **Legal Concepts in Sport: A Primer**. Virginia: AAHPERD.

CARPENTER LJ (ed.) (1992). Legal Issues in Sport and Physical Education. **Strategies/ Courtsides**. Virginia: AAHPERD.

CLEMENT A (1993). Civil Rights-The First, Fourth, and Fourteenth Amendments. **Journal of Physical Education, Recreation & Dance**; 64 (4), February, 1993: 16-17.

CLEMENT A (1988). **Law in Sport and Physical Activity**. Iowa: Brown & Benchmark.

COLLINS V (1993). **Recreation and the Law** (2nd ed.) London: E & FN Spon.

CONSTITUTIONAL ASSEMBLY RSA (1996). The Constitution of the Republic of South Africa; **Act 108 of 1996.** RSA.

FLOR P (1998). The role of the UN in the empowerment of women in sport. **Second World Conference on Women and Sport**. Windhoek; May, 1998.

FRANZSEN RCD (1991). Insurance and Claims. **Proceedings: Symposium on Recreation, Sport and The Law**. Pretoria: SAASSPER.

GARDINER S, FELIX A, JAMES M, WELCH R, O' LEARY J (1998). **Sports Law**. London: Cavendish Publishing.

GASKIN LP (1993). Establishing, Communicating, and Enforcing Rules and Regulations. **Journal of Physical Education, Recreation & Dance**; 64 (4), February, 1993: 26-27,63.

GIRVAN G, GIRVAN JT (1993). Risk Management Practices in Athletics-A Content Analysis. **Journal of Physical Education, Recreation & Dance**; 64 (4), April, 1993: 26-28.

GIRVAN G (1990). The development of an instrument to assess how risk management practices are addressed in intercollegiate athletic programs. Unpublished MH. Ed. thesis.Idaho: Idaho State University.

GOUWS J (1997). **Sport Management.** Randburg: Knowledge Resources.

GRAY GR (1993). Providing adequate Medical Care to program participants. **Journal of Physical Education, Recreation & Dance**; 64 (4), February, 1993: 56-57,65-66.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

GRAYSON E (1994). **Sport and the Law** (2nd ed.). London: Butterworths.
GREENBERG MJ, GRAY JT (1992). Law. **Reduce Your Risk**. Milwaukee: National Sports Law Institute.
GROVÉ JNJ (1991). Contracts and Agreements: Rights and Responsibilities of Both Parties, Contracting Out, Etc. **Proceedings: Symposium on Recreation, Sport and the Law**. Pretoria: SAASSPER.
HARRISON JM, BLAKEMORE CL, BUCK MM, PELLETT TL (1996). **Instructional Strategies for secondary school physical education** (4th ed.). Iowa: Brown & Benchmark.
HUMAN SCIENCES RESEARCH COUNCIL (1980). The Report of the Law Committee on Legislation hampering the Normalisation of Sports Relations in the Republic of South Africa. **National Sports Investigation**; Report 1: 7-33.
JENSEN CR (1988). **Administrative Management of Physical Education and Athletic Programs** (2nd ed.). Philadelphia: Lea & Febiger.
KAISER RA (1986). **Liability & Law in Recreation, Parks & Sports**. New Jersey: Prentice Hall.
KLOPPER HB (1991). Road Sports and Activities and Transportation. **Proceedings: Symposium on Recreation, Sport and the Law**. Pretoria: SAASSPER.
LABUSCHAGNE JMT (1998). Straf – en Delikregtelike Aanspreeklikheid vir Sportbeserings. **Stellenbosch Law Report**; 72 (1): 72-97.
LABUSCHAGNE JMT (1999). Deliktuele aanspreeklikheid van 'n besering deur 'n gimnas opgedoen. **Tydskrif vir Hedendaagse Romeins-Hollandse Reg**; 62 (1), February, 1999: 132-136.
LABUSCHAGNE JMT, SKEA JM (1999). Liability of a Coach for a Sport Participant's injury. **Stellenbosch Law Review** 10 (2): 158-183.
LUPTON M (n.d.). Disciplinary Procedure in sports clubs and organisations. **Sport Administration manual; level 1**. Johannesburg: NSC.
MARÉ MC (1991). Drug misuse in sport. **Proceedings: Symposium on Recreation, Sport & the Law**. Pretoria: SAASSPER.
MOORE C (1997). **Sports Law and Litigation**. Birmingham: CLT Professional.
NATIONAL SPORT AND RECREATION ACT, **Act 110 of 1998**.
NEETHLING J, POTGIETER JM, VISSER PJ (1999). **Law of Delict** (3rd ed.). Durban: Butterworths.
NEETHLING J (1991). Aspects of Consent to injury and Indemnity agreements. **Proceedings: Symposium on Recreation, Sport & the Law**. Pretoria: SAASSPER.
NYGAARD G, BOONE TH (1989). **Law for Physical Educators and Coaches** (2nd ed.). Ohio: Publishing Horizons, Inc.
OPIE H (1994). Coaching and the Law. **Proceedings: NOP Conference**; 1994: 34-42. Canberra: ASC.
PARMANAND SK (1987). **Sport Injuries in the Civil Law.** Johannesburg: Lex Patria.
PENMAN KA, ADAMS SH (1980). **Assessing Athletic and Physical Education Programs**. Boston: Allyn & Bacon.
PETERSON JA, HRONEK BB (1992). **Risk Management for Park, Recreation and Leisure Services** (2nd ed.). Illinois: Sagamore Publishing, Inc.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

PITTMAN AT (1993). Safe Transportation - A Driving Concern. **Journal of Physical Education, Recreation & Dance**; 64(4), February, 1993: 53.

POTGIETER JM (1991). Negligence : When supervising, coaching or organising meetings. **Proceedings: Symposium on Recreation, Sport and the Law**. Pretoria: SAASSPER.

PRINSLOO JG, BECKMAN JL (1989). **Die onderwys en die regte en pligte van ouers, onderwysers en kinders** (2nd ed.). Johannesburg: Lex Patria.

PRINSLOO MW (1991). Liability in Sport and Recreation. **Journal of South African Law**; vol. 1: 42-57.

RSA PARLIAMENT (1997). Government Gazette, 23 May 1997. **South African Institute for Drug-Free Sport Act 14 of 1997**.

RUSHING GM (1986). The development of a self-appraisal instrument to evaluate the legal vulnerability of secondary school athletic programs. D.Ed. Dissertation. University of Northern Colorado.

SCOTT M (1988). **Law and Leisure Services Management**. Essex: Longman Group Ltd.

SCOTT TJ (1991). Knowledge of the Law : The real value for the recreation and sport practitioner. **Proceedings: Symposium on Recreation, Sport and the Law**. Pretoria: SAASSPER.

SOUTH AFRICAN INSTITUTE FOR DRUG-FREE SPORT (1997). **Policy Document**.

SOUTH AFRICAN SPORTS COMMISSION ACT. **Act 109 of 1998**.

SOUTH AFRICAN STUDENT SPORTS UNION (1999). Update: Constitution and Regulations. **Circular 04/99**. Pretoria.

SOUTH AFRICAN TEACHER'S FEDERAL COUNCIL (1990). The Juridical Implications of Sport Injuries. **The Natal Physical Educator**; vol. xii.

SUSSEL TA (1995). **Canada's Legal Revolution: Public Education, the Charter, and Human Rights**. Canada: Emond Montgomery Publishers Ltd.

TEMPELHOFF LJ (1983). A study of Sport as a recreational activity at South African English medium Universities with specific reference to management policies and practices. Unpublished D.Phil. Dissertation. Pretoria: University of Pretoria.

TRISLEY P (1990). Litigation and School Sport. **Paper presented at the National Congress on Sport in Schools**. Newcastle: Hunter Academy of Sport.

VAN der MERWE NJ, OLIVIER PJ (1989). **Die onregmatige daad in die Suid-Afrikaanse reg**. Pretoria: JP van der Walt en Seun (Edms) Bpk.

VAN der MERWE R (1975). Voorsorgmaatreels wat deur die liggaamlike opvoedingonderwyser getref moet word ter voorkoming van Beserings. Unpublished MA Thesis. Bloemfontein: University of Orange Free State.

VAN der WALT JC, MIDGLEY JR (1997). **Delict: Principles & Cases** (2nd ed.); vol. 1; vol.2. Durban: Butterworths.

VAN HEERDEN HJ (1996). Preparticipation Evaluation and Identification of Aetiological Risk Factors in the Epidemiology of Sports Injuries among youths. Unpublished D.Phil. Dissertation. Pretoria: University of Pretoria.

VILJOEN F (1991). Sport and Human Rights or Playing the Ball the Constitutional Way. **Proceedings: Symposium on Recreation, Sport and the Law**. Pretoria: SAASSPER.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

VILJOEN HP (1991). Aspects of Administrative Law. **Proceedings: Symposium on Recreation, Sport and the Law.** Pretoria: SAASSPER.

VISSER PJ (1991). Some Elementary Legal Principles regarding fund-raising, sponsorships, lotteries, competitions, copyright and written material and music. **Proceedings: Symposium on Recreation, Sport and the Law.** Pretoria: SAASSPER.

WASSA (1998a). Public Hearings on the South African Sports Commission Bill; 26 August 1998.

WASSA (1998b). Steering Council's Terms of Reference and Roles.

WASSA (1998c). Presentation to the South African National Boxing Control Commission.

WASSA (1996). National Strategy: 1997-2000.

WONG GM, BERRY RC (1986). **Law and Business of the Sports Industries**. Dover: Auburn House Publishing Co.

YASSER R (1993). A Comprehensive Blueprint For the Reform of Intercollegiate Athletics. **Marquette Sports Law Journal**; vol.3 (2): 123-159.

UNIVERSITEIT VAN PRETORIA
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LIST OF CASES

1. Affutu-Nartoy v Clarke, reported in The Times, 9th February 1984.
2. Ali v State Athletic Commission of New York, 316 F Supp 1246 S.D.N.Y. 1970.
3. Antinucci v Hellman, 5 App Div 2d 634; 174 NYS 2d 343 3d Dept 1958.
4. Bain v Gillespie, 357 NW 2d 47 1984, quoted by Prinsloo, 1991.
5. Baker v Briarcliff School District, 613 NYS 2d 660 AD 2 Dept 1994.
6. Barnard v Jockey Club of South Africa, 1984 2 SA 35 W 42 46 47.
7. Blair v Washington State University, 740 P 2d 1379 Wash 1989.
8. Boardman v Ottinger, 161 Ore 202; 88 P 2d 967 1939.
9. Bolton v Stone, 1951 AC 850; Grayson, 1994.
10. Boshoff v Boshoff, 1987 2 SA 694 O.
11. Brenden v Independent School District, 342 F Supp 1244 D. Min. 1972.
12. Broom v Administrator, Natal, 1966 3 SA 505 D.
13. Cape Town Municipality v Paine, 1923 AD 207.
14. Cassem v Oos-Kaapse Komitee van die Groepsgebiederaad, 1959 3 SA 651 A.
15. Castle v St. Augustine's Links, 1922 38 TLR 615; Prinsloo, 1991.
16. Clark v Welsh, 1975 4 SA 469 W.
17. Condon v Basi, 1985 1 WLR 866 CA 869.
18. Franklin v Gwinnet County Public Schools, 117 L Ed. 2d 208 1992.
19. Frazer v Johnstone, 1990 ATR 81-056.
20. Geneeskundige en Tandheelkundige Raad v Kruger, 1972 3 SA 318 A.
21. Gross v Sweet, 64 AD 2d 774 NYS 2d 254 SC AD 1978.
22. Haffer v Temple University, 524 F Supp 531 Ed. Pa. 1981.
23. Hall v Brooklands Auto Racing Club, 1933 1 KB 205; Gardiner et al., 1998.
24. Halper v Vayo, AC Illinois 1991.
25. Harrison v Vincent, 1982; Scott, 1988.
26. Harvey v Morgan, 1954; Viljoen,1991.
27. Hewitt v Miller, 1974; Nygaard & Boone, 1985.

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28. Human v Van der Merwe, unreported,OFS Supreme Court 4193/83;Parmanand,1987.
29. IGI v Reineke 1976 1 SA 591 A.
30. James v Eastleigh Borough Council, 1990 ICR 554.
31. Jockey Club of South Africa v Feldman, 1942 AD 340.
32. Jones and another v Welsh Rugby Football Union, 1997; Moore, 1997.
33. Justine v Ontario Hockey Association et al., 1986, 54 OR 2d 513 CA.
34. Kenana v Mangope, 1978 2 SA 322 T.
35. Knouwds v Administrator, Cape, 1981 1 SA 544 KPA.
36. Koschade v Suid-Afrikaanse Amateur Skermbond, TPD M 2507/1978.
37. Kruger v Coetzee, 1966 2 SA 428 A
38. Lamorie v Warner Pacific College, 119 Or App 309, 850 P 2d 401(CA Oregon,1993).
39. Lampert v Hefer, 1955 2 SA 507 A.
40. Larson v Independent School District, 289 NW 2d 112 1979.
41. Latchford v Spedeworth International Ltd, 1984; Scott, 1988.
42. Lawrence v Kondotel Inns (Pty) Ltd, 1989 1 SA 44 D.
43. Mandelbaum v Bekker, 1927 CPD 375.
44. Martin v Philadelphia Gardens Inc, 348 Pa 232; 35 A 2d 317 1944.
45. Masombuka v Constantia Versekeringsmaatskappy, 1987 1 SA 525 T.
46. Mc Namara v Duncan, 1971 26 ALR 584.
47. Middelburgrugbyklub v Suid-Oos Transvaalse Rugby-unie, 1978 1 SA 484 T.
48. Minister of Education & Culture (HOD) v Azel, 1995 1 SA 30.
49. Minister van Landbou v Heatherdale Farms, 1970 4 SA 184 T.
50. Mogabgab v Orleans Parish School Board, 239 So 2d 456 1970.
51. Mohan and Others v Santam Insurance Co Ltd, 1983 4 SA 221 N.
52. Morehouse College v Russel, 109 Ga App 301; 136 SE 2d 179 1964.
53. Murray and Another v Harringay Arena Ltd, 1951 2 KB 529; Gardiner et al.,1998.
54. New Windsor Corporation v Mellor, Scott, 1988.
55. NISEC (Edms) Bpk v Western Cape Provincial Tender Board, 1997 3 BCLR 367 C.
56. O'Brien v Mitchel College of Advanced Education,unreported, SC NSW 1985.11.17.
57. Omar v Minister of Law and Order 1986 3 SA 306 C.
58. Payne and Payne v Maple Leaf Gardens, 1949 1 DLR 369.

59. Pell v Victor J Andrew High School & A.M.F. Inc, 123 Ill App 3d 423; 462 NE 2d 858 1984.
60. Perera v Civil Service Commission, 1983 ICR 428.
61. Pfeifer v Standard Gateway Theatre Inc, 259 Wis 333; 48 NW 2d 505 1951.
62. Povey v Governors of Rydale School, 1970 1 A11 ER 841.
63. Pretorius v Van Rensburg, unreported, TPD 6 September 1935; Parmanand, 1987.
64. R v Billinghurst, 1978 Crim LR 553.
65. Ramburan v Minister of Housing (HOD), 1995 1 SA 353 D.
66. Reed v Nebraska School Activities Association, 341 F Supp 258 Neb 1972.
67. Robertson v Hobart Police and Citizens Youth Club Inc, 1984; Opie,1994.
68. Robitaille v Vancouver Hockey Club, 1981 124 DLR 3rd 228.
69. Rootes v Shelton, 1967 116 CLR 383.
70. Rousseau v Viljoen, 1970 3 SA 413 C.
71. Santam Insurance Co Ltd v Vorster, 1973 4 SA 764 A.
72. Schaill v Tippecanoe County Social Corporation, 1988; Viljoen, 1991.
73. Sinclair v Cleary, 1946 St R Qd 74; Prinsloo, 1991.
74. Smoldon v Nolan & Whitworth, The Times, 18 December 1996;Gardiner et al.,1998.
75. Steel v Pearman, 1877 NLR 22; Parmanand, 1987.
76. Stineman v Fontbonne College, 664 F 2d 1082 1981; Gray, 1993.
77. Tonkin v Gunn, 1988; Opie, 1994.
78. Turner v Jockey Club of South Africa, 1974 3 SA 633 A.
79. Union Royale Belge des Societes de Football Association ASBL and Jean-Marc Bosman, C – 415-93, 15 December 1995; Gardiner et al., 1998.
80. University of Pretoria v Tommie Meyer Films Pty Ltd 1977 4 SA 376 T; Van der Walt & Midgley, 1997.
81. Van Breda v Jacobs, 1921 AD 330.
82. Van der Merwe v Slabbert, 1998 6 BCLR 697 N.
83. Van Huyssteen N O v Minister of Environmental Affairs and Tourism, 1996 1 SA 283 C.
84. Van Wyk v Thrills Incorporated Pty Ltd, 1978 2 SA 641 A.
85. Vernonia School District 47 J v Acton et ux., No.94-590, 1995.

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86. Vuurwa Stampklub and Another v De Jager, unreported, OPD April 1960; Parmanand, 1987.
87. Wesley v City of Savannah, 1969; Viljoen, 1991.
88. Wilks v Cheltenham, 1971 2 A11 ER 369.
89. Wooldridge v Sumner, 1963 2 QB 43.
90. Yellow Springs Exempted Village School District Board of Education v Ohio High School Athletic Association, 43 F Supp 753 Ohio 1978.
91. Zipper v Ocean Ice Palace, NJ Super Ct Law Div, 6 December 1993; Labuschagne & Skea, 1999.

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NEWSPAPER ARTICLES

1. The Sunday Times, 9 August 1998: Zuma's smoke gets up tobacco trade's nose.
2. The New York Times, Sports Sunday, 6 September 1998: A cycle of violence, on the field and off.
3. The Sunday Times, 2 August 1998: Zuma's law has loophole for global firms.
4. The Sunday Times, 9 August 1998: Cricket's day of the gizmo.
5. The Rising Sun, January 1999: Shocking death of teenage girl.
6. The Daily News, 23 February 1999: Soccer ref who shot player dead due in court today.
7. The Sunday Times, 14 February 1999: Puma's centre to sue union over contract.
8. The New York Times, Sports Sunday, 17 January 1999: Korda will play, to players' dismay.
9. The Sunday Tribune Herald, (n.d.).
10. The Times, 6 March 1997.

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APPENDIX 1

THE QUESTIONNAIRE

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EVALUATION OF LEGAL ASPECTS IN SPORTS

This evaluation instrument consists of four major categories that are identified by Roman numerals. Within each major category there are varying numbers of subcategories that are identified by capital letters. *These are the ratings we are interested in.* To the right of each subcategory heading you will find a scale from 1-7. After you have examined the statements listed under each subcategory, circle the number of the subcategory that best represents your opinion of that area. The numerous statements (listed by Arabic numerals) are used merely as an aid to help you make a better evaluation of the subcategory rating. These statements also have the 1-7 scale. The individual statements ratings should be added and divided by the number of items rated (N) to determine an average sub-category rating. There may be statements that *do not apply* to your situation or *demand information not available* to you. If this is true, simply *omit responding* to those items. Add any additional comments in the left-hand margin.

EXAMPLE:

IV. Records and Information on Athletes (Major Category)							
A. Health Records (Sub Category)	1	2	3	[4]	5	6	7
Comments	**NO**						**YES**
1. Preseason physical examination data are kept on all athletes.	1	2	3	4	5	[6]	7
2. Accurate records of injuries occuring during practice and contests are kept on all athletes.	1	2	3	[4]	5	6	7
3. A written record of all medical treatment given to athletes is kept on file.	1	[2]	3	4	5	6	7
Add numbers and divide by N for subcategory rating (i.e., 12 ÷3 =4).							

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ASSESSMENT OF LEGAL ASPECTS IN SPORTS

1. General Liability							
A. Insurance	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. The institution has a good comprehensive plan for insurance:							
a. To protect institution.	1	2	3	4	5	6	7
b. To protect officers, agents.	1	2	3	4	5	6	7
c. To protect students, athletes.	1	2	3	4	5	6	7
2. The institution has a good legal advisor for insurance matters.	1	2	3	4	5	6	7
3. The staff knows the difference between the two basic types of insurance, i.e., liability and accidental insurance.	1	2	3	4	5	6	7
4. All student assistants are covered by liability and accidental insurance.	1	2	3	4	5	6	7
5. The staff is aware of the policy governing procedures for obtaining various kinds of insurance.	1	2	3	4	5	6	7
6. The monetary amounts of insurance coverage are adequate and coverages are kept up-to-date.	1	2	3	4	5	6	7
7. Arrangements are made for insurance coverage for use of facilities by nonstudent groups	1	2	3	4	5	6	7
B. Classification and Association Relations	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. All coaches are aware of the national rules governing participation in sports camps.	1	2	3	4	5	6	7
2. All coaches are aware of which national athletic association rules are legally binding and which are recommendations.	1	2	3	4	5	6	7
3. All eligibility standards established by governing associations are adhered to	1	2	3	4	5	6	7
4. Clear rules defining the "legal residence" of a student-athlete have been developed and published for the information of all.	1	2	3	4	5	6	7
5. All coaches are aware of the legality of married students participating in sports.	1	2	3	4	5	6	7
6. All coaches are knowledgeable about the legal guidelines enabling men and women to compete on the same team.	1	2	3	4	5	6	7
C. Standard of Care (If one is not qualified to act within a specific field, he/she should not attempt to do so.)	1	2	3	4	5	6	7

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Comments	NO						YES
1. Coaches use proper sequential coaching methods before intense competition or participation is permitted .	1	2	3	4	5	6	7
2. Competent supervisors are assigned to conduct and / supervise practice in the absence of the coach.	1	2	3	4	5	6	7
3. Adequate supervision is always provided during practice and contests.	1	2	3	4	5	6	7
4. Special supervision is provided for less qualified and less experienced coaches until they become more qualified .	1	2	3	4	5	6	7
5. Sports administrators realize that if they assign unqualified personnel to conduct an activity they may be held liable.	1	2	3	4	5	6	7
D. Transportation	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. All coaching personnel are aware of the liabilities involved in using public funds for transporting athletes to contests.	1	2	3	4	5	6	7
2. All coaching personnel are aware of the liabilities involved in allowing students to travel to athletic contests in private vehicles.	1	2	3	4	5	6	7
3. Institution owned motor vehicles or public service commissioned licensees are used for transporting athletes and associated groups at all times.	1	2	3	4	5	6	7
4. All coaching personnel are aware of the liabilities involved in allowing students to drive their own vehicles to athletic contests.	1	2	3	4	5	6	7
5. All coaching personnel are aware that all drivers of private vehicles transporting athletes must possess valid licenses and appropriate insurance.	1	2	3	4	5	6	7
6. All coaching personnel exercise prudent judgement related to the loading of private vehicles carrying athletes.	1	2	3	4	5	6	7
7. All coaching personnel make certain private vehicles used for transporting athletes are checked to assure that they are in good, safe working order.	1	2	3	4	5	6	7
8. A clearly written institution policy is established relating to team members going to and returning from contests as a team.	1	2	3	4	5	6	7
9. The institution policy relating to team members going to and returning from contests as a team is adhered to by all coaching personnel.	1	2	3	4	5	6	7
E. Spectators	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. Spectators are reasonably protected from flying balls, bats, javelins, shots, etc.	1	2	3	4	5	6	7
2. Bleacher seats, steps, and railings are kept in good maintenance.	1	2	3	4	5	6	7
3. Potential damages to spectators at contests are anticipated and preventative measures taken.	1	2	3	4	5	6	7

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F. Supervision	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. Administrators effectively supervise sport programs as well as academic subjects.	1	2	3	4	5	6	7
2. Good written policies are established prohibiting unsupervised sport practice sessions.	1	2	3	4	5	6	7
3. The number of supervisors during practice and contests is appropriate for the number of participants and kind of activity.	1	2	3	4	5	6	7
4. All sport contests involving physical contact are scheduled on the basis of equitable competition in regard to size, skill etc.	1	2	3	4	5	6	7
5. Well-written rules are established for conducting safe club initiations.	1	2	3	4	5	6	7
G. Miscellaneous	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. The sport director is clearly aware of legal precedence available or clear laws established on who has the "rights" to broadcast or telecast a sports contest.	1	2	3	4	5	6	7
2. All coaches are aware of situations resulting from personal exchanges that could result in law suits relating to libel and slander.	1	2	3	4	5	6	7
3. All coaching personnel are aware of the legality of purchasing sports award with public money.	1	2	3	4	5	6	7
4. All training rules, rules of social conduct, and dress standards are reasonable, prudent, and published for the information of all.	1	2	3	4	5	6	7
5. All coaching personnel are familiar with delictual (negligence) liability as it relates to their coaching responsibilities.	1	2	3	4	5	6	7
6. All athletic personnel are aware of the Doctrine of Govern-Mental Immunity as it applies to their province.	1	2	3	4	5	6	7
II. Equipment and Facilities							
A. Equipment	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. Coaches make sure that protective equipment is kept in good condition.	1	2	3	4	5	6	7
2. Coaches refrain from "handing down" worn or defective equipment to novices and junior teams.	1	2	3	4	5	6	7

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	NO						YES
3. All coaches are aware that they are liable if rules that specify the use of protective equipment such as a mouthpiece, pads, helmets, etc. are not adhered to.	1	2	3	4	5	6	7
4. All coaches regularly examine equipment used in contests such As bats, sticks, racquets, etc. to be sure they are free from Defects that could cause injuries.	1	2	3	4	5	6	7
5. All coaches use appropriate funds to purchase sports Equipment.	1	2	3	4	5	6	7
6. Coaches know how to order protective equipment that will be Reliable.	1	2	3	4	5	6	7
7. All coaches are aware of the legality of accepting gifts from Sporting goods companies.	1	2	3	4	5	6	7
8. Provisions are made to properly fit protective wearing apparel.	1	2	3	4	5	6	7
9. Movable bleachers are designed effectively so that they cannot Be tipped over.	1	2	3	4	5	6	7
10. All coaches are aware that an athlete is not responsible for knowing necessary kinds of protective equipment needed or whether equipment is properly fitted or in safe condition.	1	2	3	4	5	6	7
B. Facilities	1	2	3	4	5	6	7

Comments	NO						YES
1. Coaches regularly consider potential dangers to students because of inadequate facilities.	1	2	3	4	5	6	7
2. "Natural hazards" around playing fields (guy wires, poles, sprinkler holes, sharp corners, etc.) are considered regularly and protective padding and/or color coding is provided.	1	2	3	4	5	6	7
3. Potential indoor hazards such as hard walls, radiators, slick Floors, glass windows, fire extinguishers, etc., are considered in order to prevent the possibility of injury.	1	2	3	4	5	6	7
4. Facilities considered as "attractive nuisances" (gymnastics Area, swimming pools, etc.) are carefully supervised and Kept locked when not being used.	1	2	3	4	5	6	7
5. Periodic inspections related to maintenance of sports facilities Are conducted (i.e., considering such items as electrical Connections, dirty floors, faulty bleachers, fungus growth, etc)	1	2	3	4	5	6	7
6. A clear written policy has established who is responsible for Inspection and maintenance of safe sports facilities (indoors And outdoors).	1	2	3	4	5	6	7

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III. Medical Aspects							
A. Legal Considerations-Preseason	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. All coaches realize the legal implications of giving athletes food or dietary supplements.	1	2	3	4	5	6	7
2. Coaches regularly confer with medical personnel regarding prevention of sport injuries.	1	2	3	4	5	6	7
3. All coaches use prudent judgement in permitting athletes with varying size and abilities to compete against one another.	1	2	3	4	5	6	7
4. All coaches use reasonable judgement in advising athletes to gain or lose weight.	1	2	3	4	5	6	7
5. All coaches demand a physical examination at the beginning of the season for any sport.	1	2	3	4	5	6	7
6. All coaches have the ability to recognize symptoms that indicate injury.	1	2	3	4	5	6	7
7. All coaches keep accurate records of injuries occuring during practices and contests.	1	2	3	4	5	6	7
8. All coaches have proper and up-to-date first aid training.	1	2	3	4	5	6	7
9. All coaches know the health status of the participants in their sport.	1	2	3	4	5	6	7
B. Legal Consideration-During Seasons	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. All coaches refrain from administering dietary supplements.	1	2	3	4	5	6	7
2. All coaches use reasonable and prudent judgement in emergency situations.	1	2	3	4	5	6	7

	NO						**YES**
3. All coaches refrain from diagnosing injuries and illnesses.	1	2	3	4	5	6	7
4. All coaches have medical assistance at all contact sports events and other sports when necessary.	1	2	3	4	5	6	7
5. All coaches know when to apply first aid and when to seek medical aid.	1	2	3	4	5	6	7
6. All coaches have medical assistance readily available during practice sessions.	1	2	3	4	5	6	7
7. Clearly written policies and procedures have been established to be followed in treating injuries occurring during practices and /or contests.	1	2	3	4	5	6	7
8. All coaches use sound sequential conditioning procedures throughout the season.	1	2	3	4	5	6	7

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C. Legal Considerations-Postcontest or Postseason	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. All coaches secure medical approval for any treatment prescribed, i.e. diathermy, x-rays, etc.	1	2	3	4	5	6	7
2. All coaches require written medical approval for further participation after illness or injury	1	2	3	4	5	6	7
IV. Records and Information on Athletes							
A. Health Records	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. Preseason physical examination data are kept on all athletes.	1	2	3	4	5	6	7
2. Accurate records of injuries occuring during practices and contests are kept on all athletes.	1	2	3	4	5	6	7
3. A written record on all medical treatment given to athletes is kept on file.	1	2	3	4	5	6	7
4. Written permission by a physician, which allows an injured Athlete to reenter competition, is kept on file.	1	2	3	4	5	6	7
B. Documents from Parents	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. A written letter of consent from parents that allows a student to participate in athletics is kept on file.	1	2	3	4	5	6	7
2. A copy of the athlete's birth certificate is kept on file to verify birthdate.	1	2	3	4	5	6	7
3. Letters from parents requesting that athletes return from athletic trips by means other than official institution transport are required and kept on file.	1	2	3	4	5	6	7
3. Written permission by a parent and /or physician that allows an athlete who has been ill to reenter competition is kept on file.	1	2	3	4	5	6	7
C. Assessment of Performance	1	2	3	4	5	6	7
Comments	**NO**						**YES**
1. Written evaluations of the athletes's character or physical abilities are open and accessible to the athlete	1	2	3	4	5	6	7

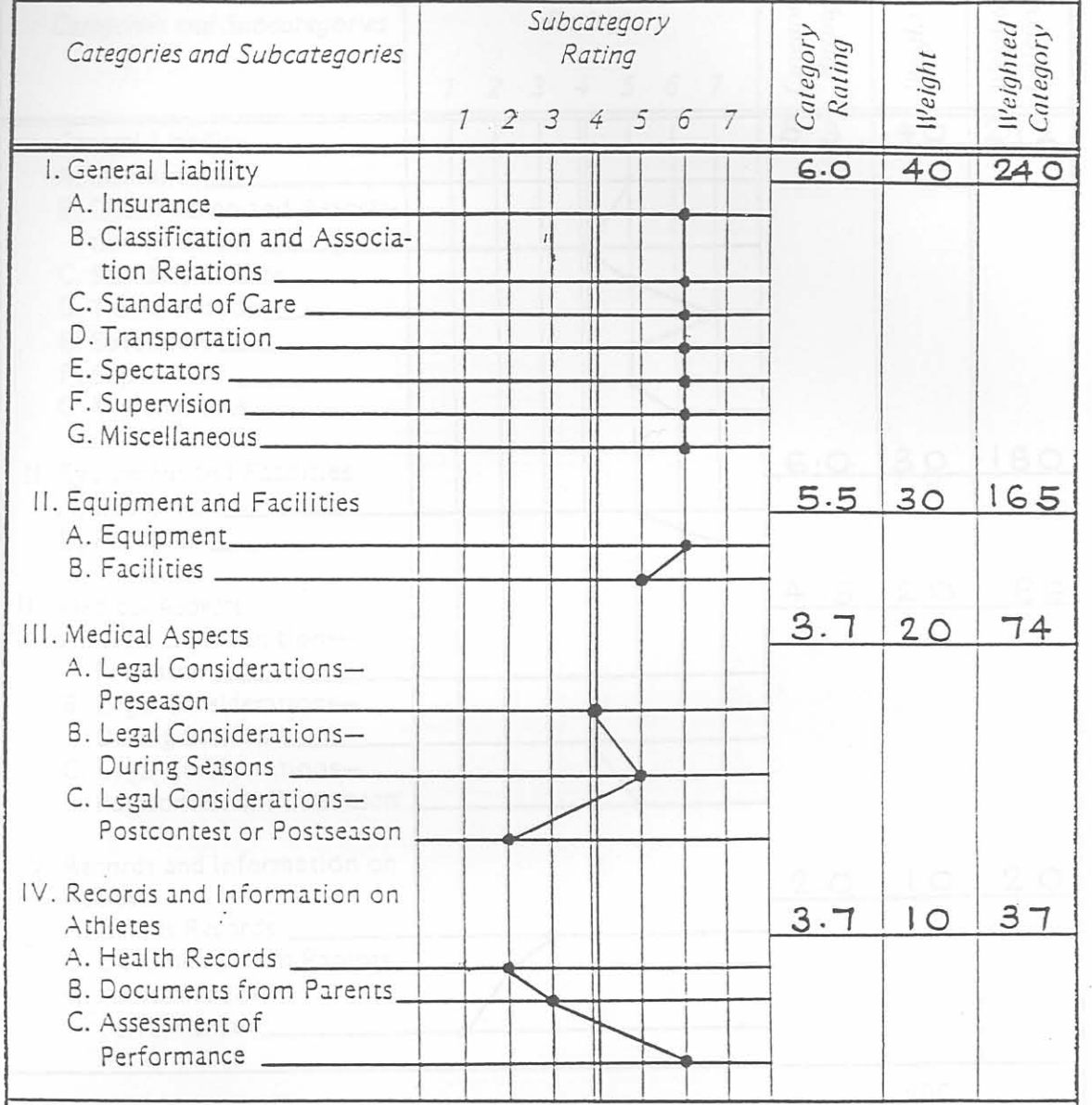
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APPENDIX 2

PROFILE ANALYSIS OF LEGAL ASPECTS

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Profile of Legal Aspects in Sports



100

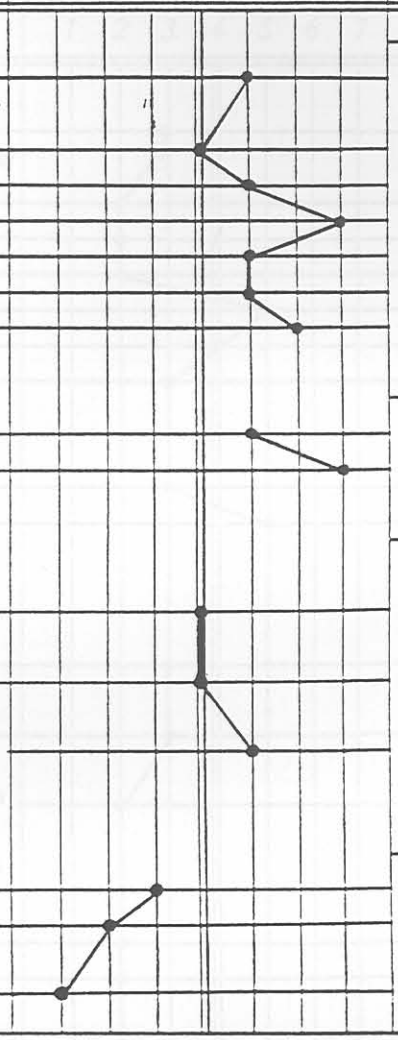
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4.7

Composite Score:
Sum of Weighted Category ÷ 700 = .74

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Profile of Legal Aspects in Sports



Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		5·3	40	212
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6·0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		4·3	20	86
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2.0	10	20
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

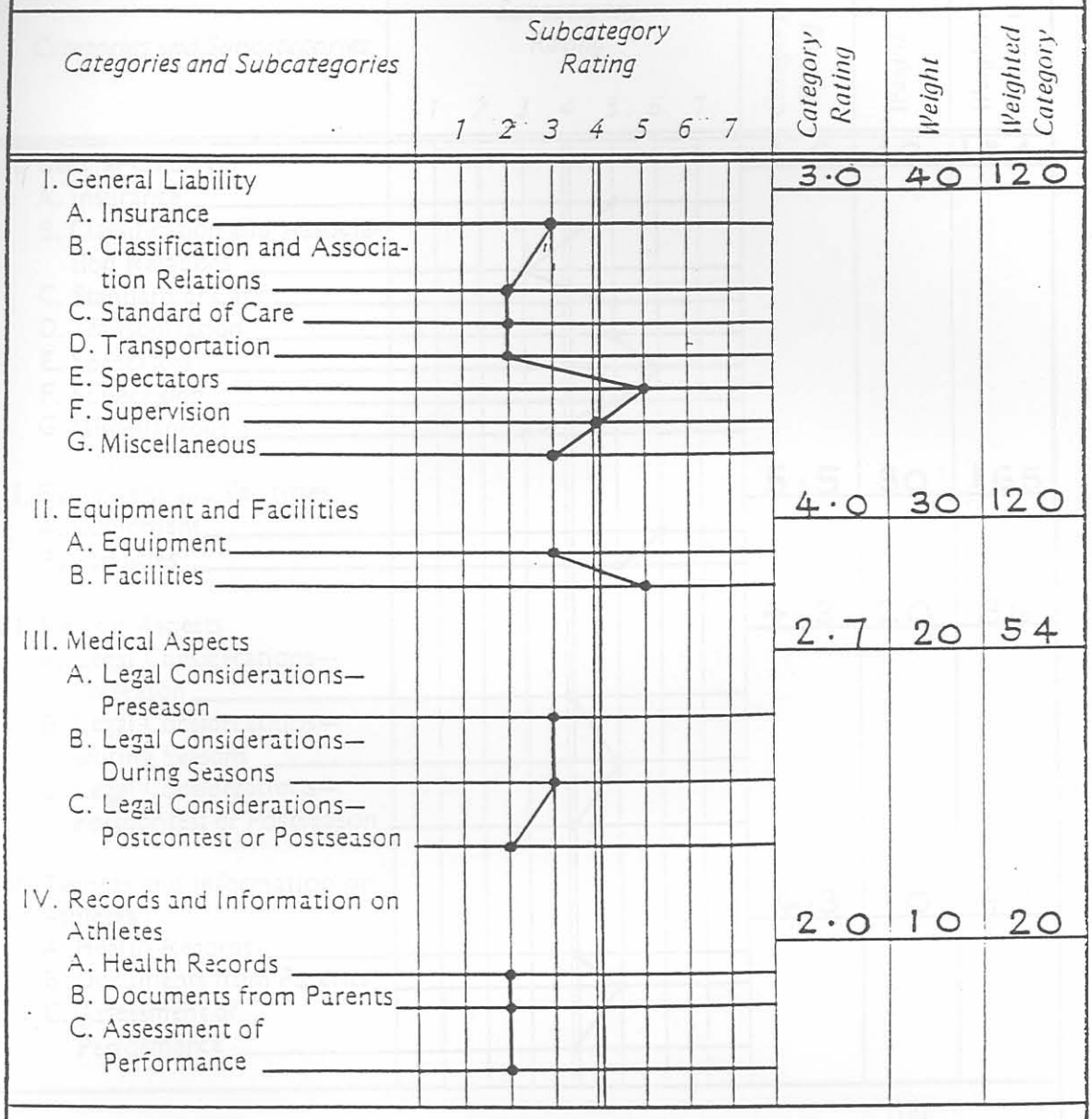
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4·4

Composite Score:
Sum of Weighted Category ÷ 700 = ·71

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		3·0	40	120
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		4·0	30	120
A. Equipment				
B. Facilities				
III. Medical Aspects		2·7	20	54
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2·0	10	20
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 2·9

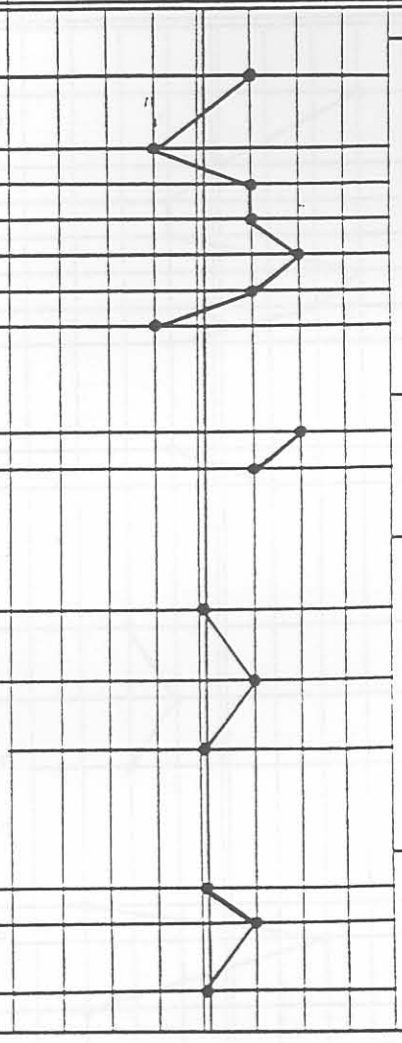
Composite Score:
Sum of Weighted Category ÷ 700 = ·45

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		4.6	40	184
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		5.5	30	165
A. Equipment				
B. Facilities				
III. Medical Aspects		4.3	20	86
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		4.3	10	43
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	



Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4.7

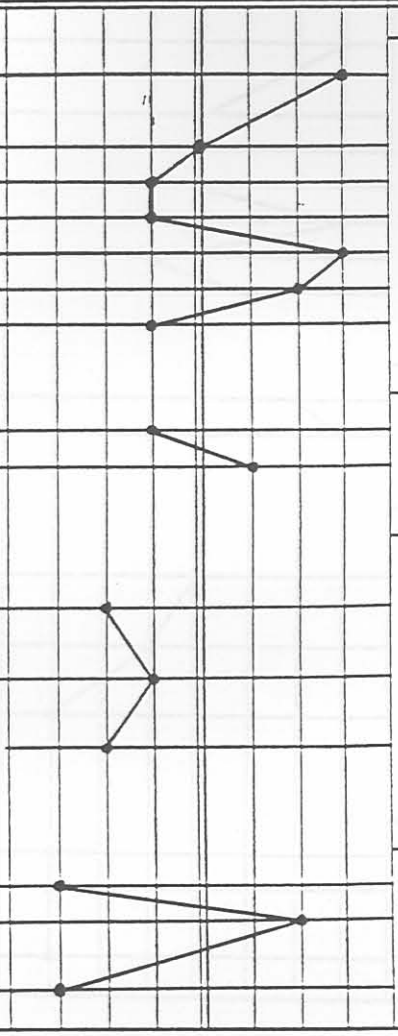
Composite Score:
Sum of Weighted Category ÷ 700 = .68

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		4.7	40	188
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		4.0	30	120
A. Equipment				
B. Facilities				
III. Medical Aspects		2.3	20	46
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2.7	10	27
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	



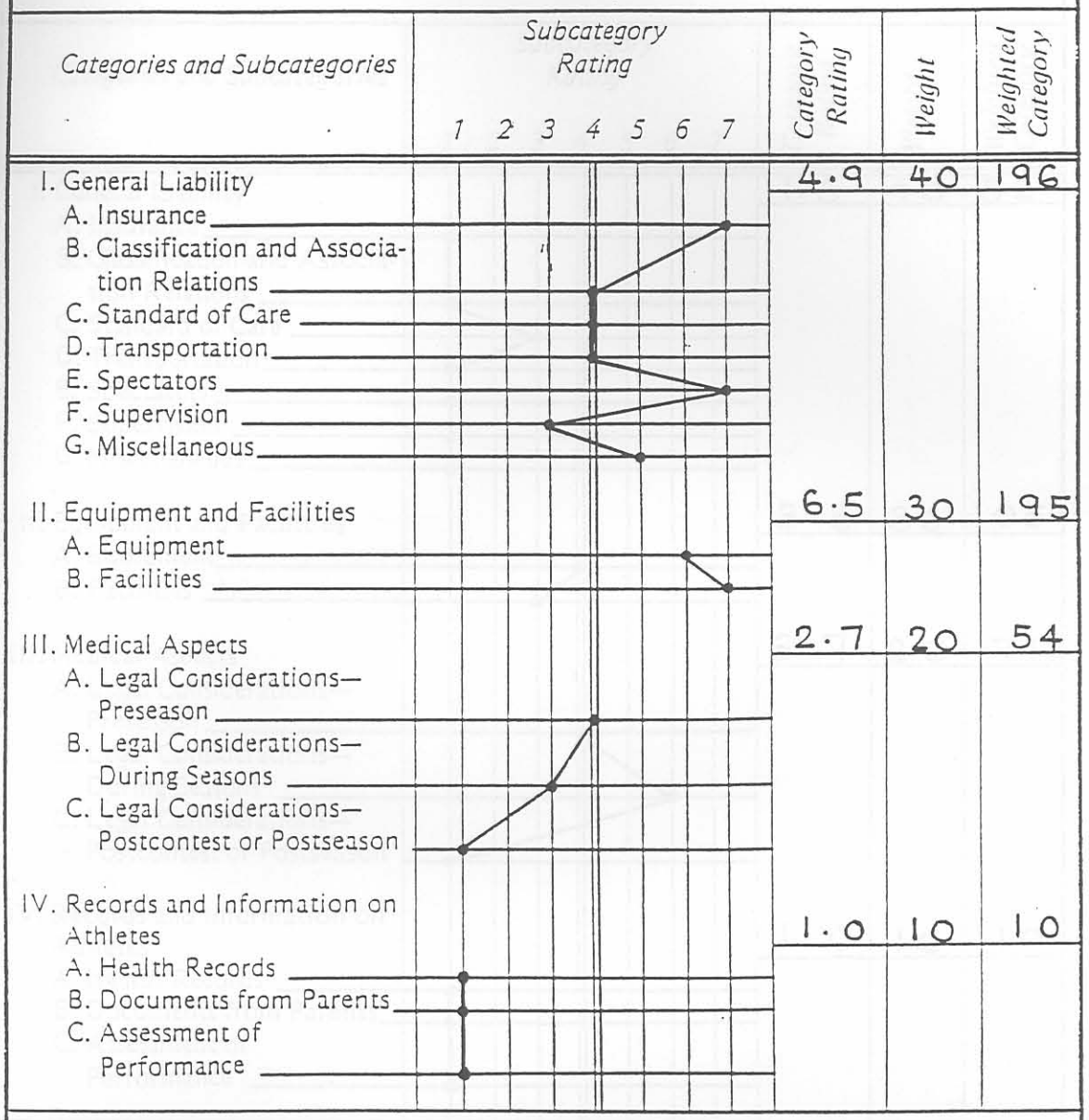
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.4

Composite Score:
Sum of Weighted Category ÷ 700 = .54

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Profile of Legal Aspects in Sports



Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		4.9	40	196
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6.5	30	195
A. Equipment				
B. Facilities				
III. Medical Aspects		2.7	20	54
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1.0	10	10
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

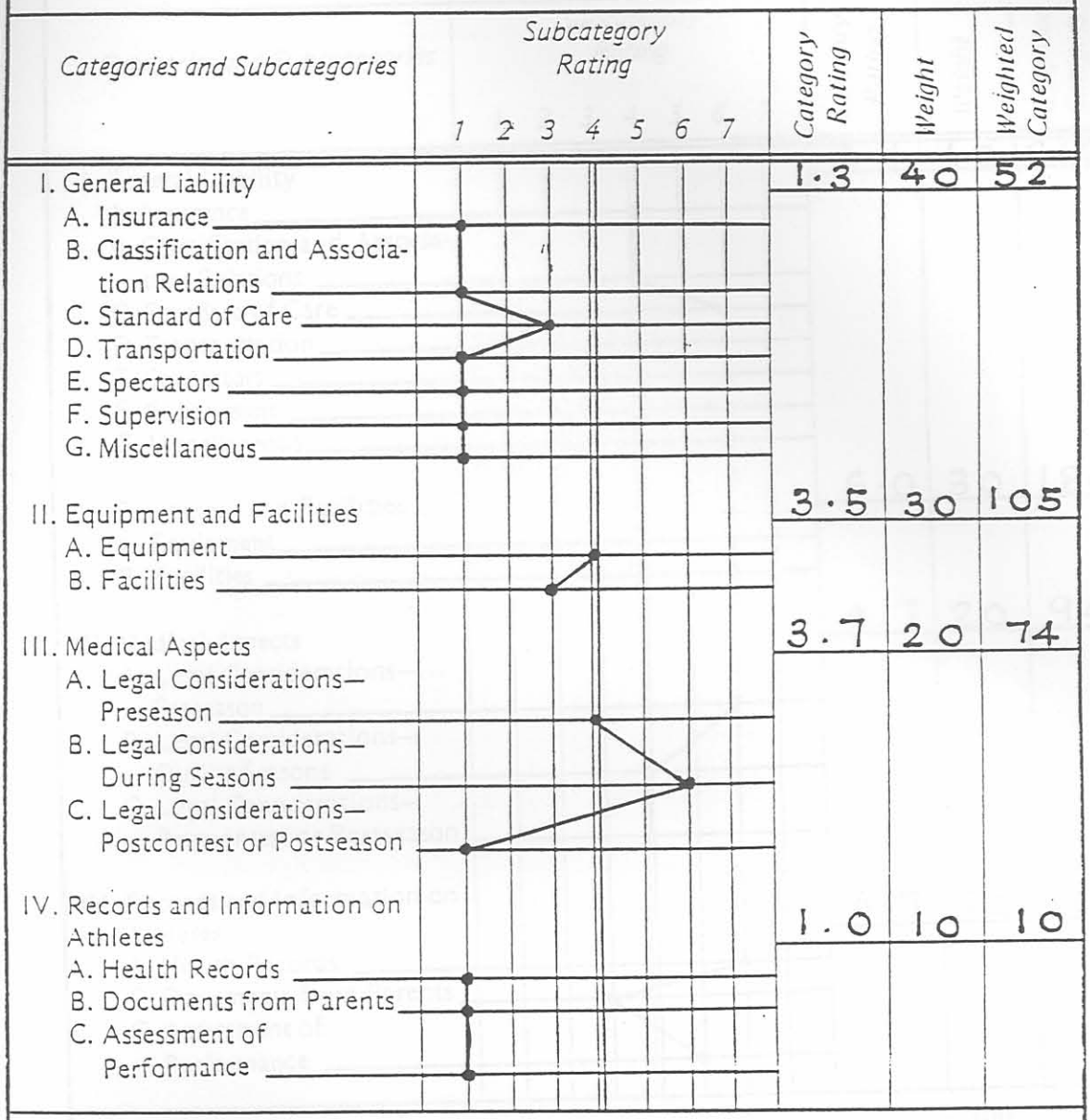
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.8

Composite Score:
Sum of Weighted Category ÷ 700 = .65

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		1.3	40	52
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		3.5	30	105
A. Equipment				
B. Facilities				
III. Medical Aspects		3.7	20	74
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1.0	10	10
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

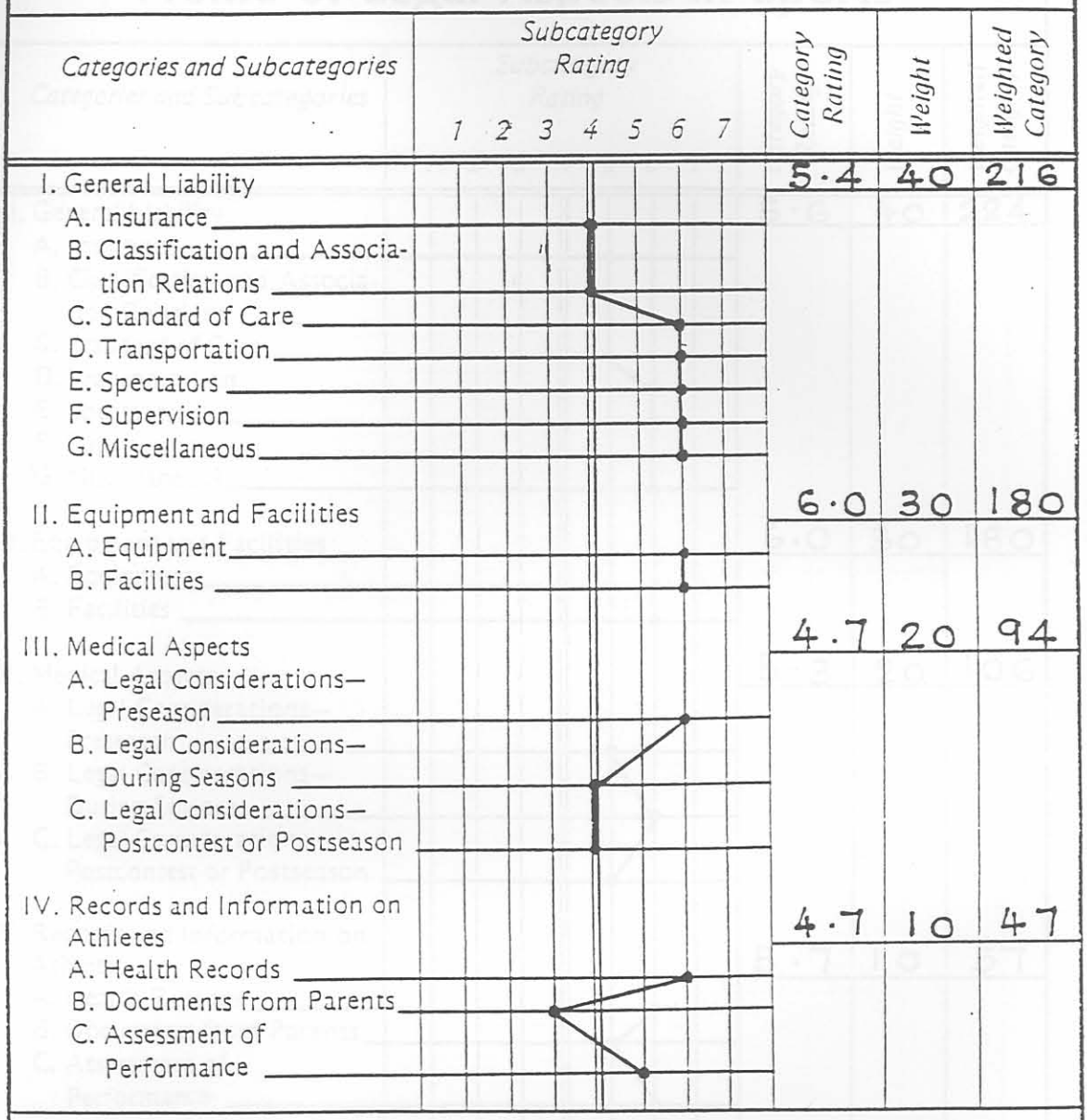
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 2.4

Composite Score:
Sum of Weighted Category ÷ 700 = .34

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		5.4	40	216
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6.0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		4.7	20	94
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		4.7	10	47
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

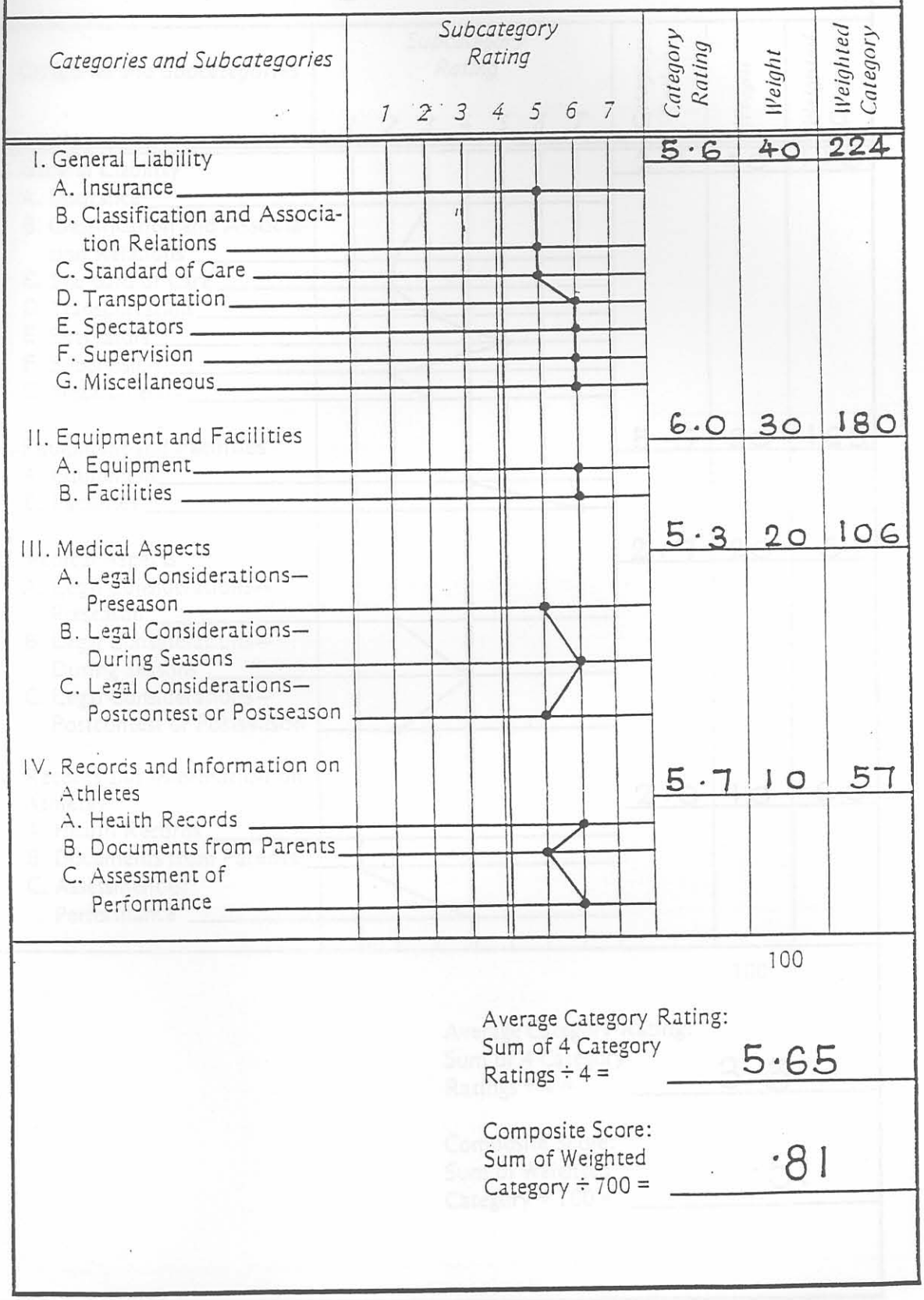
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 5.2

Composite Score:
Sum of Weighted Category ÷ 700 = .77

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		5·6	40	224
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6.0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		5·3	20	106
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		5·7	10	57
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

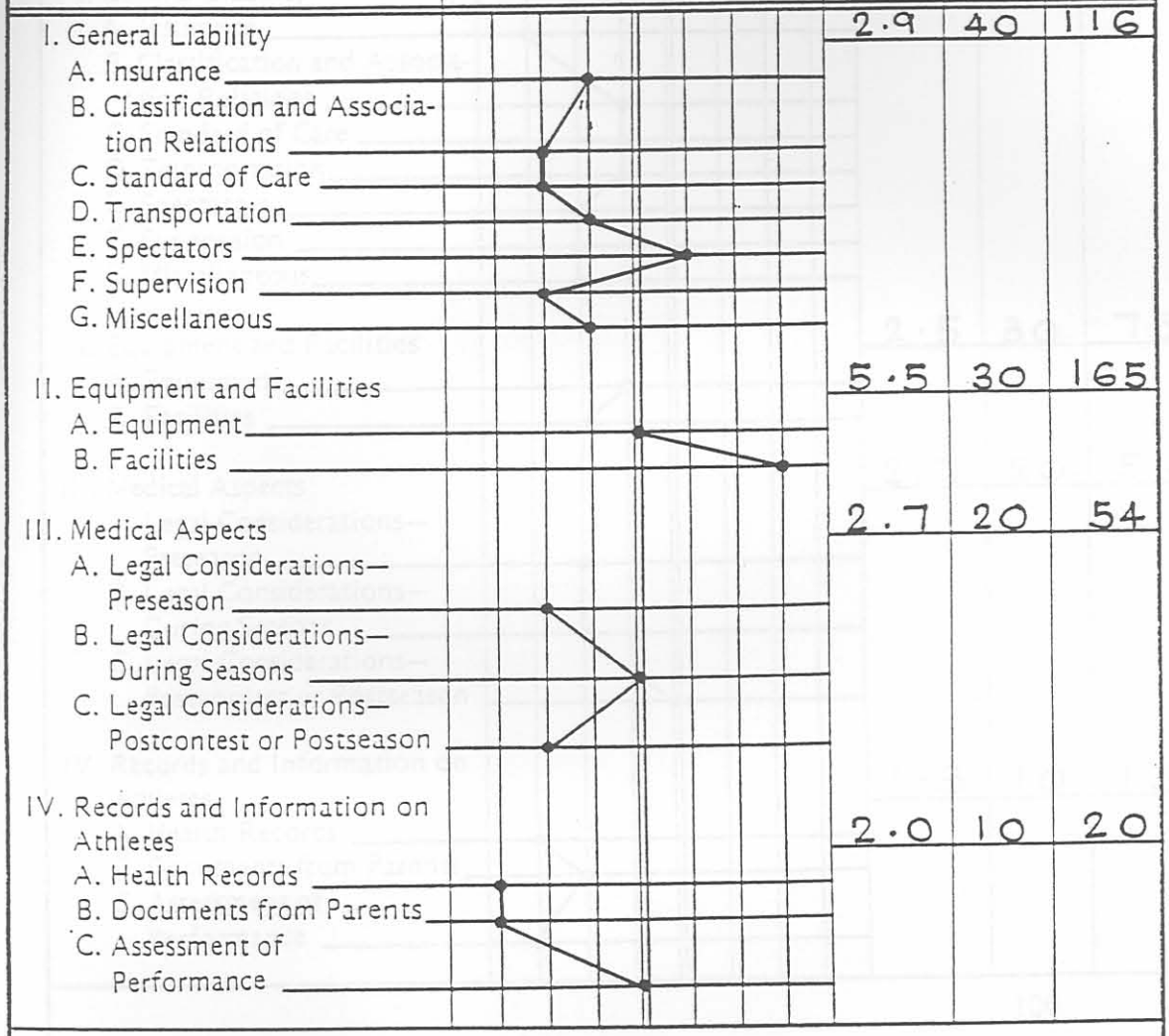
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 5·65

Composite Score:
Sum of Weighted Category ÷ 700 = ·81

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		2.9	40	116
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		5.5	30	165
A. Equipment				
B. Facilities				
III. Medical Aspects		2.7	20	54
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2.0	10	20
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

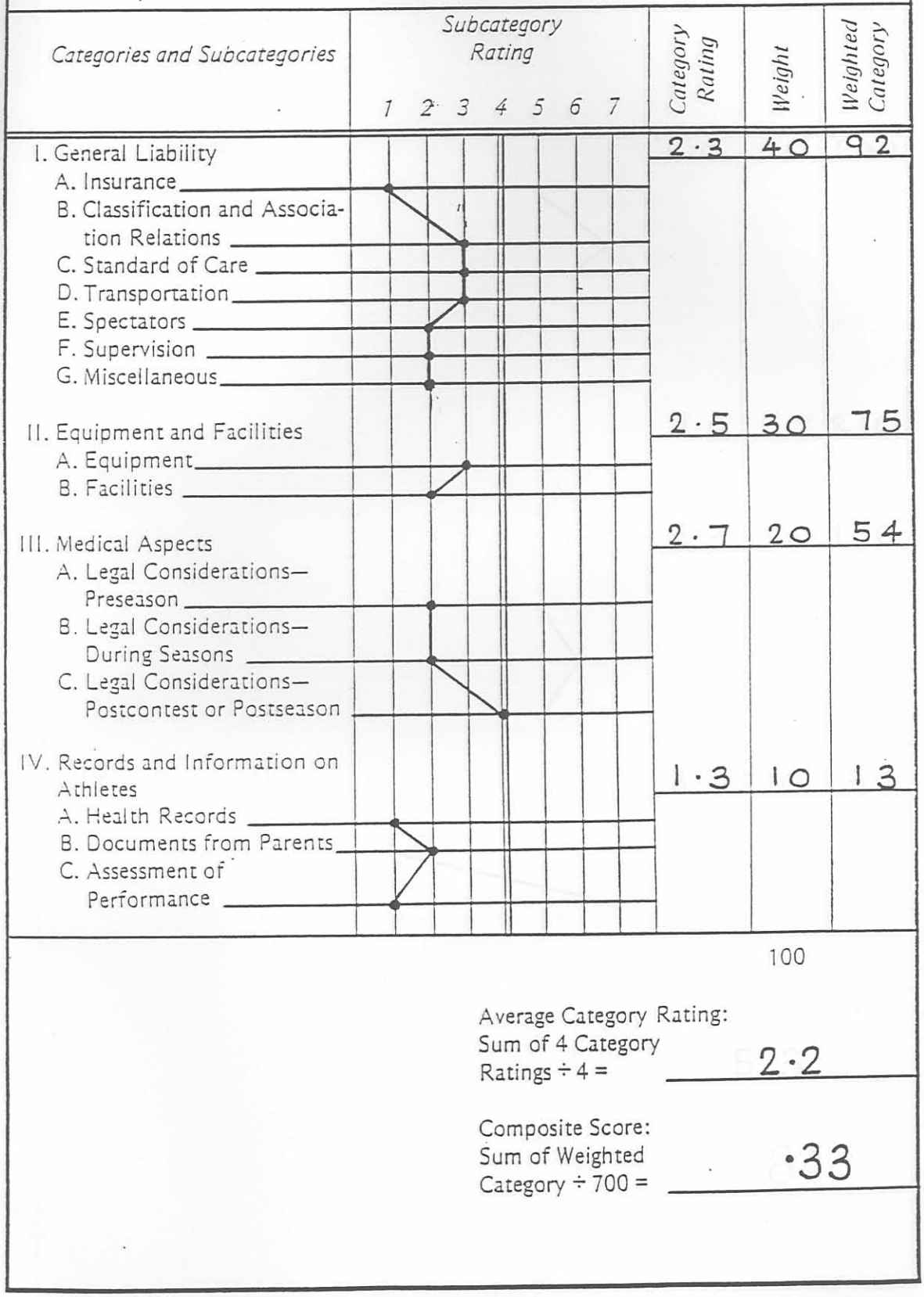
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.3

Composite Score:
Sum of Weighted Category ÷ 700 = .51

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		2·3	40	92
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		2·5	30	75
A. Equipment				
B. Facilities				
III. Medical Aspects		2·7	20	54
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1·3	10	13
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 2·2

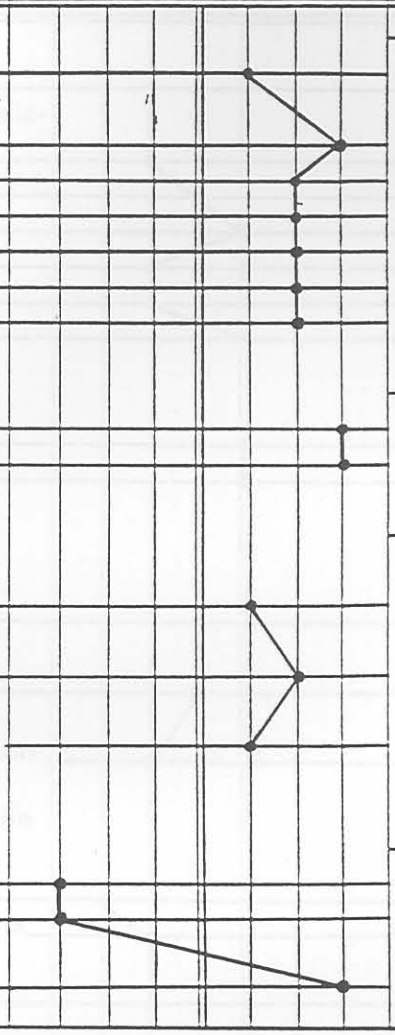
Composite Score:
Sum of Weighted Category ÷ 700 = ·33

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		6.0	40	240
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		7.0	30	210
A. Equipment				
B. Facilities				
III. Medical Aspects		5.3	20	106
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		3.0	10	30
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	



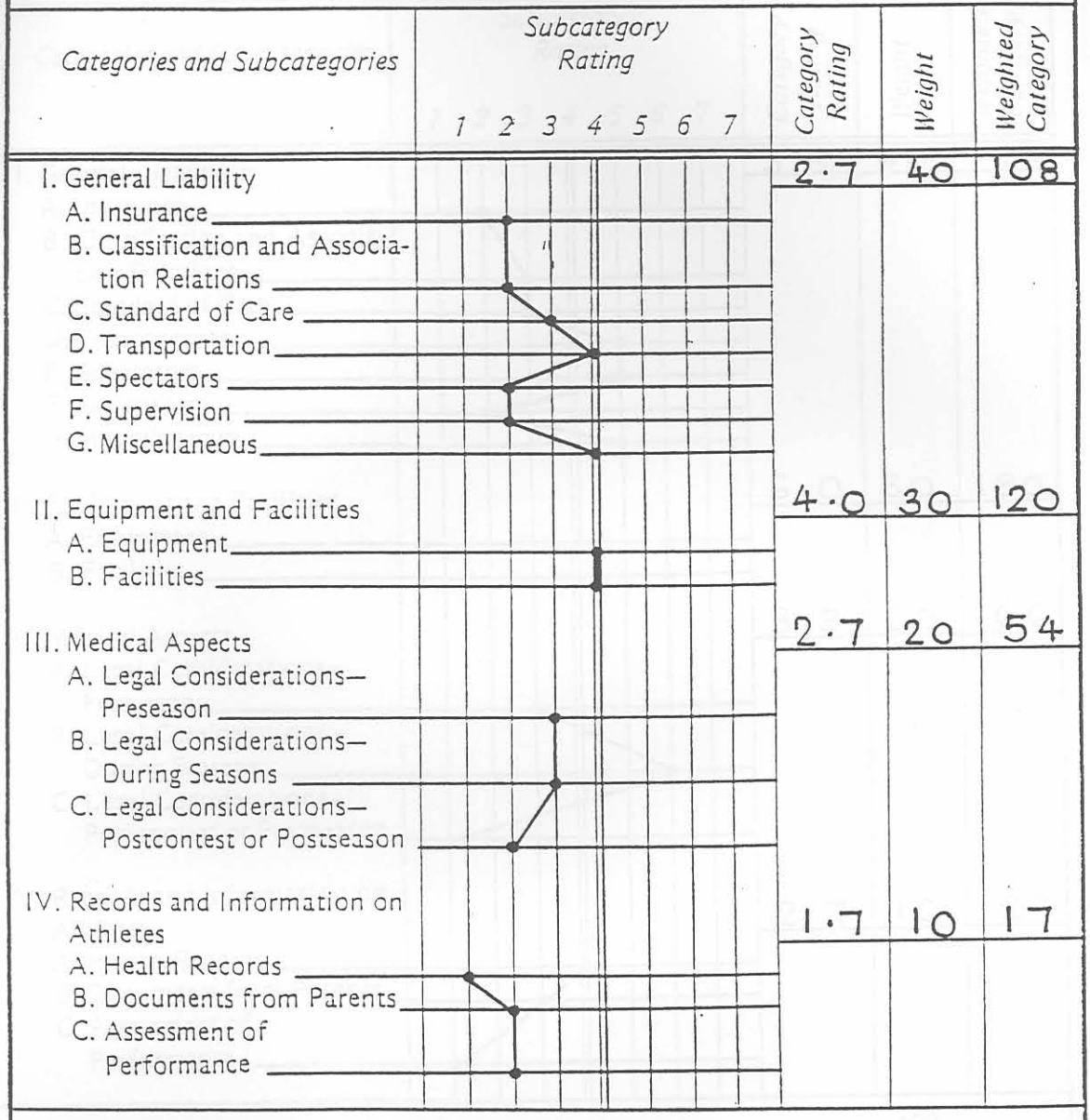
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 5.3

Composite Score:
Sum of Weighted Category ÷ 700 = .84

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Profile of Legal Aspects in Sports



Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		2·7	40	108
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		4·0	30	120
A. Equipment				
B. Facilities				
III. Medical Aspects		2·7	20	54
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1·7	10	17
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

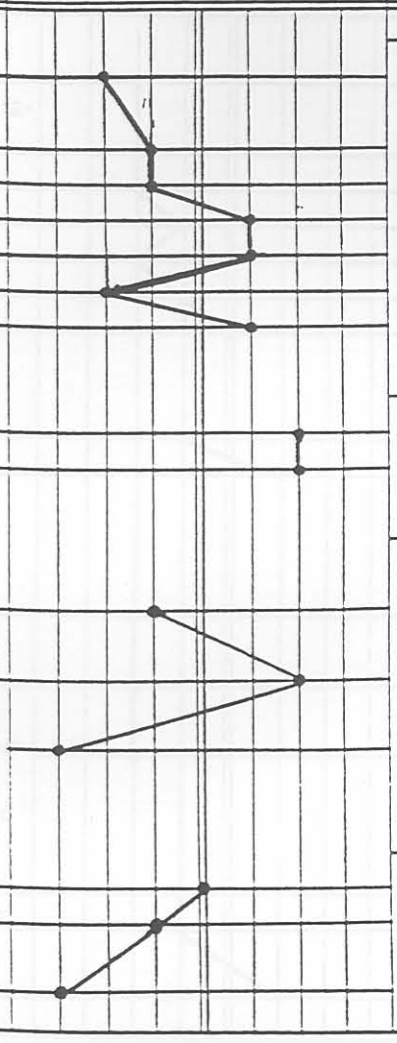
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 2·8

Composite Score:
Sum of Weighted Category ÷ 700 = ·43

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		3.6	40	144
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6.0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		3.3	20	66
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2.7	10	27
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.9

Composite Score:
Sum of Weighted Category ÷ 700 = .60

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		2.6	40	104
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		4.0	30	120
A. Equipment				
B. Facilities				
III. Medical Aspects		2.0	20	40
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		3.7	10	37
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

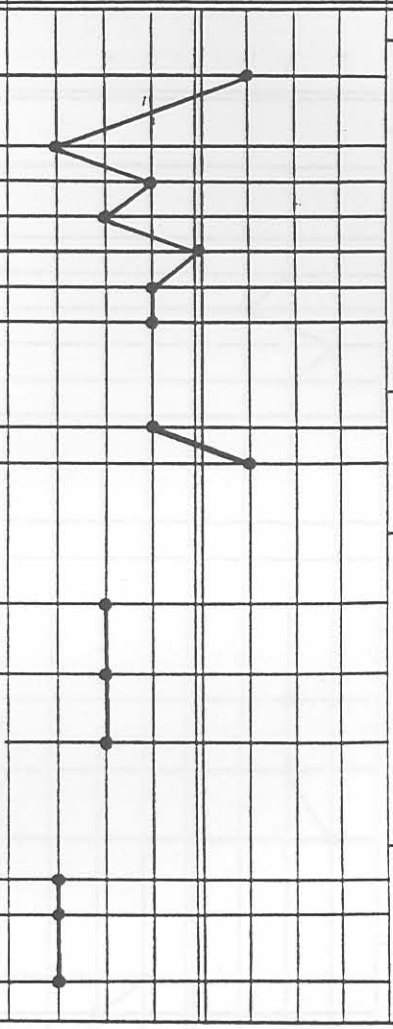
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.1

Composite Score:
Sum of Weighted Category ÷ 700 = .43

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Categories and Subcategories	Subcategory Rating 1 2 3 4 5 6 7	Category Rating	Weight	Weighted Category
I. General Liability		3.0	40	120
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		4.0	30	120
A. Equipment				
B. Facilities				
III. Medical Aspects		2.0	20	40
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1.0	10	10
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

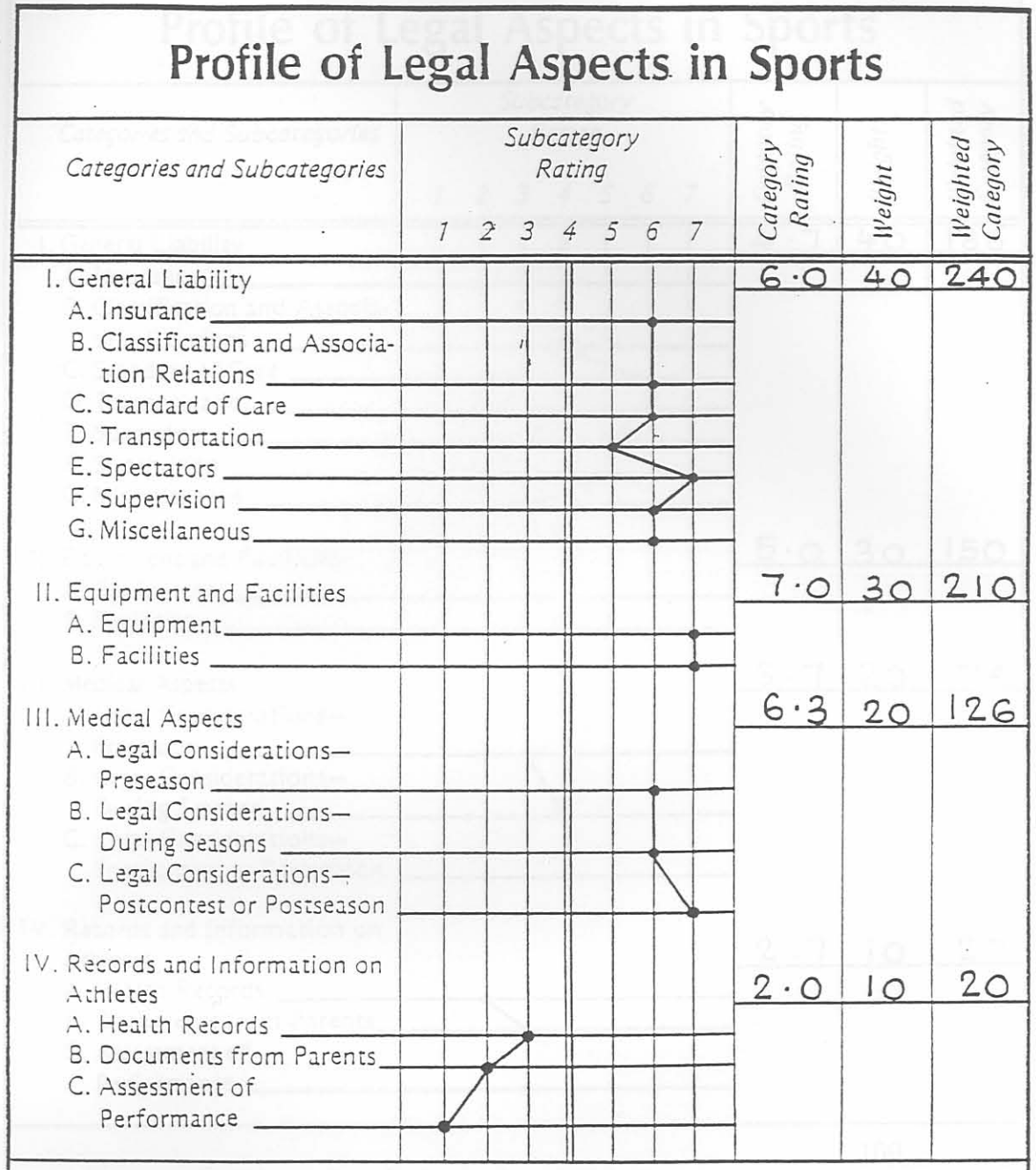
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 2.5

Composite Score:
Sum of Weighted Category ÷ 700 = .41

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		6·0	40	240
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		7·0	30	210
A. Equipment				
B. Facilities				
III. Medical Aspects		6·3	20	126
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		2·0	10	20
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

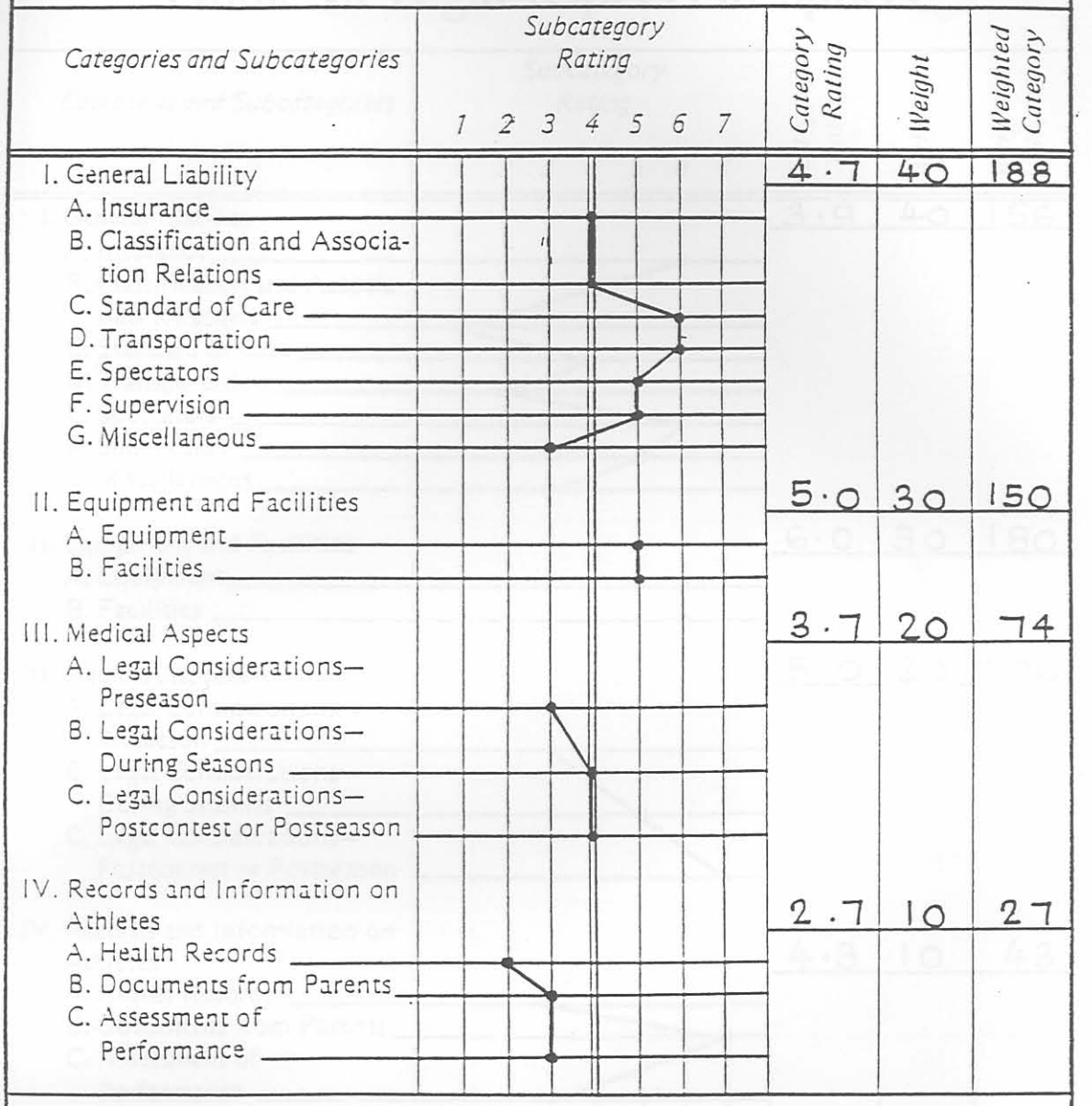
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 5·3

Composite Score:
Sum of Weighted Category ÷ 700 = ·85

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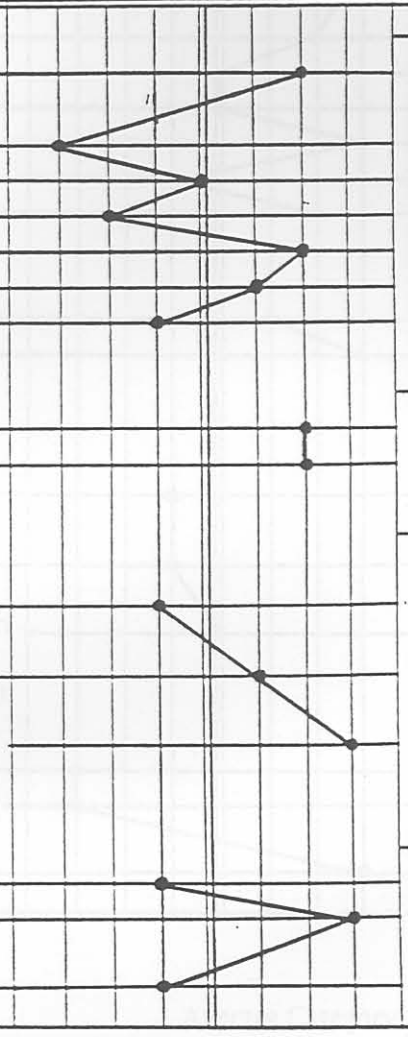
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4.0

Composite Score:
Sum of Weighted Category ÷ 700 = .63

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		3·9	40	156
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6·0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		5·0	20	100
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		4·3	10	43
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

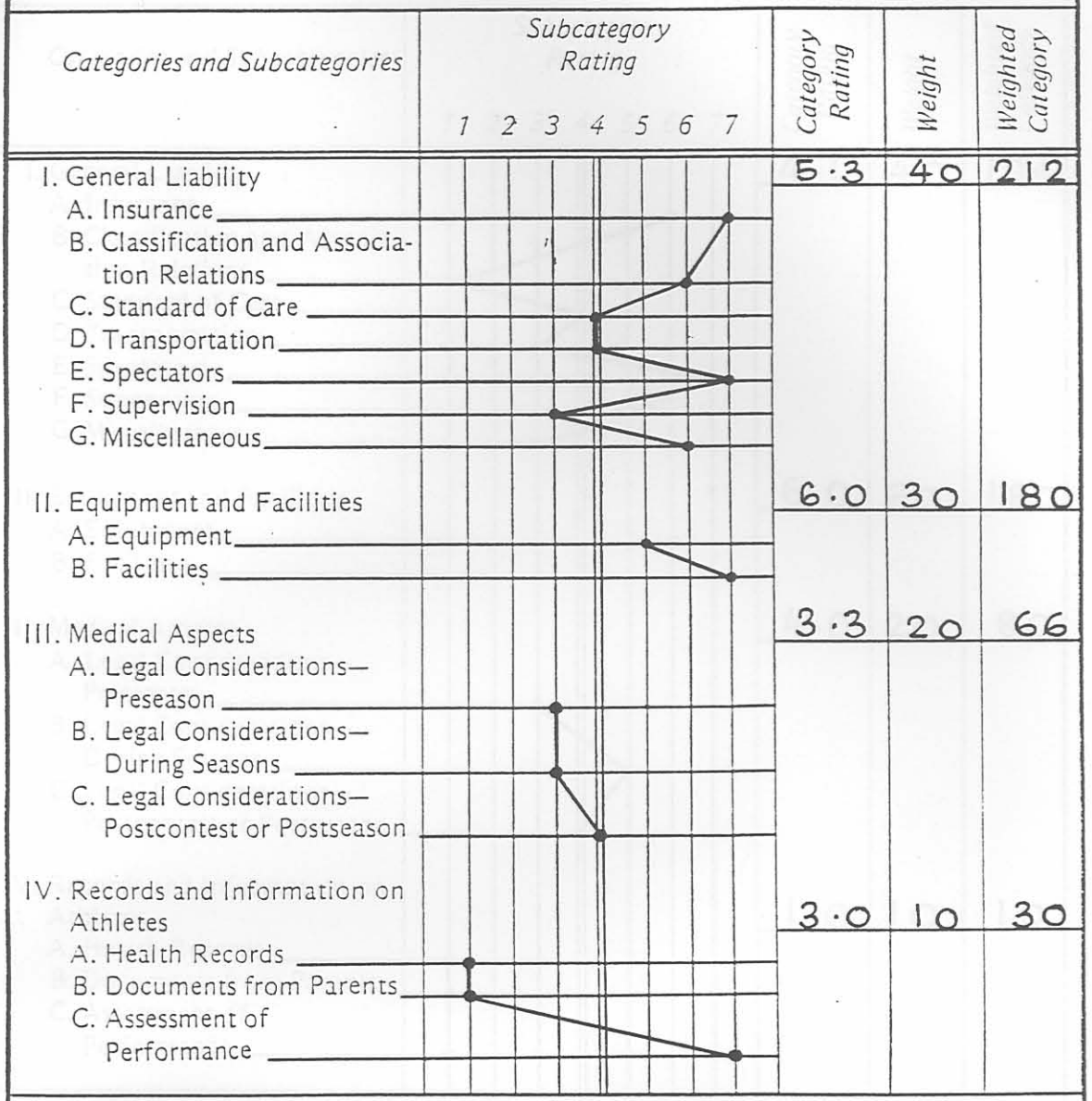
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4·8

Composite Score:
Sum of Weighted Category ÷ 700 = ·68

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		5·3	40	212
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6·0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		3·3	20	66
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		3·0	10	30
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

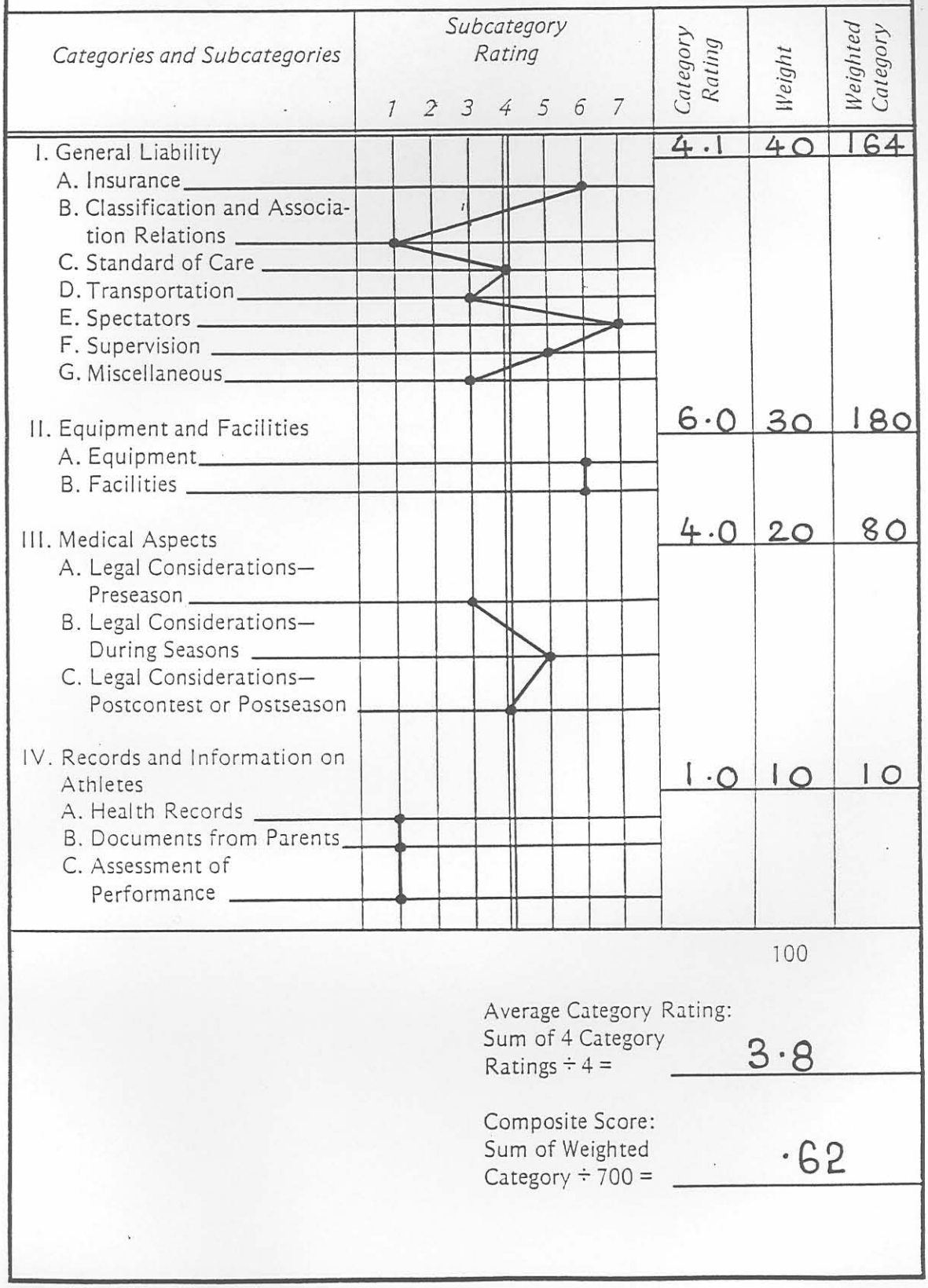
Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 4·4

Composite Score:
Sum of Weighted Category ÷ 700 = ·70

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Categories and Subcategories	Subcategory Rating (1 2 3 4 5 6 7)	Category Rating	Weight	Weighted Category
I. General Liability		4.1	40	164
A. Insurance				
B. Classification and Association Relations				
C. Standard of Care				
D. Transportation				
E. Spectators				
F. Supervision				
G. Miscellaneous				
II. Equipment and Facilities		6.0	30	180
A. Equipment				
B. Facilities				
III. Medical Aspects		4.0	20	80
A. Legal Considerations—Preseason				
B. Legal Considerations—During Seasons				
C. Legal Considerations—Postcontest or Postseason				
IV. Records and Information on Athletes		1.0	10	10
A. Health Records				
B. Documents from Parents				
C. Assessment of Performance				
			100	

Average Category Rating:
Sum of 4 Category Ratings ÷ 4 = 3.8

Composite Score:
Sum of Weighted Category ÷ 700 = .62

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