# 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).

### 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

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

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

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

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.

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

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.

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

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

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.

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).

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.**

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."**

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

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

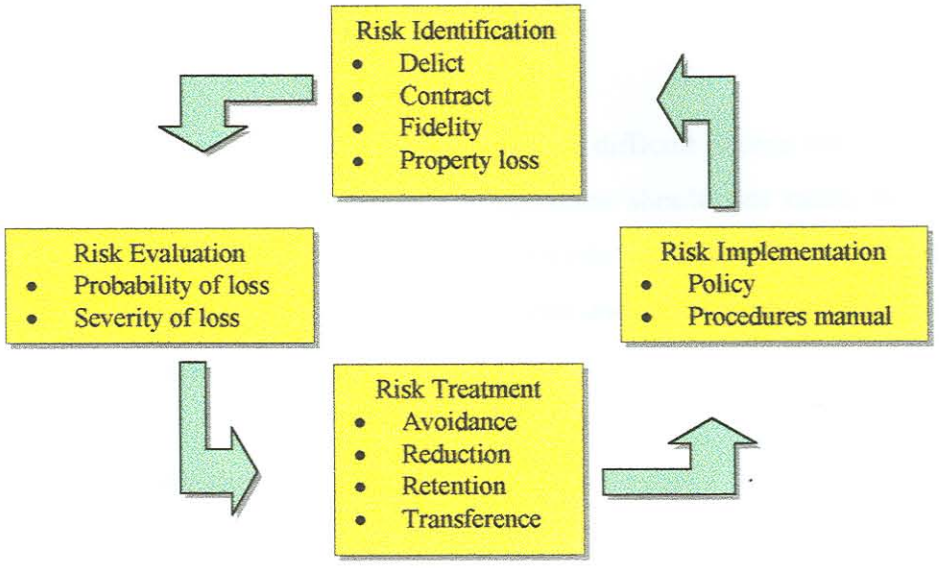
From an economic point of view the objective of risk management is to efficiently conserve the assets and financial resources of the organisation and to achieve financial stability by reducing the potential for financial loss. Financial stability is especially significant at present to both public and 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

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.

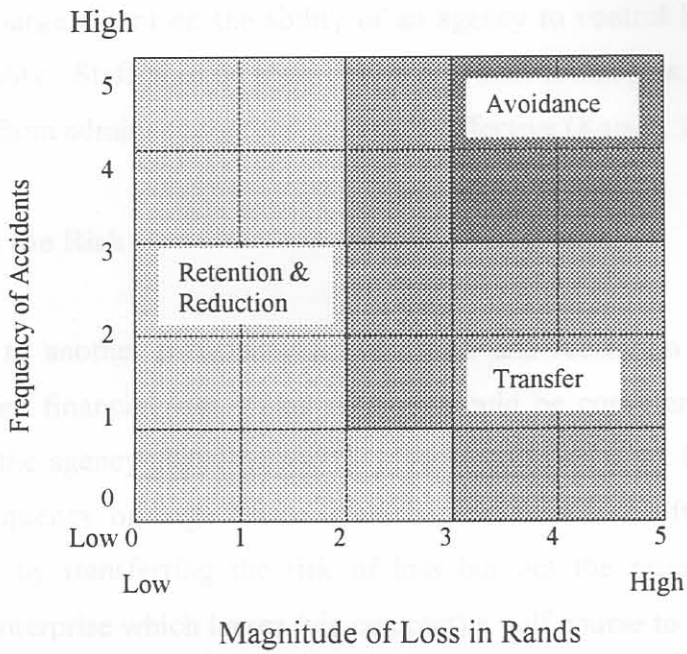
## RISK TREATMENT

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

- 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).

**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).