

THE LEGAL IMPLICATIONS OF RUGBY INJURIES

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SUMMARY

Sports law in South Africa is a field requiring exciting and intensive research. With so many sporting codes changing their status to professional sport, intensive research on the legal implications pertaining to each professional sporting code has also become necessary.

Professional rugby in South Africa has grown into a multimillion rand industry. It is an industry whose role players need specialized legal advice on a multitude of issues. This dissertation addresses the legal issues arising out of the situation where a professional player is injured, during practice or a game, due to the intentional or negligent action of another.

The medico-legal aspects of rugby, relating to causation and proof of injuries are an indispensable element of proving liability where rugby injuries are concerned. These aspects are crucial in assessing the criminal and delictual liability of players, coaches, referees, team physicians and even the union concerned. The problem of rugby violence, causing injury, is addressed by both the criminal law and the law of delict with the issue of consent being central to this discussion. Furthermore, the labour law implications can be far-reaching for both the player and the employer union due to the unique features of sport as an industry.

All role players in professional rugby will have to cooperate with the legal community to ensure that a practical body of law is established in order to make rugby a safer

sport for all concerned and to protect the professional player from unnecessary, incapacitating injury.

Chapter 1: Introduction

1.1 Introduction

“The law applied to sport is simple: others make it difficult.”¹

Professional team sport in South Africa has become a dominant cultural and financial force and has given rise to a multimillion rand industry. Accompanying this development, as with the rapid development of any sector of society, a multitude of legal problems have arisen. Moderate to serious injury in professional sport has serious financial and legal consequences for all parties concerned. Not only does the professional sportsperson lose income and incur medical expenses, the professional team loses income if its star is unable to play. If the player has been deliberately injured, this will potentially result in serious legal repercussions for not only the player that injured him, but other officials involved in the sport. Even the union may incur some form of legal liability.

Rugby, being one of South Africa’s most prominent professional sports, lends itself to a study of the possible legal implications of injury in professional team sport. It is necessary to take account of a number of sociological factors that influence sport, and the application of the law to sport, and to rugby in particular.

¹ Grayson *Sport and the Law 3ed* (2000) 1

1.2 Sociological aspects of sport.

Sport in essence reflects the values and objectives of each culture in which it finds its roots.² Changes in that specific culture will influence the perception of sport in that culture, its prominence in society and the way it is carried on.³

It is evident from everyday life that the role of sport in society is significant.⁴ As a social phenomenon, social institutions such as the family, religion, economics and politics influence sport.⁵ Similarly sport will also be subject to the norms upon which the order of society rests – the system of its laws.⁶

The two most decisive factors in the development of South African rugby to its current professional status are arguably economics and politics.

1.2.1 Sport And Money: The Influence Of Economic Factors

(a) The Influence of Economic Factors on International Sport.

The modern day leisure and entertainment industry depends heavily on sport.⁷ By way of the sponsorships, prize money and eventual payment of the professional athlete,

² Kelly *Sport and the Law: An Australian Perspective* (1987) 3

³ Kelly *Sport and the Law* 3

⁴ Kelly *Sport and the Law* 3

⁵ Basson and Loubser *Sport and the Law in South Africa* (2000) 1-3

⁶ Kelly *Sport and the Law* 3

⁷ Kelly *Sport and the Law* 3

sport has evolved into the largest industry in the contemporary world that is controlled by economic factors and measures.⁸

Within this economic paradigm money is generated for the continued existence of most kinds of sports, whether by means of sponsorships, donations or the involvement of large financial institutions.⁹ Every level of sporting administration looks to sponsorships for its full or shared funding. Sport requires this continued funding to invest money back into itself and to reward successful competitors.¹⁰ The sports industry however goes beyond the mere staging of sports events.¹¹ Its commercial drawing power is evident from the billion-dollar television and advertising or sponsorship deals. It would be difficult to imagine professional sport internationally without major tobacco or brewery sponsorships such as Dunhill and Guinness, and without the involvement of media moguls such as Kerry Packer and Rupert Murdoch.¹²

Along with this major monetary influx into sport has come the staggeringly rapid growth of professionalism in sport.¹³ Amateurism has almost if not completely departed from the highest level of competition in sport.¹⁴ The high standards of international sporting competitions and the concomitant “win at all costs” attitude means that competitors cannot pursue other careers and retain the ability to compete

⁸ Basson and Loubser *Sport and the Law* 1-4

⁹ Basson and Loubser *Sport and the Law* 1-4. Examples of such involvement in South African sport would be the major sponsorships of stadiums such as Securicor Loftus in Gauteng and Telkom Park in the Eastern Cape to name but a few. Large financial institutions also sponsor multimillion rand tournaments such as the Standard Bank Cricket Series, Bankfin Currie Cup and the ABSA Cup in soccer. Vodacom is another major corporate sponsor with its involvement ranging from rugby to surfing.

¹⁰ Grayson *Sport and the Law* 445

¹¹ Basson and Loubser *Sport and the Law* 11-1

¹² Basson and Loubser *Sport and the Law* 1-4

¹³ Basson and Loubser *Sport and the Law* 1-4

¹⁴ Verow, Lawrence and McCormick *Sport, Business and the Law* (1999) 3

at that level. As a result the primary economic unit in professional sport is the player.¹⁵ Although the union or club may employ other sporting officials such as administrators, doctors, coaches and referees, there is no sport and no commercial drawing power without the player or athlete.

Sport has not simply wished itself into this contemporary professionalism. It has been driven there by the growing public demand for sport as a form of entertainment and the concomitant interest from the commercial organizations,¹⁶ and the ethics and principles applicable to commerce.

Therefore, although economic factors play a very large enabling role in professional sport, the demands, values and norms of society of always wanting bigger and better and the patriotism associated with competition at international level has created the status of sport in contemporary society, that of professionalism.

(b) Rugby in South Africa: From Amateurism to Professionalism

Professionalism in rugby¹⁷ in South Africa was precipitated by the battle between media tycoons Rupert Murdoch and Kerry Packer in the early months of 1995,¹⁸ at more or less the same time as the 1995 Rugby World Cup was being played in South Africa. While there is some dispute as to the origins of rugby, it seems to have developed in the first half of the 1800's when one game of football divided into rugby

¹⁵ Verow et al *Sport, Business and the Law* 2

¹⁶ Verow et al *Sport, Business and the Law* 3

¹⁷ Rugby Union was the last of the large sports codes to follow the professional path. The Rugby World Cup has shown tremendous growth from 1987, with a gross commercial revenue of \$5.3 million when the sport was still considered amateur, to 1999 when fully professional it reached a gross commercial revenue of \$ 105 million. (Basson and Loubser *Sport and the Law* 11-1)

¹⁸ Gardiner, Felix, O'Leary, James & Welch *Sports Law* (1998) 290

and association.¹⁹ At the end of the nineteenth century rugby split into Rugby Union and Rugby League. Both games are international in scope, with the main Rugby Union playing countries being Australia, New Zealand, South Africa, the United Kingdom, Ireland and France.²⁰

Murdoch's envisioned Super League got the go ahead after extensive litigation in Australia.²¹ Because of the Southern Hemisphere unions' fear that Murdoch's Super League would rob them of their best players, Rugby Union suddenly had to meet the financial rewards that Super League could offer. Packer switched his attention to Rugby Union and the World Rugby Corporation (WRC) was born. Amateurism was in its death throes.²²

The WRC began signing up the top Union talent during the 1995 World Cup. Different national unions however pressured their players to give up their WRC contracts. In South Africa this led to litigation where the WRC claimed that the South African Rugby Football Union²³ induced the players that the WRC had already signed to break their contracts with them.²⁴ Although in the end no World Rugby Union Competition transpired²⁵ it was the end of amateurism both locally and internationally – rugby was now professional.

This change in the status of rugby as a sport brought about obvious changes in South Africa and elsewhere: sports agents, the professional players unions (In South Africa

¹⁹ Gardiner et al *Sports Law* 289

²⁰ Gardiner et al *Sports Law* 289

²¹ Gardiner et al *Sports Law* 290 - 293

²² Gardiner et al *Sports Law* 294

²³ Hereafter referred to as SARFU

²⁴ Gardiner et al *Sports Law* 296

²⁵ Gardiner et al *Sports Law* 296

known as SARPA²⁶), television revenues and major corporate sponsorships. As a result rugby is subjected to immense financial and commercial pressures. Rugby became an industry with an intricate financial structure, one that necessitated specialized legal intervention.

1.2.2 Sport and Politicians: The Influence of Political Factors

Gardiner²⁷ views politics as the social institution that has had the largest influence on the development of sport. Politics has the power to regulate people's lives, to establish a particular social order and to issue prescriptions in accordance with which human activities occur in a community.²⁸ Due to the fact that the political system establishes certain norms, rules and regulations for the practice of sport,²⁹ the orientation of the political regime at any given time will affect the playing of sport both domestically and internationally.

Internationally the apartheid regime of the National Party government that came into power in 1948 in South Africa played a major role in the isolation of South African sport for more than forty years. Since 1948 the National Party government promulgated a string of repressive laws that impacted directly on sport.³⁰ Among these pieces of legislation were the *Group Areas Act*³¹ and the *Reservation of Separate Amenities Act*,³² both having the effect of outlawing racially mixed sport in South Africa.

²⁶ The South African Rugby Players Association.

²⁷ Gardiner et al *Sports Law* 15, 77

²⁸ Basson and Loubser *Sport and the Law* 1-5

²⁹ Basson and Loubser *Sport and the Law* 1-5

³⁰ Basson and Loubser *Sport and the Law* 2-1

³¹ 41 of 1950

³² 49 of 1953

By the end of the 1960's, the detrimental effect of sports isolation could not be ignored and from 1970 onwards the then Minister of Sport, Piet Koornhof, attempted to get white South African sport back into international competition, but without success.³³ Mpati³⁴ argues that the effects of isolation were however not completely negative. In time they resulted in the different sporting bodies that existed among racial lines to be brought closer together and ultimately unite.³⁵

Rugby Union, under the leadership of Dr Danie Craven, chose not to defy the state policy at the time and it was only in 1992 with the encouragement of the African National Congress, and certainly not without difficulties, that Rugby Union in South Africa united under the umbrella of SARFU.³⁶

Domestically political intervention can be seen in the quota system that is being imposed in South African sport as far as the selection of players at certain levels of competition is concerned.³⁷ Sport is now also more than ever legislatively regulated in South Africa by statutes such as the *National Sports and Recreation Act*³⁸ and the *National Sports Commission Act*.³⁹

³³ Basson and Loubser *Sport and the Law* 2-3

³⁴ Basson and Loubser *Sport and the Law* 2-3

³⁵ Basson and Loubser *Sport and the Law* 2-3

³⁶ Basson and Loubser *Sport and the Law* 2-4

³⁷ Basson and Loubser *Sport and the Law* 1-5 In Rugby the most notable effect of the quota system can be seen in the Vodacom Cup which is played in the first half of the South African rugby season. As a development tournament the quota system has a positive effect in that talent from previously disadvantaged group are given the opportunity to display their skills and talent while the more seasoned players are taking part in the Super 12 tournament.

³⁸ 110 of 1998

³⁹ 109 of 1998

Politically it has been argued many times that the past of South African politics merits intervention in sport to level the playing field.⁴⁰ While many may disagree with this statement, the fact remains that sport is to a large extent dependent on state funds for its development and continued existence, and some regulation can therefore be expected from the state.⁴¹

1.3 Sport and Violence

1.3.1 The Profile of a Violent Sport

“ Serious sport has nothing to do with fair play. It is bound up with hatred, jealousy, boastfulness and disregard of all rules and sadistic pleasure in witnessing violence: in other words it is war minus the shooting.”⁴²

Violence affects most team sports at both domestic and international level.⁴³ This phenomenon begs the question whether the violence occurring in sport, and in particular rugby, is a reflection of the level of violence in the community in which it is played.⁴⁴ Certain sports display a higher and more concentrated level of violence than others. These sports have aggressive behaviour as an integral part of the game and violence occurs more often between the players.⁴⁵

⁴⁰ Basson and Loubser *Sport and the Law* 2-10

⁴¹ Basson and Loubser *Sport and the Law* 2-10

⁴² George Orwell in his essay “*The Sporting Spirit*” as quoted by Grayson *Sport and the Law* 100

⁴³ Grayson *Sport and the Law* 100

⁴⁴ Gouws *Sport Management: Theory and Practice* (1997) 336

⁴⁵ Gouws *Sport Management* 336

This aggression can be categorized either as instrumental, the primary goal being the attainment of an reward, involving neither anger nor frustration, or reactive, which is influenced by anger with the object being injury to a perceived enemy.⁴⁶ Characteristic of these violent sporting codes is a high amount of body contact between the players, rivalry, defence of a particular territorial area, blockages and controlled aggression.⁴⁷

1.3.2 The Rugby Violence Problem

Rugby in all its guises fits the above description perfectly, having been violent since the earliest traces of the game,⁴⁸ with most of the violent behaviour falling outside the rules of play being due to reactive aggression. Violence in rugby is arguably the worst and most obnoxious form of lawbreaking that will ever be encountered in sport.⁴⁹ This lawbreaking however exists along with the attitudinal problem among members of the sporting community that violence on the sports field should not be regarded as the same as violence in the street.⁵⁰ They find a way to condone violence on the sports field as somehow more understandable and excusable.⁵¹ Many hold the view that violence in rugby is all part of the game. That is however not the case.

⁴⁶ Reid and Hay "Aggression in Rugby and Soccer Players" 1978 *British Journal of Physical Education* 45 45

⁴⁷ Gouws *Sport Management* 336

⁴⁸ Rea *A History of Rugby Union Football* (1977) 12– 14 According to Rea the early origins of rugby go back to the Roman game of *Soule* played in Brittany up to 1870. This game was described as dramatic game with fighting, strangling and headbreaking, where you could slay your enemy as if by accident. In 1846 the rules had to be revised to restrain players from throttling and strangling opponents, from hacking and wearing protective nails and plates on their boots. The practice of hacking was a legalized form of brutality that enabled players to kick lumps out of their opponents. In the late 1860's a journal wrote the game off as a mixture of hacking, gouging and biting. External pressure, as with the current form of the game, caused the practice of hacking to be outlawed with the formation of the Rugby Football Union in 1871. By 1890 sufficient changes had been to the laws to make it recognizable as the game that is played today.

⁴⁹ Pearson "Rugby - Focus on Violence" 1979 *British Journal of Physical Education* 37 37

⁵⁰ Wenn *Violence Today No4: Violence in Sport*, Australian Institute of Criminology, (8-13-02)
<http://www.aic.gov.au/publications/vt/vt4.html>

⁵¹ Wenn *Violence Today No4: Violence in Sport*, Australian Institute of Criminology, (8-13-02)
<http://www.aic.gov.au/publications/vt/vt4.html>

Both locally and internationally, the problem of rugby violence has worsened despite attempts by national unions and the International Rugby Board to rid the game of this unsporting behaviour.⁵² Technology enables the union to cite players for violent fouls that have gone unnoticed by the referee, but due to the fact that this is subject to a host of internal regulations it is possible that a player that causes serious injury to another can go unpunished.⁵³ At professional level punishment has become more consistent due to the fact that prescribed sentences for certain offences are included in the disciplinary codes of the unions that act as employers.⁵⁴ This relationship between the unions and the professional players necessitates punishment of violent offences, as the union can be held vicariously liable for a player's violent behaviour that results in injury.⁵⁵

The problem of rugby violence is not unique to South Africa. All the major rugby playing countries have to deal with the problem and in countries such as France, the United Kingdom and Australia the final solution seems to be litigation or prosecution.⁵⁶

⁵² Viljoen "Violence on Our Rugby Fields" October 2001 *SA Rugby* 67 67

⁵³ Viljoen October 2001 *SA Rugby* 66 67. In 1998 Springbok prop Marius Hurter, during a Currie Cup match, punched Eastern Province forward Morne van der Merwe, breaking his nose and fracturing the bone surrounding his eye in three places. Van der Merwe was out of action for the rest of the season, but because Eastern Province officials were unsure as to whether the deadline for citing Hurter was 24 or 48 hours, they cited the punch too late, and Hurter, apart from a lot of negative publicity, did not receive the punishment which would have been appropriate in the situation.

⁵⁴ See further Viljoen October 2001 *SA Rugby* 66 68

⁵⁵ See Chapter 4 for a detailed discussion.

⁵⁶ Viljoen October 2001 *SA Rugby* 66 68

1.4 Sport and the Law

1.4.1 The Law Applicable to Sport

The question whether the law is applicable in the realm of sport is one that is no longer a matter of debate. Sport as part of society is subject to the general law of the land and no exceptions are made for the men and women playing sport.⁵⁷

Sport is not however only governed by laws of general application. The hierarchy of the rules and laws applicable to sport, according to Grayson,⁵⁸ may be summarised as follows:

(v) *Basic Playing Laws.*

These laws govern the playing of the actual game. Kelly⁵⁹ makes a further distinction under this heading. He categorizes the basic playing laws into the following:

(a) *Constitutional Rules*

These rules determine what the game is and how it should be standardized.⁶⁰ These rules will only necessitate judicial intervention in order to determine whether the sport is lawful. In the case of *R v*

⁵⁷ Basson and Loubser *Sport and the Law* 3-7
⁵⁸ *Sport and the Law*99
⁵⁹ *Sport and the Law*19
⁶⁰ Kelly *Sport and the Law* 19

*Roberts*⁶¹ attention was paid in detail to the constitutional rules of boxing in order to determine whether boxing should be taken to constitute activity contrary to public policy. The court held that it should not be so regarded.

(b) Operational Rules

These rules are established upon the foundation provided by the constitutional rules.⁶² They determine how the game should be played. In this category, as in the previous one, judicial intervention is very rarely necessary.

(c) Safety Rules

These rules operate to ensure the player's safety while playing the game.⁶³ Safety rules are very often the object of judicial scrutiny. In litigation they are regarded as indicative of what is acceptable and permissible conduct in the particular circumstances of the relevant sport. Especially in the American legal system, safety rules have a special status, as breach of such a rule is taken to vitiate the implied compact between players consenting to such actions that would otherwise be

⁶¹ reported in the *Sporting Life Column* of 20 June 1901 as cited by *Kelly Sport and the Law* 19

⁶² *Kelly Sport and the Law* 19

⁶³ *Kelly Sport and the Law* 20 See also 2.3.1 regarding safety rules.

legally culpable.⁶⁴ In sport injury litigation, these rules receive special attention.⁶⁵

(vi) *Playing Penal Laws*

These laws provide for immediate on-field sanctions for both rules facilitating play and the safety rules.⁶⁶ Kelly further categorizes these rules into supervisory and disciplinary rules.⁶⁷

(a) Supervisory rules

Supervisory rules provide penalties for transgressions of rules that facilitate the playing of the game. Penalties for the offside rule in rugby would be an example of this. These rules mainly affect the conduct of the game.⁶⁸ The penalties are imposed by the referee and involve a judgement call during play. A seemingly incorrect decision by the referee could have serious financial consequences for a professional team sport such as rugby. International litigious trends however indicate that courts will refrain from holding a referee liable for an incorrect decision regarding this category of rules.⁶⁹ It has been held in the case of *Bain v Gillespie*⁷⁰ that “referees are in the business of applying rules for the

⁶⁴ American Restatement of Torts 2ed (1965) 86

⁶⁵ See Chapters 3 and 4

⁶⁶ Grayson *Sport and the Law* 99

⁶⁷ Kelly *Sport and the Law* 21

⁶⁸ Kelly *Sport and the Law* 22

⁶⁹ Viljoen “Can you Blame the Ref?” November 2001 *SA Rugby* 44 45

⁷⁰ 357 NW 2d 47 1984 as cited by Kelly *Sport and the Law* 184

carrying out of athletic contests, they are not there to create a marketplace for others".⁷¹

(b) Disciplinary Rules

Disciplinary rules mainly affect a specific player and involve the imposition of penalties for the transgression of a safety rule.⁷² For a transgression of, for example, the law in rugby prohibiting foul play, a player will be sent to the sin bin as a result of being given a yellow card or will be sent off the field with a red card.⁷³ The enforcement of these rules also involve the exercise of judgement by the referee, but the consequences of such decision by the referee will only be judicially challengeable once the disciplinary process has passed the disciplinary hearing stage.

(vii) Administrative Laws

The administrative laws of the sport will include laws such as the constitutions of the clubs and the unions⁷⁴ and all related regulations made by such unions. Such codes and regulations have already been the object of litigation in the South African courts.

⁷¹ Viljoen November 2001 *SA Rugby* 45

⁷² Kelly *Sport and the Law* 21

⁷³ Kelly *Sport and the Law* 21

⁷⁴ Grayson *Sport and the Law* 99

In *Middelburg Rugbyklub v Suid-Oos Transvaalse Rugby-unie*⁷⁵ the internal disciplinary code of the union was not adhered to and the court subsequently overturned the decision of the disciplinary committee. In *Golden Lions Rugby Union v Venter and the Natal Rugby Union*⁷⁶ the respondents found themselves before the court for allegedly transgressing the SARFU player transfer regulations and for breach of the restraint of trade imposed in Venter's contract with the Golden Lions. The court however denied the application for an interdict preventing Venter from playing for the Natal Sharks for the duration of the 2000 rugby season.

(viii) *The National Laws of the Country*

Virtually all statutory and common law will find application in the industry of sport. In the past thirty years the volume of litigation involving sport has shown a marked increase, not only in South Africa, but also internationally.⁷⁷ The growth of professional sport and the fact that sport has become an industry on its own has resulted in massive job creation and more and more of the people in this industry have turned to the courts to protect their interests.⁷⁸

⁷⁵ 1978 1 SA 484 (T)

⁷⁶ Unreported Transvaal Provincial Division Case no. 2007/2000 2002-02-11

⁷⁷ Basson and Loubser *Sport and the Law*3-8

⁷⁸ Basson and Loubser *Sport and the Law*3-8

Not only will the criminal law and the law of delict find application in sport but also the fields of law relating to broadcasting, trade marks, copyright, contracts and labour law.

1.4.2 Sports Law: A New Legal Area?

“ You lawyers keep out of sport, we can take care of it all” ⁷⁹

Although many sport administrators may hold the same opinion as set out above, the law has been involved in sport for much longer than most realize. The earliest reported case in the United Kingdom where the law was requested to intervene in the sphere of sport was in *Jeffreys v Walters*⁸⁰ in 1748 regarding a cricket wager. Sports litigation in South Africa took place much later with cases such as *Clarke v Welsh*⁸¹ and *Boshoff v Boshoff*⁸². Lawyers have therefore been involved in sport for more than 200 years. Can it now be said that sport law has evolved into a separate legal area?

Writers have quite divergent answers to this question. Grayson in the 1994 edition of *Sport and the Law* states:

“ No subject exists which jurisprudentially can be called sport law...common law and equity create no concept of law relating exclusively to sport. Each area of the law applicable to sport does

⁷⁹ A senior FA councillor as quoted by Grayson *Sport and the Law* 91

⁸⁰ 1748 Wils 220 as quoted by Grayson 24

⁸¹ 1975 4 SA 469 (W) 482

⁸² 1987 2 SA 694 (O)

not differ from how it is found in any other social or jurisprudential category.”⁸³

And Woodhouse⁸⁴ reiterates:

“ Do remember there is no such thing as sports law”

Even if it was so that previously no such thing as sports law, it is respectfully submitted that the area of sports law is in the process of developing. Traditionally law has been divided into areas of specialism along juristic lines.⁸⁵ The demarcation line between traditional areas of the law such as delict, contract, criminal law and company law for example, is not always very clearly defined but grows clearer because of literature based on the assumption that such demarcation between the areas exists.⁸⁶

It is becoming increasingly common to look down industry lines as an alternative means of the demarcation of law. Areas, the definition of which may seem traditional, such as shipping law, construction law, tourism law and insurance law would have been seen at their inception as being no more than specific adaptations of principles derived from the areas of law defined along juristic lines as above.⁸⁷ These industries, by way of long practice and the gradual adaptation of the courts to their specific conditions and requirements have built up bodies of law, which to a certain extent set these industries apart from other industries and resulted in a new demarcated area of law.⁸⁸

⁸³ as quoted by Basson and Loubser *Sport and the Law* 3-10

⁸⁴ “The Lawyer in Sport: Some Reflections” 1996 *Sport and the Law Journal* 14

⁸⁵ Verow *Sport, Business and the Law* 1

⁸⁶ Verow *Sport, Business and the Law* 1

⁸⁷ Verow *Sport, Business and the Law* 1

⁸⁸ Verow *Sport, Business and the Law* 1

Verow is of the opinion that:

“ What we are now witnessing is the business of sport finally joining those industries which require their own specialized legal practitioners...By the repeated practice of the industry, sports law, without having acquired a body of case-law, has evolved already into a specialised area”.⁸⁹

Even wise men get to change their minds. In his 2000 edition of *Sport and the Law* Grayson states that “if sport and the law could not be regarded before...as having arrived at a mature age...it can certainly do so now”.⁹⁰

Despite the skepticism among lawyers and academics alike it can be safely assumed that Gardiner’s learned opinion is closest to the truth:

“ As an area of academic study and extensive practitioner involvement the time is right to accept that a new legal area has been born – sports law”⁹¹

The law is finding its own peculiar application in the field of sports law, and sports law will find its own unique application in every different sport.

⁸⁹ Verow *Sport, Business and the Law* 1
⁹⁰ Grayson *Sport and the Law* 94

1.5 The Legal Implications of Injury in Professional Rugby

1.5.1 The Rugby Injury Timebomb

Few sports have changed as radically as rugby union over the last 30 years.⁹² The direction the modern game has taken has led players to be more vulnerable to serious injury now than ever before.⁹³ In a repeat study⁹⁴ of the one conducted during the '93/'94 season it was found that the incidence of serious injury during rugby union matches has risen from 27% to 47%. Half of these injuries occurred in the tackle phase.⁹⁵

Although awareness of the risk of injury has increased, rugby has always been a dangerous sport. As early as the 1860's a physician attending a rugby union game wrote a letter to the *London Times*, listing the injuries that occurred during the game he attended and warned of the dangers of the game.⁹⁶ Through the development of the game rule changes have been introduced to make rugby a safer game to play, the most notable the 1988 introduction of the Crouch-Touch-Pause-Engage sequence in the scrum.⁹⁷

⁹¹ Gardiner et al *Sport and the Law*74

⁹² Jones "Heading for a Fall" December 2000 *South African Sports Illustrated* 78 80

⁹³ Jones December 2000 *South African Sports Illustrated* 80

⁹⁴ published in the *British Journal of Sports Medicine* (October 2000) as cited by Jones 80

⁹⁵ Jones December 2000 *South African Sports Illustrated* 80

⁹⁶ Kelly *Rugby Violence and the Criminal Law*1981 LLB Treatise University of Natal 6

⁹⁷ Noakes and Du Plessis *Rugby Without Risk* (1996) 39

At the heart of the injury problem is the transformation of the game that occurred with the change of status from amateur to professional.⁹⁸ The rules have been rewritten so that the matches are faster, more physical and more intense. In this environment, although it affords a more spectacular game, the likelihood of injury increases dangerously. The effect of injury on the career of the professionals that play the game may be very serious. Not only does the injury have severe psychological consequences, the financial consequences of injury for a high-income sports professional may be severe.⁹⁹ Fortunately today's sports professionals are better informed of their legal rights and know that legal recourse can be taken where serious injury is caused due to the fault of another.

1.5.2 The Legal Implications of Injury

Serious injury affecting the player's ability to play will have an effect in more than one legal area. Not only will such injury have a detrimental effect on the injured player's ability to perform in terms of his contract with the union, but where an extrinsic injury occurs the person responsible for such injury may incur criminal or delictual liability or be disciplined in terms of his employment contract with the union. The area of forensic medicine will also play an important role in determining liability. The injury may in addition have a ripple effect in other areas of the law but this study will be confined to the following:

⁹⁸ Jones December 2000 *South African Sports Illustrated* 80
⁹⁹ Basson and Loubser *Sport and the Law*5-1

(b) Medico-legal Aspects of Rugby

The mechanism of the injury caused will be crucial in establishing liability. The prosecutor or plaintiff's attorney should appreciate that medical evidence may play a pivotal role in proving their case. Each different category of injury will result in different parties incurring liability. In addition, evidence given by sports physicians are important in pinpointing risk factors and areas in a particular sport in order to effect rule changes that may reduce the occurrence of injury in this specific sport.

(c) Criminal Liability for Rugby Injuries

There is little doubt that criminal law applies to conduct in sports¹⁰⁰. The notion that the great god sport transcends the laws of the country has been contradicted for the last century by courts right across the globe¹⁰¹ and there is nothing inherent in the nature of sport to make it immune from the application of the criminal law.¹⁰²

Not only will a player be criminally liable for a violent foul,¹⁰³ the coach and referee may also incur liability for failing to prevent fouls that may cause injury.¹⁰⁴

¹⁰⁰ Weistart and Lowell *The Law of Sports* (1979) 185

¹⁰¹ Grayson *Sport and the Law* (1978) 10. The first conviction for a violent foul was in *R v Moore* 1898 14 TLR 229 where the accused was convicted of manslaughter, the death of his opponent resulting from a violent tackle during a football game. (McCutcheon "Sports Violence, Consent and the Criminal Law" 1994 *Northern Ireland Legal Quarterly* 267 268)

¹⁰² Weistart and Lowell *The Law of Sports* 185

¹⁰³ This was held in South African case law for the first time in *R v Hillebrand* 1959 3 SA 22 T 23.

¹⁰⁴ See Chapter 3 for a detailed discussion of this topic.

(d) Delictual Liability for Rugby Injuries

Everyone who participates in professional rugby runs the risk of injury. The task of the law is to determine which of those injuries must be accepted as an occupational hazard and those for which the participant may seek financial compensation from the person responsible.¹⁰⁵

The player who causes serious injury can be liable for damages and compensation to the injured party. In the same manner the coach, referee, team doctor and union may attract liability for failing to exercise the level of care expected from them by virtue of their position in professional rugby.¹⁰⁶

(e) Labour Law Implications of Rugby Injuries

A professional rugby player in South Africa stands in an employment relationship with the union he plays for, and is not considered to be an independent contractor as is the case with soccer. Labour legislation such as the Basic Conditions of Employment Act,¹⁰⁷ the Labour Relations Act,¹⁰⁸ the Employment Equity Act,¹⁰⁹ the Occupational Health and Safety Act,¹¹⁰ and the Compensation for Occupational Injuries and Diseases Act¹¹¹ therefore impact on the situation where a player finds himself injured. Legislation and common law entrench the rights of a player that might be affected by

¹⁰⁵ Collins *Recreation and the Law 2ed* (1993) 23

¹⁰⁶ See Chapter 4 for a detailed discussion of this topic.

¹⁰⁷ 75 of 1997

¹⁰⁸ 66 of 1995

¹⁰⁹ 55 of 1998

¹¹⁰ 85 of 1993

¹¹¹ 130 of 1993

an injury sustained whilst playing and affect the operation of contractual clauses pertaining to medical testing and the physical health and fitness of a player.

1.6 Conclusion

The rapidly growing professional rugby industry in South Africa is faced with a multitude of potential legal problems. As the industry is a relatively young one, no clear legal principles have been formulated and very often there are no existing guidelines which the courts have applied in similar situations. As the professional player's injury has consequences extending beyond mere pain and an inability to play sport for some time, there is a clear need for the formulation of a flexible set of principles that can be applied in criminal, delictual and labour matters if a player sustains a serious injury.

The English, American, Australian and Canadian judicial systems have over the last few decades each developed their own distinctive body of sports law. Concepts such as consent and *volenti non fit iniuria* have been defined as to fit the circumstances of professional sport. Significant factors to be taken into account include the views of society and the role the rules of the game play in determining liability for injury caused deliberately or negligently by another. Whilst the general principles with regards to the criminal, delictual and labour implications regarding injury flowing from sports violence may already exist in South African law, it is both useful and necessary to look at other legal systems for the application of such principles.

Chapter 2: Medico-legal aspects of Rugby

2.1 Introduction

A large number of sports injuries at professional level require treatment every year. Not only will the doctors that specialize in sports injuries provide medical evidence which identify areas where the sporting laws may require reassessment, but the personal injury lawyer and the prosecutor working with working with assault charges and personal injury claims will know that medical evidence may be crucial in establishing liability for violent fouls that cause injury.¹ Medical reports between litigating parties or oral medical evidence in court is a crucial factor in merging sports medicine with the law.² When giving judgment on injuries attributable to foul play in any sport, the legal profession will lean heavily on medical evidence, which in some cases would not only be necessary but also crucial.³

Medico-legal principles are applicable to all body contact sports, in particular to rugby and soccer.⁴ These principles are all interrelated and aimed at protecting the lawyer's client, the doctor's patient and the particular sport

¹ Grayson *Sport and the Law* (2000) 304

² Grayson *Sport and the Law* 304

³ Grayson *Sport and the Law* 192

⁴ Grayson "Medico-legal Aspects of Deliberate Foul Play in Rugby Union" 1990 *British Journal of Sports Medicine* 191 191

itself.¹ In this way medicine can influence rule makers to change the laws of a game. A good example of this was the introduction of the Crouch-Touch-Pause-Engage after serious concerns was expressed about the serious incidences of neck injuries as a result of collapsed scrums.²

Rugby Football can be argued to be one of the most violent sports played in the world today³ and violence and intimidation have become integral parts of rugby strategy.⁴ Foul play on the rugby field can cause serious injury and in extreme cases, death. Doctors who have professional rugby players as patients have to understand that they do not have all the answers when it comes to the prevention and treatment of injuries. Sporting injuries often require a multidisciplinary approach, as players' reliance on a knee or a shoulder is not that of most citizens. Specialist advice, both medical and legal is thus of utmost importance.⁵ The medical evidence with regard to an injury will also play a pivotal role in establishing whether an injury was inflicted intentionally or otherwise.⁶ Therefore it is important to have regard to the medico-legal consequences of foul play during the different phases of play.

2.2 General Medico-legal Principles

¹ Grayson 1990 *British Journal of Sports Medicine* 191

² Moore *Sports Law and Litigation* 2ed (2000) 142

³ Kelly "Rugby Violence and the Criminal Law" 1981 *LLB Treatise University of Natal* 2

⁴ Kelly 1981 *LLB Treatise University of Natal* 9

⁵ Grayson "Medicine, Sport and the Law" (1990) *New Law Journal* 528

⁶ Moore *Sports Law* 142 - 143

According to Grayson⁷ general medico-legal principles entail the following

1. The rule of law on the field of play should reflect the wider law, which does not stop at the boundaries of the field of play or the touchline.
2. The spirit of the game runs throughout.
3. The legal profession, in order to advise on injuries caused by deliberate foul play, leans heavily on medical evidence.
4. Sports medical practitioners and others concerned with sport should be persuaded that the belief that all is fair in love and war, and therefore in sport too, is criminally and civilly liable in court.
5. Sports medical practitioners who possess vision and understanding of their own particular sport and emphasize the need to uphold the rule of law, both on and off the field, should be acknowledged.

Legal categories are however never closed. The synthesis between sports medicine and the law identifies a new category which time and progress would appeared to have rendered inevitable, as it is essential for not only the health of the community, but also that of sport.⁸

⁷ Grayson 1990 *British Journal of Sports Medicine* 191 - 192

⁸ Grayson 1990 *New Law Journal* 528

2.3 Classification of Injuries in Rugby

Injuries in a contact-intended sport such as rugby can be divided into two main categories, namely intrinsic injuries and extrinsic injuries.

A. Intrinsic injuries

Intrinsic injuries do not result from external trauma but from repetitive overuse of the body.⁹ The serious orthopaedic injuries such as knee ligament, ankle and tendon injuries are not related to the violence that occur during the game but are often the result of simple manoeuvres such as the changing of direction while running.¹⁰

Intrinsic injuries may be:

- (a) self-produced through unbalanced, uncontrolled and abnormal body movements. A good example would be the twist of a knee that tears a meniscus.¹¹
- (b) injury caused by repeated stress, usually in the form of traction leading to stretching of muscles, ligament or tendons. In certain cases repeated or prolonged undue pressure may cause a stress fracture.¹²

⁹ Noakes and Du Plessis *Rugby Without Risk* (1996) 47

¹⁰ Noble "Rugby Injuries" 1984 *South African Journal of Sports Medicine* 2-3

¹¹ Helfet "Injuries in Sport - a Review" 1981 *South African Sports Medicine* 14 14

¹² Helfet 1981 *South African Sports Medicine* 14

In all probability this group of injuries will become increasingly common as professional rugby players are required to partake in pre- and in-season training programmes, which will become increasingly demanding, especially for the professional player that plays at international level.¹³ It is highly unusual for intrinsic injuries to give rise to legal liability. There are however exceptions to this rule.

B. Extrinsic injuries

In the case of an extrinsic injury, external force is applied to the body of one player by another player, or by an object¹⁴ that may be used by others but is not controlled by the injured person.¹⁵ The more serious extrinsic injuries resulting from rugby usually stem from the collisions frequently occurring during the game.¹⁶

Literature reporting basic scientific analyses has shown that the ruck, the tackle and the scrum account for the majority of serious extrinsic injuries. Dirty play unrelated to a specific phase of the game completes the major injury profile.¹⁷

¹³ Noakes and Du Plessis *Rugby Without Risk* 47

¹⁴ such as the goal posts.

¹⁵ Helfet 1981 *South African Sports Medicine* 14, Noakes and Du Plessis *Rugby Without Risk* 47

¹⁶ Noakes and Du Plessis *Rugby Without Risk* 47

¹⁷ Noble 1984 *South African Journal of Sports Medicine* 2

2.3.1 Foul Play and the Different Phases of Play.

Foul or dirty play is defined as “any action by a player which is contrary to the letter and spirit of the Game and includes obstruction, unfair play, misconduct, dangerous play, unsporting behaviour, retaliation and repeated infringements”.¹⁸ The simplest form of foul play will be a simple infringement of the rules and will be quite easy to define.¹⁹ The more complex forms of foul play, which are more difficult to define, would be the conduct regarded as “contrary to the letter and spirit of the Game”, “unsporting behaviour “ and “unfair play”. A possible example of this could be intimidation and provoking players into retaliation, which is a well-known and well-proven tactic.²⁰ As winning has become increasingly important due to the professional nature of the game, the game as a whole has become harder and faster. Incidences of players and teams utilizing intimidation or attempts to decrease the numbers of the opposition by injuring them deliberately, has fortunately not become the rule, but incidences thereof occur more and more frequently. The prevention of foul play at all levels is therefore of the utmost importance.²¹

The rules relating to foul play in rugby can be regarded as safety rules.²² These rules are of significant importance in body contact sports since they are primarily aimed at enhancing safety during play.²³ While some rules relating to

¹⁸ Law 26 of the Rugby Football Laws

¹⁹ Conduct constituting foul play in these instances is clearly indicated as illegal in the rules. Law 26(3) would be a good example.

²⁰ Jonck and Oosthuizen “Rugby Brutalities – Should Lawyers Join the Game?” *Rugby* 15 5

²¹ Dunnill and Gray *Rugby Injuries* (1982) 33

²² Kelly *Sport and the Law : An Australian Perspective* (1987) 20

²³ Kelly *Sport and the Law* 20 Kelly also distinguishes between constitutional rules (rules which establish foundations), operational rules (rules facilitating play) and supervisory and disciplinary rules (rules usually built into the system that regulates play, the purpose of which is to ensure fairness, equalise opportunities and deal with transgressions of the rules of play). See 1.4.1 for a detailed discussion.

foul play relate exclusively to safety, such as the rule restraining a head-high tackle²⁴ others may in addition have the purpose of facilitating play, such as the rule relating to collapsed scrums.²⁵ It is a matter of common sense that not every infringement of a rule relating to foul play will be the cause of injury to another player.²⁶ The discussion will therefore be limited to transgressions that have the potential of causing injury to another player and therefore would be of significance to the criminal law.

Scientific studies have shown that foul play may account for 31% of all reported injuries in rugby.²⁷ A player has a 5% chance of sustaining injuries due to foul play in any given phase of play during a game.²⁸ Almost without exception foul play injuries occur during match play as opposed to practice sessions.²⁹ In what is to follow, violent, intentional or negligent transgressions of rules relating to foul play, during the different phases of play, will be discussed to give a better understanding of the potentially harmful and even fatal consequences of foul play.

²⁴ Law 26(3)(c) states that it is illegal for any player to "tackle early, or late, or dangerously". Since the head-high tackle is regarded as dangerous, it is therefore illegal.

²⁵ Law 20 note (ix) explains the procedure following a collapsed scrum. Law 26(3)(h) states that it is illegal for a player to "wilfully cause a scrummage...to collapse". See Kelly *Sport and the Law* 20

²⁶ An example would be the infringement of Law 26(2)(b), which states that it is illegal for a player to waste time intentionally.

²⁷ Davies and Gibson "Injuries in Rugby Union Football" 1978 *British Medical Journal* 1759 – 1761 as cited in Grayson "Medicine, Sport and the Law" 1990 *New Law Journal* 528

²⁸ Clarke, Roux and Noakes "A Prospective Study of the Incidence and Nature of injuries to Adult Rugby Players" 1990 *South African Medical Journal* 559 – 562

²⁹ Noakes and Du Plessis *Rugby Without Risk* 115

2.3.2 Tackle³⁰

The tackling phase is by far the riskiest activity on the rugby field.³¹ Studies have shown that the tackling phase can account for 49% of all injuries sustained in rugby.³² The tackling phase consists of two separate elements: tackling another player and being tackled.³³ Being tackled accounts for more than a quarter of all injuries making it the most dangerous phase of play,³⁴ and the majority of non-scrum injuries to the cervical spine occur as a result of tackles or a loose scrum.³⁵ As a result of the high risk of injury during the tackle phase of the game, players should be taught relentlessly how to tackle correctly and how to "ride" a tackle. Emphasis should shift from the speed and impact of the collision to the technique of tackling and falling.³⁶

Tackling procedures regarded as illegal and dangerous will include crash-tackling a defenceless player; tackling a player without the ball; early, late and stiff-arm tackling and head-high tackling.³⁷

One of the two specific mechanisms of tackle injuries - injuries arising from accidental collision of the tackler's head with the thigh of the opponent - are in

³⁰ Law 18 defines a tackle as occurring when "a player carrying the ball in the field-of-play is held by one or more opponents so that while he is held he is brought to the ground or the ball comes into contact with the ground".

³¹ Noakes and Du Plessis *Rugby Without Risk* 106

³² Noakes and Du Plessis *Rugby Without Risk* 106

³³ Noakes and Du Plessis *Rugby Without Risk* 105 – 107

³⁴ Noakes and Du Plessis *Rugby Without Risk* 106

³⁵ Scher "The High Rugby Tackle - a Continuing Menace" 1981 *The South African Journal of Sports Medicine* 3 3

³⁶ Upton, Roux and Noakes "Inadequate pre-season preparation of Schoolboy Rugby Players - a survey of players at 25 Cape Province High Schools" 1996 *South African Medical Journal* 533 533

³⁷ Noakes and Du Plessis *Rugby Without Risk* 210. Law 18(2)(a) and (b) and Law 26(3)(c) regulates what conduct will be regarded as foul play concerning the tackling phase. Law 26(3)(c) states that it is illegal for any player "to tackle early, or late or dangerously, including the action known as a 'stiff arm tackle'".

most instances due to misjudgment on the part of the tackler and may in most instances be unavoidable.³⁸

The second specific mechanism of tackle injury is that of the head-high tackle, which is regarded as the most dangerous tackle³⁹ for the tackled player because of the risk of spinal injury⁴⁰ and often results in injuries that may paralyze or even be fatal to players.⁴¹

Although this tackle is theoretically illegal, the tackle is still common practice and very often happens accidentally due to miscalculation during a fast movement.⁴² The tackler executing the head-high tackle usually wraps one arm around his opponent's neck from the side or the front, applying a rotation and flexion force to the cervical spine.⁴³ This may cause fracture or dislocation of the cervical vertebrae with damage to the spinal cord.⁴⁴

When the high tackle is executed from behind, the neck is forced into a rotated and hyper-extended position.⁴⁵ This combination may cause fracture and dislocation of the cervical vertebrae and damage to the spinal cord.⁴⁶ In severe

³⁸ Scher 1981 *South African Journal of Sports Medicine* 3 3

³⁹ A player guilty of such conduct is instructed by the referee to leave the field immediately.

⁴⁰ Noakes and Du Plessis *Rugby Without Risk* 209

⁴¹ Du Plessis "Killer Rugby Foul Fells Schoolboy" *Saturday Argus* (97 – 07 – 06) 16. Dr Ismail Jakoet of the South African Rugby Football Union had been quoted to say that since 1989 neck injuries have risen among adult players. He stated that although the high tackle was not always deliberate, it remained the highest cause of neck injuries in rugby and suggested that instead of awarding a penalty, alternative ways of ridding the game of a head-high tackle should be examined.

⁴² Scher 1981 *South African Journal of Sports Medicine* 3

⁴³ Scher 1981 *South African Journal of Sports Medicine* 4

⁴⁴ Noakes and Du Plessis *Rugby Without Risk* 127

⁴⁵ Scher 1981 *South African Journal of Sports Medicine* 3

⁴⁶ Noakes and Du Plessis *Rugby Without Risk* 126

injuries where the severing of the spinal cord is caused in this manner, possible complications may be permanent paralysis⁴⁷ or death.

2.3.3 Scrummage⁴⁸

Together with the tackling phase the tight scrum accounts for 72% of all injuries sustained in rugby.⁴⁹ Illegal procedures that contribute to these injuries include the intentional collapse of the scrum and “popping” the scrum.⁵⁰ The mechanism of spinal injuries sustained in the scrum are due to flexion force, whether as a result of “crashing” or “popping” of the scrum.⁵¹

The intentional collapse of a scrum is becoming an increasingly popular tactic.⁵² When a scrum collapses, intentionally or otherwise, the heads of the front row forwards strike the ground. If the remainder of the scrum continue to push forward, their necks are forced to bend forward and rotate resulting in the rupture of ligaments and the dislocation of either one or both of the facet joints on the side of the vertebrae. When these joints dislocate the spinal cord is pinched and is at risk of damage.⁵³

⁴⁷ Noakes and Du Plessis *Rugby Without Risk* 121

⁴⁸ Law 20 defines a scrum as follows: “A scrummage which can take place only in the field-of-play, is formed by players from each team closing up in readiness to allow the ball to be put on the ground between them...[t]he middle player in each front row is the hooker and the players on either side of him are the props”.

⁴⁹ Noakes and Du Plessis *Rugby Without Risk* 121

⁵⁰ Noakes and Du Plessis *Rugby Without Risk* 127 – 128. Law 26(3)(h) states that it is illegal to collapse a scrum intentionally. Law 26(3)(g) states that it is illegal in the front row of a scrum to lift an opponent off his feet or force him upward out of the scrummage.

⁵¹ Scher “Dislocation of the Cervical Spine in a Rugby Player Due to the ‘Crashing’ of the Scrum” 1991 *South African Journal of Sports Medicine* 8 8

⁵² Grayson 1990 *New Law Journal* 528

⁵³ Noakes and Du Plessis *Rugby Without Risk* 127 – 128. The hooker is at great risk when the scrum collapses because his arms are locked around his props, inhibiting any shoulder movement. He is therefore unable to drop his one shoulder in order to protect his neck.

“Popping” of the scrum occurs when opposing front row forwards actively extend their necks and direct their push upwards, lifting the opposing front row forwards off their feet. As a result the necks of the tight-head prop and the hooker are forced into extreme flexion which could result in fracture or dislocation of the vertebrae.⁵⁴

Another form of dangerous play concerning the scrum is where the front row of a scrum form some distance from the opponents and rush against them during the formation of the scrum.⁵⁵ Impact on the top of the head of a front row forward against the chest or shoulder of an opposing front row player at scrum engagement can cause cervical fracture with severance of the spinal cord.⁵⁶ In order to prevent injuries caused by this form of foul play the CTPE (crouch, touch, pause, engage) technique had been introduced.⁵⁷ The above injury cannot occur when the CTPE technique of scrum engagement is used⁵⁸ and must be applied without exception by the referee.⁵⁹

2.3.4 Ruck⁶⁰ and Maul⁶¹

In this phase of play the player most at risk is the ball carrier.⁶² The ruck and maul phase can account for 18% of all injuries.⁶³ Jumping on top of other

⁵⁴ Noakes and Du Plessis *Rugby Without Risk* 128

⁵⁵ Law 26(3)(f)

⁵⁶ Noakes and Du Plessis *Rugby Without Risk* 125, 128 – 129

⁵⁷ Law 20 (2) states that “[i]n the interests of safety, each front row should engage in the sequence of crouch, then pause and only engage on the call ‘Engage’ given by the referee”.

⁵⁸ Noakes and Du Plessis *Rugby Without Risk* 129

⁵⁹ See Chapter 4 with regards to liability of the referee arising out of the negligent failure to apply this technique.

⁶⁰ Law 21 “ A Ruck, which can take place only in the field-of-play, is formed when the ball is on the ground and one or more players from each team are on their feet and in physical contact, closing around the ball between them.”

⁶¹ Law 22 “A maul, which can take place only on the field-of-play, is formed from each team on their feet and in physical contact closing around a player who is in possession of the ball.”

players and intentionally collapsing a ruck or a maul is regarded as dangerous play and therefore considered to be illegal.⁶⁴ The neck of the player at the bottom of the ruck may be flexed excessively by the force of the collapsing ruck on top of him, causing cervical fracture.⁶⁵ A player may use his feet to retrieve a ball out of a ruck⁶⁶ but may not intentionally or negligently hack, kick or trample on an opponent lying on the ground.⁶⁷ The latter can cause skin lacerations, dental injuries and other more serious injuries to the face and upper limbs.⁶⁸

2.3.5 Foul Play Unrelated to a Specific Phase of Play

Foul play unrelated to a specific phase of play can account for 15% to 40% of all injuries.⁶⁹ In this type of foul another player harms an opposing player intentionally or negligently. A good example would be an on-field brawl.

Law 26 renders the following conduct illegal: The striking of an opponent;⁷⁰ to hold, push, charge or obstruct an opponent not holding the ball;⁷¹ to molest, obstruct an opponent when the ball is out of play.⁷² The striking of an opponent in rugby, where the players do not wear protective headgear, can cause serious injury.⁷³

⁶² Noakes and Du Plessis *Rugby Without Risk* 130
⁶³ Noakes and Du Plessis *Rugby Without Risk* 141
⁶⁴ Noakes and Du Plessis *Rugby Without Risk* 212. See Law 26(3)(h)
⁶⁵ Noakes and Du Plessis *Rugby Without Risk* 129 – 130
⁶⁶ Law 21. The act of retrieving the ball with the feet is called Rucking.
⁶⁷ Law 26(3)(b)
⁶⁸ Noakes and Du Plessis *Rugby Without Risk* 269 – 271
⁶⁹ Noakes and Du Plessis *Rugby Without Risk* 106
⁷⁰ Law 26(3)(a)
⁷¹ Law 26(3)(e). This is however permitted in a scrummage ruck or maul.
⁷² Law 26(3)(i)
⁷³ Kelly 1981 *LLB Treatise University of Natal* 11

2.4 The Medico-legal Report in Sports Injury Litigation

The medico-legal report in sports injury litigation will often prove to be pivotal in establishing liability on the side of the accused or defendant. The submission of the medico-legal report into evidence will be accompanied by calling the author of the report as an expert witness during the trial. The expert in question will not always necessarily be a sports physician, although the sports physician may be one of the most important experts to be called. There are a host of different medical specialists whose reports may influence the decision of the court regarding liability and the quantum of damages.

2.4.1 Rules of Evidence Pertaining to Expert Evidence

Expert opinion is readily received on issues relating to medicine, as certain issues cannot be decided without expert guidance.⁷⁴ Expert evidence on these issues is especially relevant where a person has been injured or assaulted.⁷⁵ The party seeking to adduce the expert evidence must satisfy the court that the evidence is not irrelevant. The court must be satisfied that:

- The witness has specialist knowledge, training, skill or experience and can assist the court in deciding on the issues;
- The witness is indeed an expert for the purpose for which he is called to express an opinion;

⁷⁴Schwikkard, Skeen and Van der Merwe *Principles of Evidence* (1997) 86⁷⁵*S v Melrose* 1985 1 SA 720 (Z) 724 I

- The witness does or will not express an opinion on hypothetical facts.⁷⁶

Where a party seeks to adduce expert evidence the rules of court must be complied with in civil cases.⁷⁷ In criminal cases prior disclosure may be demanded on constitutional grounds.⁷⁸

2.4.2 The Experts Called to Prove an Injury.

The first expert to be called after the plaintiff or the victim of the injury has testified will be the physician that attended to the player immediately after the injury was sustained. This physician is called to establish the nexus between the incident and the resultant injury and to testify as to the initial diagnosis

Once the injury has stabilized and the future prognosis is known, further specialists will come into the picture. If the player cannot perform his duties in terms of his contract an occupational therapist that specializes in medico-legal examinations will have to submit a report as to the extent of which the player can perform his duties. If the occupational therapist concludes that there is a degree of disability and inability on the side of the player to perform in terms of his contract, a medico-legal report from an industrial psychologist will be necessary to determine the financial loss to the injured player.

⁷⁶ Schwikkard et al *Evidence*⁸⁷

⁷⁷ Rule 24(9) of the Magistrates' Court Rules and Rule 36(9) of the Rules of the High Court provides that "[n]o person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as witness any person to give evidence as an expert upon any matter upon which the evidence of an expert witness may be received, unless he shall (a) not less than 15 days before the hearing, have delivered his intention to do so; and (b) not less than 10 days before the hearing, have delivered a summary of such opinions of such expert and his reasons therefore.

⁷⁸ Schwikkard et al *Principles of Evidence* 92

The specific type of injury will further determine the specialist physician of which a medico-legal report will be required. A medico-legal report will be required from an orthopaedic surgeon where any muscular or skeletal injury was sustained. Where brain injuries are present, a report will be required from a neurologist who will provide an analysis of the location of the injury and the disability resulting from such injury. Where the brain was injured and surgery will be necessary or a distinct possibility, a medico-legal report from a neurosurgeon will be required. In addition to this a report by a neuropsychologist evaluating the emotional and cognitive abilities of the injured where brain damage has been sustained, may be submitted.

2.5 Conclusion

From the above can be concluded that in order to establish legal liability for violent, intentional or negligent foul play in rugby a multi-disciplinary approach is required. In assessing liability the legal profession will have to take the medico-legal aspects into account and lawyers and sports medical practitioners should work together to identify violent, intentional foul play and the devastating effect thereof on sportsmen.⁷⁹

⁷⁹ Grayson 1990 *New Law Journal* 528, Grayson 1996 *British Journal of Sports Medicine* 192

Chapter 3: Criminal Liability for Rugby Injuries

3.1 Introduction

Where a player is seriously injured or killed in Rugby, the question arises whether the facts require the interference of the criminal law. This would involve a number of separate inquiries such as whether the elements of a specific crime against the person are present and whether the accused has a defence.¹ In controlling incidents of violence on the rugby field, criminal law has the same aims as when it seeks to control any other form of violence.

These aims would be:

- To protect individuals from harm,
- To uphold the values of society,
- To punish the perpetrators in such a way as to deter other players from similar conduct in the future.²

¹ Weistart and Lowell *The Law of Sports* (1979) 185

² Gardiner, Felix, O'Leary, James & Welch *Sports Law* (1998) 456

Since rugby is considered a lawful sport³ the task of the court will therefore be to decide what will constitute an unlawful act in a lawful game.⁴ In what is to follow the criminal liability of the players, the coach and the referee will be examined.

3.2 Liability of a player

The following discussion will not entail a discussion of the separate elements of each crime which can be committed by a player during a rugby match, but an attempt will be made to highlight the principles applicable to violent rugby fouls and the defences available to the player with reference to the categories of crimes against the person.

3.2.1 Assault

The forms of assault recognized in South African law are those of common assault,⁵ assault with intent to do grievous bodily harm⁶ and indecent assault.⁷

³ According to Burchell & Hunt *South African Criminal Law and Procedure* (3rd ed by Burchell) (1997) 135 "in the absence of legislation to the contrary, games in which the intention of the participants is not to inflict serious injury and where the rules are designed to prevent such injury are not contrary to public policy and hence lawful". Labuschagne "Straf- en Delikregtelike Aanspreeklikheid vir Sportbeserings" 1998 *Stell LR* 72 87 classifies rugby as a "kontakbedoeelde sportsoort", meaning that in rugby body contact is expected or intended, but the aim is not to cause serious injury to the opponent.

⁴ Kelly *Sport and the Law: An Australian Perspective* (1987) 246

⁵ Common assault is defined as consisting of unlawfully and intentionally applying force directly or indirectly, to the person of another; or inspiring a belief in a another person that force is immediately to be applied to him. Snyman *Criminal Law 4 ed* (2002) 430

⁶ All the requirements for common assault apply to this form of assault with the added requirement that there must be intent to do grievous bodily harm. Snyman *Criminal Law* 434

⁷ Indecent assault consists in unlawfully and intentionally assaulting another with the object of committing an indecency. Snyman *Criminal Law* 436. The definition is based on the case of *S v F* 1982 2 SA 580 T

Rugby can in fact be said to be a series of lawful assaults.⁸ Various defences render violent and forceful conduct, which would constitute assault, lawful when it happens in the game of rugby. These defences include private defence, consent⁹ and provocation.¹⁰

3.2.1.1 The Defence of Consent and the Limitations Thereof

Generally the law does permit a person to consent to the perpetration of violence upon him.¹¹ However consent may be effective as a defence to make lawful what would otherwise be an offence,¹² in other words, it operates as a justification ground. What sets certain sports apart from other social activities is the element of constant physical contact.¹³ In a sport such as rugby where violence is a known and accepted feature, the relationship of players to each other may be founded on an assumption of consent.¹⁴ It is therefore not necessary to ask whether the consent was in casu permissible, merely whether the consent was legally effective.¹⁵

There are however limits to such consent.¹⁶ In the English case of *R v Venna*¹⁷ the Court of Appeal endorsed the principles established in the earlier case of *R v Bradshaw*¹⁸ that deliberate, intentional or reckless violent foul play gives rise

⁸ "The Player and the Law" 1984 *Rugby World* 45

⁹ Labuschagne 1998 *Stell LR* 83

¹⁰ Snyman *Criminal Law* 235

¹¹ "The Player and the Law" 1984 *Rugby World* 45

¹² Kelly *Sport and the Law* 242

¹³ Moore *Sports Law and Litigation 2ed* (2000) 63

¹⁴ Kelly *Sport and the Law* 241

¹⁵ Kelly *Sport and the Law* 246

¹⁶ "The Player and the Law" 1984 *Rugby World* 45

¹⁷ 1975 3 All ER 788 as cited by Moore *Sports Law* 62

¹⁸ 1878 14 Cox CC 83 as cited by Kelly "Rugby Violence and the Criminal Law" LLB Treatise University of Natal 25 and Moore 63. In this case the accused, during a football game, the accused jumped in the

to criminal liability. In the more recent case of *R v Brown*¹⁹ the court made the following observations regarding consent in contact sports:

"Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at midpoint between fighting, where the participant knows that his opponent will try to harm him and the milder sports where there is at most an acknowledgement that someone might be accidentally hurt...In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately."

Consent to rough and undisciplined play, where there is no intention to cause injury is a defence to a charge of assault, which may well cover "raking" during a game of rugby. Rucking is permitted by Law 21 as long as the player does not contravene Law 26²⁰ in doing so. Kelly states that the difference between rucking and kicking lies in the intention of the person trying to retrieve the ball.²¹

It is however doubtful whether a player can consent to a deliberate punch or a manoeuvre such as the "clothesline" by which an opponent is felled by a straight arm in the throat.²² Consent will only be effective during the time of play. The unlawfulness of acts of violence committed during half time, when play has

air, striking the opponent in the stomach causing rupture of the intestines. The victim later died of his injuries. The case however resulted in an acquittal.

¹⁹ 1994 AC 21 as cited by Moore *Sports Law* 64. In this case the House of Lords rule on the effectiveness of adults consenting to sado-masochistic acts.

²⁰ The law regulating foul play.

²¹ Kelly *Rugby Violence* 12

²² Grayson "Sporting Violence" 1989 *New Law Journal* 1621 1621

been stopped by the referee and after the final whistle has blown, will not be negated by the defence of consent.²³

(a) Scope of Consent

In the English case of *R v Billingham*²⁴ the court held that the sole issue which had to be determined was whether the act of the accused²⁵ was one the victim effectively consented to by entering onto the rugby field. The judge instructed the jury to consider the following:

“You have to determine where the line has to be drawn; between that to which a person taking part in a rugby match is deemed to consent and that to which he is not deemed to consent...Rugby is a game of physical contact and some force is necessarily involved...If such conduct is of the kind which can be reasonably expected to happen during a game then the participant is deemed to consent to that. When you come to fists flying or the boot going in, you enter a more difficult realm. Because violence does occur on the rugby field that does not necessarily mean it is consented to. Playing a game of rugby does not confer upon the players unlimited licence to use force. There obviously must be cases which cross the line of that which a player is deemed to consent to.”

The Scottish Criminal Injuries Compensation Board's 23rd report stated that

“[I]n a sport in which bodily contact is a commonplace part of the game, the players consent to such contact even if, through unfortunate accident, injury, perhaps of a serious nature, may result. However such players do not consent to being deliberately punched or kicked and such actions constitute an assault”.²⁶

As stated in *R v Billingham* above, there is a certain point at which the consent of the player will be considered immaterial and the conduct is treated as

²³ Moore *Sports Law* 66

²⁴ 1978 Crim LR 553 as cited by Stewart “Football: Criminal Aspects” 1980 *The Scots Law Times* 49 50

²⁵ Billingham punched the opposing scrumhalf in the face, fracturing his jaw in two places. In doing this he made sporting history by becoming the first offender of foul play under the rugby code to be prosecuted. Grayson “Keeping Sport Alive” 1990 *New Law Journal* 12 12

²⁶ Grayson “The Day Sport Dies” 1988 *New Law Journal* 9 10

unlawful.²⁷ To determine this limit a number of tests have been suggested in both literature and case law.

(i) Rules of the Game Test

In the English case of *R v Bradshaw*²⁸ the court held that in a football game each player consents in advance to such injuries as he may suffer, as long as a player acting within the rules of the game inflicts the injuries. The court held that although no rules or practice of the game can make lawful that which is unlawful according to legal standards, it can be reasonably inferred that a player who is playing according to the rules and practices of the game, and does not go beyond them, is not actuated by any malicious motive or intention and that he is not acting in a manner that is likely to produce death or injury.²⁹

In the Australian case of *Wilhams v Wills*³⁰ it was held:

“If a player suffers injury in the course of the game and such injury occurs while the rules of the game are being observed, then there cannot be any question of assault because consent vitiates any such claim ... On the other hand, there is no doubt and it is really agreed, that if there is a deliberate assault...then that is an actionable assault.”

An injury caused by foul play is therefore not consented to. The simple solution would therefore be that all foul play is unlawful since a participant's consent is limited to what is permitted by the rules.³¹

²⁷ McCutcheon "Sports Violence, Consent and the Criminal Law" 1994 *Northern Ireland Legal Quarterly* 267

²⁸ 1878 14 Cox CC 83 as cited by Kelly *Rugby Violence* 25.

²⁹ *R v Bradshaw* 1878 14 Cox CC 83 as cited by Gardiner et al *Sports Law* 446

Available South African text and case law seem to support this approach. Burchell and Hunt³² state that the player consents to risk of injury incurred when “the game is being played according to the rules” and this approach was also set out by the court in *R v Hillebrand*.³³ In *Human v Van der Merwe*³⁴ a rugby player struck his opponent in the face and seriously injured him. Since the punch was in conflict with the rules of the game, both parties tacitly accepted the unlawfulness of the defendant’s conduct. The case was settled out of court.

This approach can be criticized on several points. First, the acceptability of violence in sport is a matter of legal policy and not a matter of private regulation. To use the rules of a particular sport as a test would be to confer on a private agency, the sports governing body, the power to license violence. Secondly, this approach would have the impractical result that trivial fouls involving force would be unlawful, while applications of greater force which are within the rules would be lawful.

In *Condon v Bas*³⁵ the court cited the Australian case of *Rootes v Shelton*³⁶ and approved the view as held, that whilst a tackle might break the rules of a game, it might not in itself be conclusive of the element of fault being present. Thirdly, this approach does not conform

³⁰ 1977 74 Law Socy of S A 450 as cited by Kelly *Sport and The Law* 152
³¹ McCutcheon 1994 *Northern Ireland Legal Quarterly* 273
³² *Criminal Law* 136
³³ 1959 3 SA 22 T 23 E – F
³⁴ Unreported case of the Free State High Court 4193/83
³⁵ 1985 1 WLR 866 As cited by Moore *Sports Law* 68
³⁶ 1968 ALR 33

to social reality. The players know that in the course of the game they may be fouled. Nevertheless they participate and accept the inherent risks.³⁷

(ii) The Test in *R v Cey*³⁸

In this Canadian case the test to determine the limits of consent was held to be whether the force employed was so violent and inherently dangerous as to have been excluded from the implied consent. The court further held that the player's consent had to be considered within the following objective framework: the conditions in which the game is played, the nature of the act, the degree of risk and injury, probability of harm occurring, age of the players and players' level of experience.³⁹

It is likely that the application of this test will mean that different thresholds will apply in the context of different sports.⁴⁰ This decision was confirmed in the later case of *R v Ciccarelli*.⁴¹

In the English case of *Condon v Bas*⁴² the court similarly held that “[t]here will be a higher degree of care required by a player in a first division match than of a player in a local league [match]”. Unqualified application of this test can however mean that, in a game, any

³⁷ McCutcheon 1994 *Northern Ireland Legal Quarterly* 273 – 274
³⁸ 1989 48 CCC 3d 480 as cited by McCutcheon 1994 *Northern Ireland Legal Quarterly* 276.
³⁹ McCutcheon 1994 *Northern Ireland Legal Quarterly* 276
⁴⁰ McCutcheon 1994 *Northern Ireland Legal Quarterly* 279
⁴¹ 1990 54 CCC 3d 121 Ont DC 126 as cited by Labuschagne 1998 *Stell LR* 86
⁴² 1985 2 All ER 453 as cited by Grayson “Foul Play” 1991 *New Law Journal* 742 742

application of force that is intended to harm is unlawful. Consequently the threshold will be set too low.⁴³

Commonly accepted contacts in sport are deliberately forceful or intimidatory. In this manner it is accepted that a tackle in rugby has a dual purpose of preventing an opponent from gaining an advantage and of “softening up” the opponent. The latter purpose is considered to be essential to the contest between rival players.⁴⁴

(iii) Normal Course of the game Test

Burchell and Hunt⁴⁵ state that participation in lawful sport in itself means consent to risk to bodily injury incurred while the game is being played and the accused’s act, although contrary to the rules of the game is one which occurs “normally in the course of the game”.

In a game of rugby, although an injury caused by an unavoidable late tackle may be justified by consent, serious injury due to an assault would not fall within the normal anticipated risks of the game. An act such as biting or kicking an opponent during a game will not be excused.⁴⁶

⁴³ McCutcheon 1994 *Northern Ireland Legal Quarterly* 279

⁴⁴ McCutcheon 1994 *Northern Ireland Legal Quarterly* 279

⁴⁵ *Criminal Law* 136

⁴⁶ Labuschagne 1998 *Stell LR* 88

In the English case of *R v Johnson*⁴⁷ the accused was charged with wounding with intent when he bit an opponent's ear tearing half of the lower lobe away. The accused was convicted despite his defence that he was wearing a gumguard and that he was not the assailant, and sentenced to six months' imprisonment, which was upheld on appeal.⁴⁸

In *R v Shervill* the accused kicked his opponent and pleaded guilty to unlawful wounding. He was sentenced to six months' imprisonment, reduced on appeal to two months.⁴⁹

This approach is also expressed in *R v Billingham* where the judge held that if "conduct is of the kind that could be reasonably expected to happen during a game then the [player] is deemed to consent to that".⁵⁰ Even though spectators and players alike may regard fistfights as "normal incidents" in a game, the law for obvious reasons cannot take the same view.⁵¹

In *Billingham* the accused was convicted of inflicting grievous bodily harm and sentenced to nine months' imprisonment, suspended for two years, after punching an opponent and fracturing his jaw in two places.

In *R v Bishop* the accused was convicted of common assault and

⁴⁷ 1986 8 Cr App R S 344 as cited by Duff "Summary for Criminal Prosecutions for Football and Rugby Violence" 1994 *Scots Law Times* 281 282

⁴⁸ Biting is not tolerated by the criminal law or within the sphere of rugby. South African flanker Wickus van Heerden was suspended for 18 months after biting a New South Wales prop in April 1998. The bite did not however draw blood. South African prop Johan le Roux was suspended for 19 months after biting All Black Captain Sean Fitzpatrick's ear 1994 "Player Might Appeal Ban for Biting" *The Irish Times* (07 – 04 – 1998) Transvaal hooker Wittes Buitendach was suspended for life after biting the ear of an opponent in a club match in 1994. Glasspool "Rugby's Custodians Share the Blame" *The Star* (27 – 07 – 1994) 13

⁴⁹ 1989 11 Cr App R S 284 as cited by McCutcheon 1994 *Northern Ireland Legal Quarterly* 271

⁵⁰ as cited by Stewart 1980 *Scots Law Times* 50

⁵¹ Burchell & Hunt *Criminal Law* 136n 64

sentenced to a month's imprisonment suspended for one year, after punching an opponent in an off-the-ball incident.⁵²

In the Australian case of *Mcnamara v Duncan*⁵³ the plaintiff had already given the ball away by kicking it. The defendant came in to tackle and, apparently after the ball was released, struck the plaintiff on the head with a stiff elbow. Serious injury resulted. The court held that it was common cause that an intentional striking of a player on the head was not an accepted part of the game and therefore a serious infringement.

In a recent case, *Moreland v De Villiers*, in the Cape Town Magistrates' court the magistrate held that a punch on the field is not part of the game. The same was applicable to pushing, shoving and the raking of an opponent. She also stated that it does not matter whether you punch somebody on the street or on the rugby field, it still constitutes assault.⁵⁴

(iv) Violation of a Safety Rule Test

American law favours the violation of the safety rule test. In *Nabozny v Barnhill*⁵⁵ the court held that

“ when athletes are engaged in athletic competition, the teams are trained and coached by competent personnel, a recognized set of rules governs the play, and a safety rule is contained therein which is primarily designed to protect

⁵² As cited by Duff “A Hooligan's Game – Played by Gentlemen” 1994 *Scots Law Times* 277 278

⁵³ 1971 26 ALR 584 as cited by Kelly *Sport and the Law* 151 – 152

⁵⁴ Unreported. As cited by Van Greunen “Hou vuiste maar tuis, ook op veld” *Rapport* (30 – 10 – 1994) 7

⁵⁵ 1975 Illinois App 3d 212 as cited by Kelly 1981 *Rugby Violence* 25

players from injury, a player is liable for a deliberate, willful, or reckless violation of said rule which causes injuries”.

The American Restatement (Second) of Torts states that “participating in...a game does not manifest contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants”. This principle will apply whether or not a player knows that those against whom he is playing are habitual violators of such rules.⁵⁶ Liability will thus arise upon injury caused by breach of a safety rule. A head-high tackle in rugby would constitute a violation of a safety rule and the inherent danger thereof is obvious.⁵⁷ The advantages of the approach are numerous. First, it draws a distinct line between lawful acts and those that are not. Secondly, the test adequately differentiates between trivial fouls and calculated dangerous play. Thirdly, by not focusing on intent to inflict bodily harm, the test is sufficiently flexible to preserve the fundamental characteristics of a specific sport within a legal framework, and fourthly the function of safety rules coincides with the primary function of criminal law.⁵⁸

(vi) Conclusion

From the above it can be concluded that the normal course of the game test seems to be the test most favoured by both courts and the literature. However since the first assault case of this kind in South

⁵⁶
⁵⁷

as cited by McCutcheon 1994 *Northern Ireland Legal Quarterly* 278 – 279
See 2.3.1 for the mechanism of injury.

Africa was decided in the lower courts, the choice is left open to the high courts to employ another test. In the instance of a case relating to rugby violence, the violation of a safety rule test seems to be the more appropriate test and it will, in addition to the abovementioned advantages, have wider application than the other tests.

(b) Consent and Public Policy

The fundamental consideration in sports cases is identical to that of “normal” consent cases: it involves the question of whether the conduct of the accused is lawful in terms of the prevailing views of society.⁵⁹ The rules of that sport may define the permissible conduct for the purposes of the specific sport, but society’s tests can only be embodied in the law.⁶⁰ It therefore seems clear that the definition of the limit of conduct that is protected must in the final analysis rest upon the general demands of public policy.⁶¹ The consent that matters is the consent of society.⁶²

(c) Consent and the problem of proving intention

The defense of consent and the problems associated with proving intention to establish criminal liability for a rugby injury are to a large extent interlinked. As the defence of consent has no application where there is an intentional or negligent breach of the rules of the game⁶³ there will be little difficulty proving that a blow struck at another was intentional.⁶⁴ A player cannot consent to intentional or negligent injury caused by another player.⁶⁵

If play is stopped by the referee and thereafter the players are involved in a brawl, those involved in the brawl will prima facie commit assault or assault with

⁵⁹ Kelly *Rugby Violence* 1981 26
⁶⁰ Kelly *Sport and the Law* 246
⁶¹ Weistart and Lowell *The Law of Sports* 186
⁶² Kelly *Sport and the Law* 246
⁶³ Moore *Sports Law* 62
⁶⁴ Moore *Sports Law* 66
⁶⁵ Moore *Sports Law* 62

intent to do grievous bodily harm as was held in the English cases of *R v Kamara*⁶⁶ and *R v Ferguson*.⁶⁷

Such blatant fouls fortunately seem to be the exception rather than the rule. In a contact-intended sport such as rugby the distinction between lawful and unlawful contact is often blurred, especially because rucking and mauling is expressly permitted by the rules of the sport. A reasonable tackle, executed according to the rules of the game will not be rendered unlawful simply because it causes serious injury, or in extreme cases, death.

While the rules of the game are an objective measure to determine the unlawfulness of a player's actions, they may also be used as a gauge for assessing the mental state or intention of the perpetrator. The rules of the game as a whole provide one of the factors from which the inference of intention or the absence thereof can be drawn. It can easily be inferred that a player playing within the rules of the game is not deliberately trying to inflict injury upon the opponent, but is only trying to play the game.⁶⁸ In contradiction to this, if an incident of violence is clearly contrary to the rules of the game it is easier for the court to infer that the perpetrator was acting with intention to harm or was at least negligent⁶⁹ as to such harm ensuing.⁷⁰ In *R v Bradshaw*⁷¹ the court held that

⁶⁶ 1988 *The Times* 15 April as cited by Moore 66. In this case a professional footballer pleaded guilty to a charge of bodily harm after breaking the jaw of an opposing player in the tunnel after the game.

⁶⁷ 1995 *The Times* 12 October. In this case a player received a custodial sentence for an assault upon another player. Moore 66-67. See n114 supra for further examples.

⁶⁸ An example would be when a player tackles another in a way that is permitted by the rules, but the tackled player nonetheless sustains injury.

⁶⁹ An example of this would be a deliberate late tackle causing injury.

⁷⁰ Gardiner et al *Sports Law* 447.

⁷¹ 1878 Cox CC 83 as cited by Duff "A Hooligan's Game Played by Gentlemen" *Scots Law Times* 277 277

" Therefore in one way you need not concern yourselves with the rules of football, but on the other hand, if a man is playing according to the rules of practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by malicious motive or intention and that he is not acting in a manner which he will know be likely to be productive of death and injury. But independent of the rules, if the [player] intended to cause serious hurt to the deceased, or if he knew that in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not, then the act would be unlawful."

Although this guide to inferring intention to establish criminal liability on behalf of the perpetrator might be useful, between participants it is very difficult to show that any physical injury which has been inflicted during play was inflicted intentionally or even negligently. Whether a foul or even injurious play falling within the rules of the game should attract criminal liability would depend on the specific facts of each case.⁷² With regards to cases of this nature, the English High Court held in *Champion v Brown*⁷³ "that the court has to find the facts, apply the law, and that is the end of it".

(d) The recommendations of the UK Law Commission : Consultation Papers 134 and 139, Consent and offences against the person.

The consultation papers on consent and offences against the person were published in February 1994 and December 1995 respectively. In the revised proposals published in paper 139 the Law Commission made the following

⁷² Moore *Sports Law* 67. The following set of facts sets out the importance of each case being determined on its own facts: Jack Tatum, American football linebacker was given a brief during one game to "sack" the opposing quarterback, Darryl Stingley, using as much force as possible. Tatum had done so with a legitimate tackle, using such excessive force that Stingley's neck was broken and he was paralysed from the neck down. Later in his autobiography, Tatum admitted that it was his intention to hurt his opponents to such an extent that they could not continue playing, or were too intimidated to continue the game. (Gardiner *Sports Law* 447)

⁷³ 24-02-1993 as cited by Grayson *Sport and the Law* (2000) 54

recommendations with regard to the circumstances in which criminal liability will arise for the causation of seriously disabling injury:

Criminal liability will not arise unless the following conditions are satisfied:

1. The player in question must have been aware of the risk that he may cause a serious disabling injury by his conduct
2. The risk was not a reasonable risk for him to take in the light of the circumstances known to him, including the consent of the other players to the risks inherent in playing according to the rules of the sport in question.
3. The injury resulted in permanent bodily injury or disfigurement.⁷⁴

A player would therefore run the risk of being held criminally liable for his actions if his conduct falls clearly outside the scope of the rules of the game. Ordinarily, a player that continually high tackles his opponents, despite the warnings of the referee, will be held criminally liable if it is proven that his actions had been deliberate or at least negligent. The recommendations of the United Kingdom Law Commission, if and when they are enacted, will mean that even though intention cannot be proven, the player inflicting the injury can still be held criminally liable if it can be proven that he was aware of the risk that he might inflict such injury and the risk was not a reasonable one for him to take.⁷⁵

⁷⁴ Moore *Sports Law*65
⁷⁵ Moore *Sports Law*65

The test as laid down in the Law Commission paper will be extremely useful to establish liability where no *dolus directus* can be proven and the conduct clearly falls outside the scope of the consent involved in the specific sport. If adopted by the courts it could easily deal with the problems caused by the difficulty of proving direct intent. In addition to this it is an all-encompassing objective test, excluding no factor that should be taken into account to determine criminal liability for an injury in sport. The direct application of the test by the South African courts will however be difficult where the charge against the accused is that of assault, as the requirements of fault to be established must be at least that of *dolus eventualis*. In South African law there is no such thing as negligent assault and if the test does not establish *dolus eventualis* on the part of the accused, he cannot be held criminally liable.

3.2.1.2 Private Defence

In order for private defence to operate as a ground of justification, excluding the unlawfulness of the accused's actions, the requirement for private defence must be fulfilled.⁷⁶ The question whether these requirements have been fulfilled must be ascertained objectively.⁷⁷ Any act by a player, falling outside the accepted risks of the game may be averted by force in private defence.⁷⁸ This would include any form of foul play as described above.⁷⁹

⁷⁶ Burchell and Hunt *Criminal Law* 72 – 78

⁷⁷ Burchell and Hunt *Criminal Law* 79

⁷⁸ Labuschagne 1998 *Stell LR* 83

⁷⁹ Chapter 2

In the American case *People v Freer*⁸⁰ the accused was convicted of assault. The victim during a tackle in a football match punched the accused on his throat. When the ensuing pile-up got off Freer he punched the victim in the face, causing injury requiring plastic surgery. Private defence was raised, as a ground of justification, but the court held that since Freer had no reason to fear a continuing attack by the victim, he had committed an assault.

A player will also be able to raise private defence when an opponent assaults one of his teammates and he uses force to avert the attack, as he would defend himself if he were assaulted.⁸¹ It is however difficult to distinguish between genuine private defence on behalf of a fellow player and retaliation. In the heat of the game it is very often difficult enough for the referee to draw this distinction, it will be even more so to draw such a distinction in a courtroom, months after the incident occurred.⁸²

3.2.1.3 Provocation

Rugby is a series of physical confrontations that may be extremely provocative and obstruction and intimidation both play a vital role in these confrontations.⁸³ Provoking players into retaliation, especially those known for their short and violent tempers is an old and much-used tactic.⁸⁴

⁸⁰ 381 NYS 2d 976 1976 as cited by Beumler 1980 *Arizona Law Review* 925

⁸¹ Burchell & Hunt *Criminal Law* 80

⁸² Gardiner et al *Sports Law* 468

⁸³ Crawford "Rugby Violence" 1976 *British Journal of Physical Education* 204 204

⁸⁴ Terblanche "Let's Be Consistent" *Eastern Province Herald* (1994 - 07 - 20) 6

In *R v Gingell*⁸⁵ the English court stated *obiter* that where a charge of sport-related assault is laid, almost without exception provocation would be raised as a defence. On the facts of the case, the court held that even though the initial blow struck by Gingell was provoked, there was no excuse for the following blows.⁸⁶

Provocation does not however operate as a ground excluding unlawfulness as do the grounds discussed above, but may exclude mens rea on the side of the perpetrator for the following reasons:

(a) It may exclude criminal capacity

If the evidence reveals that the accused because of the provocation, at the time of the commission of his act suffered such emotional stress or anger that he failed to appreciate the unlawfulness of this act or was unable to act in accordance with such appreciation, then the accused, due to the provocation must be found not guilty.⁸⁷ In *S v Van Vuuren*⁸⁸ the court held that “[o]ther factors [such as provocation] which may contribute towards the conclusion that [the accused] failed to realize what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability”. The Supreme Court of Appeal

⁸⁵ 1980 Crim LR 661 as cited in Kelly *Sport and the Law* 252

⁸⁶ Gardiner et al *Sports Law* 460 In a similar situation, on 14 September 2002 Springbok Andre Venter hit colleague Robbie Fleck during a Currie Cup match. After Fleck kicked him in self defence to get Venter off him, Venter started hitting him repeatedly. They were both suspended for more than one week that was later suspended. Pretorius "Vuisslaners hoor vandag of hulle 'getug' gaan word." *Die Burger* (16-9-2002)

⁸⁷ Snyman *Criminal Law* 237

confirmed in *S v Campher*⁸⁹ that provocation does can not only possibly exclude the accused's intention but in certain extreme cases also exclude criminal capacity in respect thereof, with the result that the accused would be acquitted.

(b) It may exclude intention

A player who is *doli capax* may nevertheless escape criminal liability on the basis, that as a result of provocation he lacks intention to commit a crime⁹⁰. The reason why provocation excludes intention is that the provoked person usually directs his actions towards injuring the victim but as a result of the circumstances fails to appreciate the unlawfulness of his actions.⁹¹

In *Moreland v De Villiers*⁹² the defendant stated in his address to the court that he bona fide believed that he was entitled to punch his opponent after provocative behaviour by the opponent. The defendant believed that his act was justified and consequently did not have knowledge of unlawfulness.

In practice if a person is charged with a qualified form of assault, such as assault with intent to do grievous bodily harm, it is accepted that a successful reliance on provocation will exclude the specific intent but that

⁸⁸ 1983 1 SA 12 A 17 G – H

⁸⁹ 1987 1 SA 940 A

⁹⁰ Burchell & Hunt *Criminal Law* 263

⁹¹ Snyman *Criminal Law* 237

the accused must nevertheless be convicted of common assault⁹³. Snyman criticizes this practice, as being nothing other than an application of the “specific intent” doctrine. He states that it is difficult to see how, if the provocation excludes the intent to do grievous bodily harm, the accused can still entertain ordinary intent to commit common assault.⁹⁴

It may be attributed to the court’s unwillingness to acquit an accused on the defence of provocation, since it can create the impression that a person who is provoked by another has the right to take the law into his own hands, while public policy demands otherwise.⁹⁵

In addition to the above effects of provocation it also will serve as a factor considered in mitigation of sentence,⁹⁶ even if it is found to have excluded neither capacity nor intention. In the English case of *Fraser v Berkeley*⁹⁷ it was held:

“The law would be an unwise law, if it did not make allowance for human infirmities; and if a person commits violence at a time when he is smarting under immediate provocation, that is a matter of mitigation”

⁹² Unreported. Cape Town Magistrates Court Case No 4387/94
⁹³ Snyman *Criminal Law* 237
⁹⁴ Snyman *Criminal Law* 238
⁹⁵ Snyman *Criminal Law* 239. Kelly 1987 *Sport and the Law* 252
⁹⁶ Snyman *Criminal Law* 239
⁹⁷ 1836 173 ER 272 as cited by Kelly *Sport and the Law* 252

3.2.1.4 Conclusion

If a player therefore injures, or seriously injures another player by means of conduct constituting foul play whilst playing a game of rugby, and that injury results in charge of assault or assault with intent to do grievous bodily harm, he can raise the defences of consent to injury and private defence to show that his conduct was lawful or show that the provoking behaviour of the victim caused his criminal capacity or intention to be excluded. Since a concept such as negligent assault is not part of our law, once the intention of the accused is shown to be excluded he will have to be acquitted by the court.

The principles as set out above will only apply where a player had injured another player. In the instance where a player for example assaulted a referee during a game, the ordinary principles relating to assault will apply would addition to the player exposing himself to disciplinary action by the union to which he is affiliated.⁹⁸

3.2.2 Murder and Culpable Homicide

Murder consists of the unlawful, intentional causing of death, while culpable homicide consists of the unlawful, negligent causing of death of another human

⁹⁸ A disciplinary committee banned an Eastern Province player who assaulted the referee during a club match on the 20th of June 1998 from rugby in the Eastern Cape for life. Harmse "Speler praat oor hou en skorsing" *Die Burger* (1998 – 06 – 25) 15

being.⁹⁹ Therefore if a player intentionally kills another player or causes grievous bodily harm from which death results,¹⁰⁰ then he commits murder.¹⁰¹

If however a player acts in such a manner that serious injury causing death results, such as in the instance of a reckless violent head-high tackle, failing to foresee that death might result from his actions, then his conduct falls short of the reasonable man. This will render him negligent and, where death results from his actions, guilty of culpable homicide. In South African law culpable homicide is defined as the unlawful, negligent causing of the death of another human being.¹⁰²

In *R v Hillebrand*¹⁰³ the court held that:

“If forward A in a rugby scrum were deliberately to kick forward B on the head, and as a result of that kick forward B were to die, then forward A would be guilty of culpable homicide because forward A would have committed an assault upon forward B not permitted by the rules of the game of rugby”

It is submitted that while this decision was made in an era where convictions were reduced as a matter of policy, the same example if reviewed today would render forward A guilty of murder. It is clear from the example that intention is present and not negligence. English case law follows a similar approach. In *R v Bradshaw* the court held that “[n]o rules of practice of any game can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another”.¹⁰⁴ Therefore

⁹⁹ Snyman *Criminal Law* 421

¹⁰⁰ See Chapter Two for the ways in which deliberate or even negligent foul play may result in the death of a player.

¹⁰¹ “The Player and the Law” 1984 *Rugby World* 45 45. The writer also states that although some may have tried, until the publishing of the article there has not been any known case of rugby murder.

¹⁰² Snyman *Criminal Law* 425

¹⁰³ 1959 3 SA 22 T 23 E – F

¹⁰⁴ 1878 14 Cox 83 as cited by Kelly *Sport and the Law* 247

where death results from the actions of a player, the inquiry does not involve the question whether a rule of the specific sport has been breached, as is the case with assault. In *R v Moore*¹⁰⁵ the court held that “the rules of the game were quite immaterial and it did not matter whether he broke the rules or not”. The court outlined the test for culpable homicide in sport as follows:

“Football was a lawful game, but it was a rough one, and persons who played it must be careful to restrain themselves so as not to do bodily harm to another person. No one had a right to use force, which was likely to injure another, and if he did use such force and death resulted the crime of manslaughter had been committed. If a blow were struck recklessly which caused a man to fall, and in falling he struck against something and was injured and died, the person who struck the blow was guilty of manslaughter.”

As the possible defences that may be raised by the player have been discussed at length above the differences in application with the regards to murder and culpable homicide will be highlighted.

3.2.2.1 The Defence of Consent

Our common law does not permit a person to consent to his own death.¹⁰⁶ Therefore an accused may not raise this defence to a charge of murder or culpable homicide and no further inquiry into this defence would be necessary.

¹⁰⁵ 1898 14 TLR 229 as cited by Kelly *Sport and the Law* 247 – 248
¹⁰⁶ Snyman *Criminal Law* 123. Burchell & Hunt *Criminal Law* 128 – 129

3.2.2.2 Private Defence

As set out above private defence may be raised by the accused providing all the requirements for the defence has been met.¹⁰⁷ A requirement that would receive special attention concerning a charge of murder or culpable homicide is the requirement that the force used may not be more harmful than necessary to ward off the attack.¹⁰⁸ In the English case of *R v Hardy*¹⁰⁹ a brawl between players of both sides broke out after a ruck in a rugby union game. The deceased attacked the defendant from behind and the defendant punched the deceased on the jaw. The deceased fell and hit his head on the ground, which was still very hard from recent frost. The deceased died two days later.

The defendant claimed that he only threw the punch as he was being hit from behind and had received repeated blows to the head, the only way he believed that he could prevent further blows from behind was to hit his assailant.

The unforeseen consequences of his actions did not affect the operation of the defence of private defence.¹¹⁰ The accused was acquitted on a charge of manslaughter after raising private defence.

¹⁰⁷ See 3.2.1.2

¹⁰⁸ Snyman *Criminal Law* 102 – 106

¹⁰⁹ reported in *The Times* (12 – 07 – 1994) and *The Scotsman* (22 – 07 – 1994) cited by Duff 1994 *The Scots Law Times* 280 – 281 and Gardiner *Sport and the Law* 463 and 468

¹¹⁰ Gardiner et al *Sports Law* 468 In South African law the court has held in *S v Van As* 1976 2 SA 921 (A) that the court would not expect of the accused to foresee a possibility that the reasonable man would not be expected to foresee. It is therefore submitted that the South African courts will follow a similar approach.

3.2.2.3 Provocation

As with assault, provocation would have the effect of either excluding criminal capacity or intention on the side of the accused regarding a charge of murder.

However if a player is charged with murder and the court finds that as a result of provocation he did not have intention to kill, he may still be convicted of culpable homicide if it appears that he acted negligently. It is highly unlikely that a court would find an accused, who killed the victim as a result of provocation, not to have acted negligently. The result would be in practice that if provocation were successfully raised against a charge of murder then the accused would almost without exception be convicted of culpable homicide.¹¹¹

If however the player is charged with culpable homicide, provocation will exclude his negligence only if it can be shown that the reasonable man would also have lost his temper and have acted in the same way the accused did.¹¹² In this instance an objective test would be applied rather than the subjective test used in the instance of a charge of murder or assault.

3.2.2.4 Conclusion

Although there have been few instances of prosecution for culpable homicide and no reported prosecutions for murder on a rugby field, a murder prosecution is possible should a player be killed as a result of another player's intentional

¹¹¹ Snyman *Criminal Law* 240

conduct. On such charges the defences which may be successfully raised are private defence and provocation.

3.3 Liability of the Coach and Referee

3.3.1 Introduction

Coaches and referees are officials central to the everyday life of a sporting organisation¹¹³ and greatly influence players due to the specific relationship between these officials and the players. All officials involved in rugby have a duty of care towards their players and have to fulfil certain legal requirements to avoid liability.¹¹⁴ Responsibility is therefore increasingly placed upon coaches and other officials to prevent injuries to the players,¹¹⁵ whether the injuries arise as a result of foul play or otherwise.

In accordance with criminal law principles, liability may arise for these officials due to both a voluntary act or an omission.¹¹⁶ To establish liability on account of an act would be relatively clear-cut. It is however more difficult to establish liability on account of an omission. For the purposes of the criminal law an omission is constituted by a “failure to act positively in circumstances where there is a legal duty to act positively”.¹¹⁷

¹¹² Snyman *Criminal Law* 240

¹¹³ Kelly *Sport and the Law* 176

¹¹⁴ Du Plessis and Noakes *Rugby Without Risk* 279 At provincial and international level these officials include the team’s medical doctor, physiotherapist and fitness expert. The discussion of liability will however be confined to the coach and referee.

¹¹⁵ Labuschagne 1998 *Stell LR* 72 73

¹¹⁶ Snyman *Criminal Law* 51 – 63

¹¹⁷ Snyman *Criminal Law* 57 – 58

Before it can therefore be said that there will be criminal liability on the part of a coach or a referee on account of an omission,¹¹⁸ it has to be established whether the law imposes a duty on such official to act in a certain way in certain circumstances. This issue has been extensively adjudicated on, pertaining to the law of delict, in rugby playing countries. Since the principles of delict and criminal law are interrelated it is submitted that these principles, as developed by the courts, may apply *mutatis mutandis* in the event of a case pertaining to the issue raised hereunder coming before a criminal court. Similarly the foreign decisions apply principles to those applicable in South African law, and may guide the South African courts in deciding on the liability of a coach or referee.

3.3.2 Liability of a Coach

3.3.2.1 Introduction

In team sports, such as rugby, the coach appears as a father figure or guru to the players.¹¹⁹ The view that a coach should “look after” his players to ensure their safety is widely accepted. The Australian Rugby Football Union’s safety directives include the following advice:

- “ Players should be selected for positions appropriate to their physical build and stature; they should be physically fit when selected and those unfit should not be selected; all players should train with special exercises to strengthen their necks, limbs and torso. This applies particularly to front-row forwards.

¹¹⁸ Apart from criminal liability arising out of an act, which is governed by criminal law principles in general and not relevant for the purposes of this discussion.

¹¹⁹ Kelly *Sport and the Law* 176

- Pre-match talks should not be used to promote excessive levels of aggression or a 'win at all costs' attitude.
- Players must be coached on how to scrum, tackle and ruck and maul...
- Players who are guilty of repeated acts of illegal or foul play should not be selected."¹²⁰

A coach will to a certain extent have a significant influence on what his team does on the field. Therefore, where a coach causes the death of a player by means of his culpable conduct (or lack of conduct), he can be found guilty of murder, where intention is established or culpable homicide, where negligence is present.¹²¹ A coach must meet the standard of conduct of a reasonable coach within his group in these particular circumstances.¹²² It is submitted that a coach at a professional level will have to comply with a higher standard of conduct than a coach who coaches at a lower level of the sport.

3.3.2.2 Basis of the Legal Duty Imposed on the Coach

The general rule pertaining to a legal duty to act, as expressed in *Minister van Polisie v Ewels*¹²³ is that a person is not under a legal duty to prevent harm to another. There are however exceptions to this rule. The legal duty imposed on the coach can be based on one of the following grounds:

¹²⁰ Du Plessis and Noakes *Rugby Without Risk* (1996) 229

¹²¹ Van der Merwe "Juridiese Aanspreeklikheid van die Sport Afrigter vir Beserings" 1989 *Noublad* 36

¹²² Prinsloo "Liability in Sport And Recreation" 1991 *TSAR* 42 48

¹²³ 1975 3 SA 590 A

(a) Prior Conduct

When a person has through his own conduct created a potentially dangerous situation then he is under a legal duty to prevent the danger from materialising.¹²⁴ An example of such prior conduct can be found in the Australian case of *O'Brien v Mitchel College of Advanced Education*¹²⁵ where a rugby coach taught his forwards a dangerous tactic, the “flying wedge”¹²⁶ whereby the forwards exercise pressure on their opponents in a V-formation. In the course of a game the players, in doing this, caused serious injury to an opponent, severing his spinal cord.

It is submitted that by teaching the players this potentially dangerous manoeuvre, the coach had not only failed to comply with the legal duty of preventing his players from using a tactic that clearly causes serious injuries, but had also acted negligently, by teaching them a tactic which is prohibited by the safety rules embodied in Law 26, in the first place.

(b) Protective or Special Relationship

A person who stands in a special or protective relationship towards another may be under a legal duty to take steps to protect that person from harm.¹²⁷ In the English case of *Affutu-Nartoy v Clarke*¹²⁸ pupils participated in a practice

¹²⁴₁₂₄ Burchell and Hunt *Criminal Law*48

¹²⁵ Unreported, Supreme Court of New South Wales, 17 November 1985 As cited by Kelly *Sport and the Law*112 – 113.

¹²⁶ Law 26(4) of the Laws of Rugby Football expressly provides that “it is illegal for a team to adopt [a play] known as the Flying Wedge”

¹²⁷ Burchell and Hunt *Criminal Law*49

¹²⁸ as reported in *The Times* (1984 – 02 – 09) and cited in “The Player and the Law” 1984 *Rugby World* 46-47

game of rugby football. There were insufficient members to make two full sides and the teacher who was coaching them played in the full back position for the weaker team. He also refereed and coached the game as they went along. In the course of the game the coach tackled one of his pupils and the pupil sustained serious injury to his lower vertebrae.

The judge in this case held that in a moment of aberration, the coach tackled in a dangerous and illegal manner. In doing this he failed in his duty of care towards the pupil he was coaching.¹²⁹

(c) Contract or Undertaking

A legal duty may be imposed by agreement, whether express or implied.¹³⁰ Between the player and the coach there may be a contract, with an implied term of reasonable care.¹³¹

Kelly states that the legal relationship between the player and the coach is analogous to the legal relationship between physician and patient.¹³² In this instance the coach would then also be under a legal obligation to warn the player of the inherent risks of the game or a specific tactic.¹³³

¹²⁹ Anonymous 1984 *Rugby World* 47

¹³⁰ Burchell and Hunt *Criminal Law* 51

¹³¹ Kelly *Sport and the Law* 176

¹³² Kelly *Sport and the Law* 176

¹³³ Burchell and Hunt *Criminal Law* 51, Kelly *Sport and the Law* 177

3.3.2.3 Content of the Duty and Standard of Care

The content of the duty will depend on the circumstances and the principles applicable to negligence in general.¹³⁴ In essence, all cases of negligence involve the failure to achieve a particular standard through some omission.¹³⁵ The test will therefore be whether the reasonable man in the position of the coach would have foreseen that the particular consequences might have resulted from his act or omission and whether the reasonable person in the position of the coach would have guarded against such possibilities.¹³⁶

In *Clarke v Welsh*¹³⁷ the South African court however held that if the occurrence of injury in a particular instance is such a rare one that no reasonable person could have foreseen it, then no liability would arise. In the Canadian case of *Taylor v R* the court held that the standard of care imposed on a coach or instructor is that of the reasonable parent.¹³⁸

The duties imposed on a coach can be divided into three broad categories. The coach must discharge his responsibilities in the areas of facilities and organisation, instruction and supervision and medical care.¹³⁹

¹³⁴ Kelly *Sport and the Law* 177

¹³⁵ Burchell and Hunt *Criminal Law* 47

¹³⁶ Snyman *Criminal Law* 208

¹³⁷ 1975 4 SA 469 (W) 482 A – B

¹³⁸ 1978 95 DLR 3d 82 as cited by Kligman "Tort Liability for Sports Injuries" 1989 *Canadian Insurance Law Review* 153 173 – 174

¹³⁹ Kligman 1989 *Canadian Insurance Law Review* 172

(a) Facilities and Organisation

A coach will be under the obligation to select and use premises and equipment that are accepted as reasonably safe for the purposes it intended for. A coach may also be under the obligation to ensure that the event in which the players partake is safely organised.¹⁴⁰

In *Leahy v School Board of Hernando County*¹⁴¹ college gridiron football coaches were held liable for breach of their duty of care after they had “knowingly permitted the players to practise when equipped contrary to directions”. The coaches allowed the players to practise drills without proper helmets and one player sustained severe facial injuries.

(b) Instruction and Supervision

The coach should exercise reasonable care in his instruction of the players and the supervision of the activities undertaken by the players.¹⁴² In the American case of *Vendrell v School District No 26C*¹⁴³ a school football player suffered a broken neck when charging headfirst into approaching tacklers. It was argued on behalf of the plaintiff that the coach had been negligent since he

¹⁴⁰ Kligman 1989 *Canadian Insurance Law Review* 172

¹⁴¹ 450 So 2d 883 1984 as cited by Kelly *Sport and the Law* 181

¹⁴² Kligman 1989 *Canadian Insurance Law Review* 172

¹⁴³ 376 P 2d 406 1962 as cited by Kelly *Sport and the Law* 178

had recommended the manoeuvre that had caused the injury. The coach was not held liable since the court found that the players had undergone extensive training and practice under competent supervision and instruction in the fundamental skills of the game.

This category would also include the duty to warn the players against the inherent dangers of certain tactics and to give instruction how to reduce the risk of injury related to the specific tactic or phase of play. The disclosure requirement is analogous to that of informed consent regarding medical treatment.¹⁴⁴ Where the risks are already familiar, or are manifest then such knowledge may serve as a warning.¹⁴⁵

(c) *Medical care*

The coach should ensure that where one of his players are injured, further participation should be prohibited where necessary. In the event of serious injury, it is the coach's duty to provide reasonable and necessary first aid and also to summon further medical assistance.¹⁴⁶ It is of utmost importance that a coach should not act beyond the scope of his knowledge of what first aid or medical measures are appropriate when serious injury occur.¹⁴⁷

¹⁴⁴ Kelly *Sport and the Law*177

¹⁴⁵ Kelly *Sport and the Law*177

¹⁴⁶ Kligman 1989 *Canadian Insurance Law Review* 173

¹⁴⁷ Kelly *Sport and the Law*180

In the American case of *Mogabgab v Orleans Parish School Board*¹⁴⁸ a player became ill during a training session. The player was covered with a blanket and after some discussion took place the coach declined to call a doctor. The player was eventually taken to hospital and died soon thereafter. The court held that the coach was to be held liable for the player's death because he was negligent in denying proper medical treatment and by administering "ill-chosen first aid in an untrained manner". It is therefore clear that if there is any doubt as to the nature of the injuries sustained professional medical assistance should be obtained.¹⁴⁹

3.3.3 Liability of a Referee

3.3.3.1 Introduction

The referee is the sole judge of the Rugby Laws and of fact during a match and all his decisions are binding upon the players.¹⁵⁰ However, Grayson in a statement to the press has said that "[r]efereeing a physical contact sport becomes a risky activity. It means that referees have got to observe the laws of the game meticulously and keep strict control, because otherwise they could be challenged in court".¹⁵¹

¹⁴⁸ 239 2d 456 1970 as cited by Kelly *Sport and the Law* 180

¹⁴⁹ Kelly *Sport and the Law* 180

¹⁵⁰ Law 6(5)

¹⁵¹ Lee, Goodman and Hands "Rugby Referee Blamed for Paralysed Player" *The Times* (20 – 04 – 1996)

It is obvious that a referee is only human and that room must be left for mistakes on his side. The Rugby Laws were amended in 1889, not to make the referee infallible, but to establish a degree of certainty on the application of the Laws and judgement of fact during a match.¹⁵² However, the referee will have a duty of reasonable care towards players in a match that he is refereeing and if he fails to comply with that duty, it is submitted that in certain instances the referee may be held criminally liable.

3.3.3.2 Basis of the Legal Duty Imposed on the Referee

As stated above¹⁵³ there is no general legal duty on a person to prevent harm to another. The situation of the referee can however be seen as an exception. It is submitted that the legal duty imposed on the referee can be based on a “contract” or undertaking between the referee and the players. The decisions of the referee is binding on the players¹⁵⁴ and they must conduct themselves accordingly¹⁵⁵ whilst the referee must ensure that the Laws are adhered to and applied which will include the meticulous application of the safety rules in order to reduce the risk of injury to the players.

¹⁵² <http://www.the-times.co.uk/cgi-bin/BackIssue?2528726>
¹⁵³ Prinsloo “Regsaanspreeklikheid van 'n Skeidsregter” 1992 *Tydskrif vir Regswetenskap* 92 95
3.3.2.2
¹⁵⁴ Law 6(5)
¹⁵⁵ Law 6(8) states that all players must respect the authority of the referee and they must not dispute his decisions.

3.3.3.3 Content of the Legal Duty and Standard of Care

The standard of care that must be observed by the referee is that of the reasonable referee.¹⁵⁶ Prinsloo holds the reasonable referee to be a person who with reasonable capacity and care applies the Laws in such a way that dangerous play is prevented and the players are not exposed to an unnecessary risk of injury.¹⁵⁷

In the controversial English High Court decision *Smoldon v Whitworth and Nolan*¹⁵⁸ a hooker sustained fractured cervical vertebrae causing permanent paralysis in his lower body and limbs. This injury occurred when a scrum was collapsed intentionally by opposing prop forward, Thomas Whitworth, and the plaintiff alleged that the referee should have acted earlier to prevent the accident.¹⁵⁹ It was alleged that the referee had allowed twenty-five previous scrum collapses to go unpunished.

The final scrum in which the plaintiff sustained the injury was collapsed and reformed twice. The court held that the known risk of a collapsed scrum was spinal injury of the utmost severity. Where there is such a high known risk there is nothing objectionable in the law seeking to protect rugby players from potentially dangerous or lethal aspects of the game by imposing a duty of

¹⁵⁶ Prinsloo "Aanspreeklikheid van 'n Skeidsregter vir die Besering van 'n Rugbyspeler" 1996 *TSAR* 799

¹⁵⁷ Prinsloo 1996 *TSAR* 799

¹⁵⁸ Queen's Bench Division, unreported as cited by Prinsloo 1996 *TSAR* 793 and reported in *The Times* (23 – 04 – 1996) http://www.rugbyreferee.org.nz/art_frm.htm

¹⁵⁹ Lee "The Times Reports the Smoldon Decision" *The Times* (26 – 03 – 1996) http://www.rugbyreferee.org.nz/art_frm.htm

care.¹⁶⁰ The court also held that the referee did not understand, nor did he apply the Law pertaining to scrummage prescribing the crouch – touch – pause – engage sequence and allowed three to four times the normal amount of scrummages to collapse. Consequently the referee fell short of the “standard of a reasonably competent referee in refereeing the scrummages in this game”¹⁶¹ and was held liable for the plaintiff’s injury.

The duty imposed on the referee will encompass everything relating to the application of the laws relating to foul play as well as the laws relating to injured players and availability of first aid or medical care. Law 26 states that as a penalty for misconduct or dangerous play the referee must either order the player off, or caution the player that he will be ordered off if he repeats the offence. For a similar offence after the caution the referee must order the player to leave the field. Law 6(3) states that the referee must “in every match apply the Laws of the Game without any variation or omission”. There are two options available to a referee attempting to minimalise injuries during the game. The first is the so-called “quick whistle” option. Here the referee will respond very quickly in order to prevent a piling up of players on the ball. The second option open to the referee is to let the players play until a transgression takes place. In this instance the player will have to accept responsibility for his actions and the referee will have to discipline the player accordingly.

¹⁶⁰ Reported in *The Times* (23 – 04 – 1996) http://www.rugbyreferee.org.nz/art_frm.htm
¹⁶¹ Prinsloo 1996 *TSAR* 797

Regarding injured players the Laws state in Law 3(6)(b) that if the referee is advised by a doctor or other medically trained person or for any other reason considers a player so injured that that it would be harmful for him to continue playing, the referee must require of the player to leave the field.

The referee is therefore not only obliged to discharge the duties as imposed on him by the laws of rugby but must in addition at all times adhere to the standard of the reasonable referee in the circumstances of the specific match.

3.3.3.4 Conclusion

A coach, who shapes the players and the techniques applied during a game, and a referee, who regulates play during a match, are therefore significant role-players in what happens during a rugby match. If they fail to act with the reasonable skill and care expected from them at the level that the game is played, they will expose themselves to prosecution arising out of their negligent conduct. Coaches and referees should follow directives, prescribed by their unions in order to minimise serious injury, meticulously and strive towards making rugby a safer and less violent game for all involved.

3.4 Conclusion

Violence in rugby poses a serious problem. The problem of violence in contact sport must be controlled, for without some type of restraint it may

potentially hold serious negative consequences for our society.¹⁶² Interference by means of the criminal law may prove to be instrumental in imposing such restraints.

There has for some time been a movement towards greater safety on the rugby field. Commissioners for the purpose of citing foul play have been implemented at games in an attempt to curb incidences of foul play. Citing may also take place after the game by the relevant team by means of studying video recordings of the game. Certain procedures prescribed by the relevant authority must however be observed. In an incidence of violence between a Western Province and Eastern Province player in 1998 the citing of a Western Province player was not made timeously by the Eastern Province Union and SARFU was not able to take disciplinary steps against the culprit.¹⁶³

Although these measures go a long way towards curbing the on-field violence their objects are defeated by an attitude among players and officials alike of “If you don’t cite me then I won’t cite you”, and the fact that not all games are televised and therefore this “after the game” facility is not always available.

Although video recordings are used as a matter of course by internal tribunals, and are treated as primary evidence, the courts have to adhere to

¹⁶² Nielsen 1989 *Iowa Law Review* 686
¹⁶³ Harmse *Die Burger* (13 – 08 – 1998) 1

certain evidentiary rules and may possibly not attach the same evidentiary weight to the recordings.¹⁶⁴

The issue whether criminal liability arises when somebody commits an act of violence, which is not considered as part of the game or violates a safety rule, on the rugby field, is a moot point. In theory, in South African law, you can be charged, tried and convicted of assault, culpable homicide, attempted murder or murder for an act of violence on the rugby field. You are liable whether you are a player¹⁶⁵ or official,¹⁶⁶ although liability will be based on different grounds.

Kelly states that special sensitivities are involved in a sport like rugby and that players and officials have to be brought to appreciate that the intervention of the criminal law may be indispensable and that in the interest of the sport they have to co-operate.¹⁶⁷ Care must be taken to ensure that the law is not viewed as a punitive force used by the aggrieved party to extract revenge at every possible opportunity. Emphasis should be placed on the positive component of a legal presence in the sporting sphere; ideally having the result of a culture of understanding of the legal responsibilities of all involved in the game. This would ensure that everyone is more careful in the execution of their responsibilities to everyone else in the game.¹⁶⁸

¹⁶⁴ Kelly *Sport and the Law* 254

¹⁶⁵ See 3.2

¹⁶⁶ See 3.3

¹⁶⁷ Kelly *Sport and the Law* 254

¹⁶⁸ Noakes and Du Plessis *Rugby without Risk* 275

Rugby officials, lawyers, medical officers and players alike, must co-operate to make rugby a safer, but not less spectacular, game for all. With the game becoming more and more professional, the rewards for winning in rugby and the urge to win and tensions among players become more and more extreme, giving rise to attempts to secure an unfair advantage by culpable means.¹⁶⁹

Such co-operation between rugby and the criminal law will not only be in the best interests of the already violent society we live in, but also in the best interests of the game.

Chapter 4: Delictual Liability for Rugby Injuries

4.1. Introduction

The incidences of serious debilitating injury on our rugby fields are on the increase. Apart from the fact that this is an alarming phenomenon, the fact remains that the reliance of a professional rugby player on his physical fitness and ability to play a match of rugby is not that of the ordinary man in the street. Recourse to the internal tribunals of the sporting body may afford the victim of sports violence or other negligent conduct some satisfaction in that the perpetrator is punished, but it does not remedy patrimonial loss suffered by the victim of the abovementioned conduct. As early as the 1980's the need for a body of sports law principles relating to liability for sports injuries was advocated by Parmanand.¹ He stated that the sporting world should take cognisance of the fact that:

- "1. Merely because an injury has been incurred in the name of sport does not mean that the victim is ineligible for compensation.
2. Sports and sports enterprises do not enjoy insulation from legal liability.
3. Unsportsmanslike conduct resulting in injury does occasion delictual and criminal liability.
4. Negligence in sport by participants inter se or between participants and spectators differ only minimally from

negligence in everyday society and such negligence can indeed be the subject of judicial scrutiny"²

Delictual liability would occur whenever the act of one person unlawfully and culpably causes damage to another, irrespective of the kind of interest affected by the act. The law of delict is therefore based on general principles that developed around the five elements of delictual liability namely the act, causation, damage, unlawfulness and fault.³

The South African law of delict distinguishes between delicts involving patrimonial damage or *damnum iniuria datum* and those delicts involving injury to personality rights or *iniuria*. This distinction between the two forms of delict derives from the Roman law distinction between the *Actio legis Aquiliae* and the *Actio Iniuriarum*.⁴

Delictual liability for a sports injury centres on the question whether there was a legal duty on the perpetrator to protect the victim from harm, and if such a duty is found to exist, the standard of care must be determined. A number of defences will be available to the alleged perpetrator including consent, necessity, provocation and the defence of *volenti non fit iniuria*. What exactly the latter defence entails, will be dealt with later in detail.

¹ Parmanand *Sport Injuries in the Civil Law* (1987) 9

² Parmanand *Sport Injuries* 9

³ Basson and Loubser *Sport and the Law in South Africa* (2000) 5-10

⁴ Basson and Loubser *Sport and the Law* 5-10 - 5-11

Delictual damages can also be awarded on the basis of vicarious liability, which is typically imposed in an employer/employee relationship.⁵ This means not only can the player, coach, referee or occupier who causes injury to a player be sued, but also the sporting body that employs such person.

The role that the law of delict plays is therefore thus to compensate those who suffer injury and resultant loss and pain and inconvenience as a result of the fault of another⁶ where the injury results from onfield violence⁷ incorrect training, or the negligence of another. In the case of a culpable sports injury, the injured party may claim for reparation of personal harm in the form of a solatio, compensation for patrimonial loss such as medical expenses, loss of income and other calculable pecuniary damage and compensation for pain and suffering.⁸

Although delict is not generally used to punish the perpetrator, the award of damages does punish the perpetrator indirectly in that he is "punished" financially.

4.2. Personal Liability

To establish wrongfulness the conduct of the perpetrator must have either infringed a subjective right of another player or wrongfulness will arise due to the breach of a legal duty. If it is established that the perpetrator acted with

⁵ Basson and Loubser *Sport and the Law* 5-11

⁶ Basson and Loubser *Sport and the Law* 5-11

⁷ Gardiner, Felix, James, Welch and O'Leary *Sports Law* (1998) 474

⁸ Prinsloo "Liability in Sport and Recreation" 1991 *TSAR* 42 42

intention in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis* or that he failed to discharge the duty of care placed upon him, ie was negligent, and damage ensues, the perpetrator can be held delictually liable. Delictual liability of the players individually, the coaches, referees and medical officers involved in rugby will now be examined in detail.

4.2.1 Liability of a player

Claims for sporting injuries are often dismissed by lawyers and the general public alike on the basis of the *volenti non fit iniuria*⁹ principle. What is lost sight of however is that the ordinary principles of delictual liability also apply to conduct on the rugby field.¹⁰

In the English case of *Condon v Basi*¹¹ the court outlined two approaches that may be followed in establishing delictual liability for a sporting injury:

(1) The first is that standard delictual principles are applicable in all situations, but this approach is modified on a case to case basis by the *volenti non fit iniuria*¹² in the sense of consent to risk of injury by the plaintiff.¹³ For example what would generally be regarded as an assault would not amount to assault in the circumstances because consent or voluntary assumption of risk eliminates

⁹ A willing person is not wronged

¹⁰ Midgley "Sporting injuries" 1986 *Businessman's Law* 115 115

¹¹ 1985 1 WLR 866 CA As cited by Midgley 1986 *Businessman's Law* 115. James Condon suffered a broken leg from a foul tackle by Gurdaver Basi in a local league soccer match. The offender was sent off but the plaintiff sued for the English torts of assault, battery and negligence. Grayson *Sport and the Law 3ed* (2000) 277

¹² Midgley 1986 *Businessman's Law* 116

¹³ Moore *Sports Law and Litigation 2ed* (2000) 77

the apparent wrongfulness of the perpetrators conduct. This approach focuses on the wrongfulness of the perpetrator's act.

(2) The second approach, which the court preferred in this instance, takes the view that the general principles have a built in modifier, which takes into account all of the circumstances of the case. The question of consent or voluntary assumption of risk will not affect the outcome. This approach places a general duty on the player to take all reasonable care, taking into account the circumstances under which he is placed.¹⁴ This approach focuses on fault, more specifically on negligence

To fully understand the delictual liability that arises when one player injures another wrongfully and culpably, regard must be had to the different grounds of justification and the elements of delict they eliminate, as well as the question of whether a duty of care rests upon a player and the standard of that duty of care and the factors that may influence the standard of care.

4.2.1.1 Liability for omissions - duty to protect from harm

This category concerns the nature of the defendant's conduct. Van der Walt and Midgley consider the legal duty approach the most appropriate method for dealing with this issue.¹⁵ To establish whether a legal duty existed the question will always be whether the defendant ought to have reasonably and practically

¹⁴ Midgley 1986 *Businessman's Law* 116, Moore *Sports Law* 77

¹⁵ Van der Walt and Midgley *Delict Principles and Cases* (1997) 70. Roman Dutch law accepted the principle that a failure to act when a legal duty to act existed was actionable. Van der Walt and Midgley *Delict* 70

prevented the harm to the plaintiff.¹⁶ In *Nabozny v Barnhill*¹⁷ the court had to consider whether a player is liable for the negligent infliction of injury to an opposing player. In judgment the court held that:

" where a safety rule is contained in a recognised set of rules governing the conduct of an athletic competition, a participant in such competition, trained and coached by knowledgeable personnel, is under a legal duty to every other participant to refrain from conduct prescribed by the safety rule and is liable in tort when his conduct is either deliberate, wilful or with a reckless disregard for the safety of a fellow participant."¹⁸

The court will be required with regard to every case to consider the following: "the possible extent of the harm; the degree of risk that the harm will materialise; the interests of the defendant and the community; the availability of practical preventative measures and the chances of their success; and whether the cost in preventing the harm is reasonably proportional to the harm".¹⁹ The omission can be performed negligently or intentionally and should not be confused with an omission to take reasonable steps to prevent foreseeable harm, which would amount to negligence and not to an omission as a form of conduct giving rise to liability.²⁰

An instance in which the court determined that a legal duty exists²¹ and which is very likely to find application in the law of sport is that of a special relationship between the parties. As had been pointed out omission as a species of conduct

¹⁶ Van der Walt and Midgley *Delict* 70

¹⁷ 31 Ill App 3d 212, 334 NE 2d 258 1975 as cited by Parmanand *Sport Injuries* 142

¹⁸ Parmanand *Sport Injuries* 142

¹⁹ Van der Walt and Midgley *Delict* 70

²⁰ Neethling, Potgieter and Visser *Law of Delict 4ed* (2001) 131

²¹ Van der Walt and Midgley *Delict* 72

and negligence in the form of an omission should not be confused. However the English doctrine of duty of care²² can be used effectively in determining if there was a duty on the defendant to protect the plaintiff from harm.

The doctrine of duty of care involves a two-part enquiry:

1. Whether the defendant owes a duty of care towards the plaintiff.
2. Whether that duty of care was breached.²³

In *Condon v Basi* the court expressed its surprise that there was no authority as to the standard of care applicable to the conduct of players in competitive sports, especially those including physical contact. The court outlined two possible approaches:²⁴

- "(1) to take a more generalised duty of care and to modify it on the basis that the participants in sport impliedly consent to taking risks which would otherwise be a breach of the duty of care;
- (2) alternatively that there is a general standard of care - the so-called neighbour principle propounded by Lord Atkin in *Donoghue v Stevenson 1932 AC 562*. In other words the player is under a duty to take all reasonable care, taking into account the circumstances under which he is placed."²⁵

²² Neethling criticizes the use of this doctrine in that it is foreign to the principles of Roman-Dutch law which forms the basis of our law of delict. He also argues that the duty of care doctrine may confuse the test for wrongfulness with the test for negligence. Our courts have however used the duty of care concept as a synonym for a legal duty in determining wrongfulness (Neethling et al *Law of Delict* 149), and it is submitted that it would also be useful to do so when determining liability for sports injuries.

²³ Neethling et al *Law of Delict* 149

²⁴ Moore *Sports Law* 77

²⁵ Moore *Sports Law* 77

The court went on to stress that a higher standard of care might be expected from, for example, a player in a top league football match than from a player in a local league match.²⁶ In a later appellate division case, *Elliot v Saunders and Liverpool FC*²⁷ the court held that:

" the fact that the players are top professionals with very great skills, is no doubt one of the circumstances to be considered, but in my judgement the fact that the game is premier league rather than at a lower level, does not necessarily mean that the standard of care is different."

In the opinion of the court, in determining whether the standard of care had been breached, each case had to be decided on the specific facts of the case.²⁸

Moore²⁹ however qualifies this statement by pointing out that there is considerable force in the argument that the standard is different between contact and non-contact sports, since the risk of injury is inevitably more foreseeable in contact sports.³⁰ The standard of care will arguably be lower than the general standard of care as set out in *Donoghue v Stevenson*.³¹

²⁶ Moore *Sports Law* 77

²⁷ Unreported as cited by Moore *Sports Law* 77

²⁸ Moore *Sports Law* 78

²⁹ Moore *Sports Law* 80

4.2.1.2 Justification Grounds

(a) *Volenti non fit iniuria*

The justification ground of consent which may take the form of consent to injury, and consent to risk of injury or voluntary assumption of risk³² falls under the maxim *volenti non fit iniuria* and negates wrongfulness. In the case of consent to injury, the injured party consents to specific harm, for example, a rugby prop may consent that his opponent may scrum against him, or that he may be tackled.

In the case of consent to risk of injury or voluntary assumption of risk the injured party consents to the harm caused by the defendant's conduct, for example a player may accept the risk of being injured in a tackle or ruck. The player does not consent to a specific act or injury, but deliberately exposes himself to conduct involving risk of harm.³³ In the latter instance the injured party will not be able to hold the defendant delictually liable because he has consented to the risk of such harm.³⁴

For consent or voluntary assumption of risk to succeed as a valid defence the following requirements must be met:

³⁰ Moore *Sports Law* 80

³¹ Moore *Sports Law* 81

³² Neethling et al *The Law of Delict* 99, Van der Walt and Midgley *Delict* 112

³³ Van der Walt and Midgley *Delict* 113

³⁴ Neethling et al *Delict* 98

(a) *The plaintiff must have had knowledge of the harm or risk involved in the defendant's conduct, as well as the nature and the full extent thereof.*³⁵

(b) *Knowledge of the harm or risk is not sufficient. The plaintiff must also have appreciated the nature of the harm and risk involved.*³⁶

(c) *The plaintiff must have consented to the harm or assumed the risk implicit in the defendant's conduct.*³⁷

(d) *The defendant's conduct must have fallen within the limits of consent. If the conduct does not comply with the terms of the consent the defence falls a way.*³⁸

A number of factors influence the ambit of the consent given:

(i) The playing culture: rules, customs and conventions of a sport.

In determining the ambit of consent the rules, customs and conventions of the sport is important because it can be used to define the type of conduct the players can expect from participation and the limits of lawful conduct and the extent to which the consent can legitimise certain common non-dangerous types of play.³⁹

In terms of the legal convictions of society, there is usually no question of wrongfulness where the injury occurred from play within the rules and customs

³⁵ Van der Walt and Midgley *Delict* 114

³⁶ Van der Walt and Midgley *Delict* 114

³⁷ Van der Walt and Midgley *Delict* 114

³⁸ Van der Walt and Midgley *Delict* 115

of a game.⁴⁰ The playing culture of sport does not only extend to what is provided for in the rules. In *Elliot v Saunders*⁴¹ the court held that in the playing culture of contact sport "a frequent or familiar infraction of the rules of a game can fall within the ordinary risks of the game as accepted by the participants".⁴²

In the case of *Hackbart v Cincinnati Bengals, Inc.*⁴³ the district court had held that it would be impossible for the court to differentiate between violations occurring in the course of fair play and those subject to liability because of deliberate or negligent actions beyond the bounds of the rules and customs of the game. However, in reversing this decision the Tenth Circuit followed a different line of reasoning and held that "there were no principles of law which allow a court to rule out certain tortious conduct by general roughness of the game or difficulty of administering it".⁴⁴ The court found that there were specific rules aimed at prohibiting the type of blow that injures Hackbart, and furthermore, on evidence, that such conduct in addition was also prohibited by the customs of the game.⁴⁵

³⁹ Gardiner et al *Sports Law* 480

⁴⁰ Parmanand "Delictual Liability for Injuries in Sport: In search of a Formula" 1986 *Obiter* 54

⁴¹ *Elliot v Saunders and Liverpool FC* unreported decision of the High Court 1994 as cited by Gardiner et al *Sports Law* 443

⁴² Gardiner et al *Sports Law* 480

⁴³ 601 F 2d 516 (10th Cir.) cert denied 444 US 1979 as cited by Beumler "Liability in Professional Sports: An Alternative to Violence" 1980 *Arizona Law Review* 919 931 - 936 The facts of the case is as follow: Hackbart's neck was seriously fractured by Charles Clark of the Cincinnati Bengals during a game of American Gridiron Football. Clark had run a pass play that was intercepted by a member of Hackbart's team. Because of this interception Hackbart who was defending Clark suddenly found himself in an offensive role and had blocked Clark by throwing himself in front of Clark. Frustrated by the course of events, Clark had clubbed the back of Harkbart's neck from behind with his forearm, seriously fracturing it.

⁴⁴ Beumler 1980 *Arizona Law Review* 933

⁴⁵ Beumler 1980 *Arizona Law Review* 934

A rule specifically formulated to protect players from injury is known as a safety rule.⁴⁶ In the American Restatement of Torts⁴⁷ it is stated:

" Taking Part in a Game: Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by the rules or usages of the game if such rules or usages are designed to protect the participants and not merely secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules."

This approach was confirmed in the case of *Nabozny v Barnhill*⁴⁸ where the court stated that " a fellow competitor is to refrain from conduct prescribed by a safety rule". In this case the consent to risk of injury defence was negated by the violation of a safety rule causing a dangerous situation to which the plaintiff could not consent.⁴⁹

The rules of a game concerned are frequently taken into account when considering the ambit of consent concerning delictual liability. In the Australian case of *McNamara v Duncan*⁵⁰ the court held that the plaintiff had intentionally punched the plaintiff in a Australian Rules Football Match. The court held that the striking was an infringement of the rules and that it cannot be reasonably

⁴⁶ See chapter 2 for a detailed discussion of the Rugby Union Safety rules.

⁴⁷ 2ed 1965 86

⁴⁸ 1975 31 Ill App 3d 212 as cited by McCutcheon "Sports Violence, Consent and the Criminal Law" 1994 *Northern Ireland Quarterly Review* 267 279

⁴⁹ McCutcheon 1994 *Northern Ireland Quarterly Review* 279

⁵⁰ 1971 26 ALR 584

held that the plaintiff consented to receiving such a blow as it was contrary to the rules and deliberate.⁵¹

Another factor that is often considered is whether the conduct complained of forms part of the game. A plaintiff would be allowed to recover damages for injury provided that the risk was not normally associated with the game. Conduct that therefore does not measure up to what society's notion is of what is part of the game of rugby would therefore be actionable.⁵² In the Cape Magistrate's court in the case of *Moreland v De Villiers* the court held that punching an opponent in the face is not part of the game of rugby.⁵³

(ii) The Duration of the Game

Consent to injury or risk of injury will only be operative for the duration of the game. Recovery for damages for any injury sustained by virtue of another participant or any role player in the sports relationship before or after the game will therefore be addressed by employing the ordinary principles of delict. The same would also apply to time out during a game to address injury of a player or to discipline a transgressor of the rules. However the momentum of the game can give rise to "legitimate" injuries,⁵⁴ which would fall within the rules, and be considered as part of the game, had the whistle not blown. It is quite possible that Rugby in its current form, being a fast moving contact-intended sport can give rise to such injuries. A good example would be an unavoidable tackle

⁵¹ As cited by Gardiner et al *Sports Law* 481

⁵² Parmanand 1986 *Obiter* 55

⁵³ As reported in *Rapport* 30 Oktober 1994 7

causing injury to the tackled person after the whistle had blown. Labuschagne is of the opinion that injuries that occur at a theoretical play rate of zero, should be evaluated by using the normal principles of delict, unless the momentum of the game or the dynamics of an existing altercation require otherwise.⁵⁵

*(e) The consent must extend to all the consequences that may arise out of the conduct of the defendant.*⁵⁶

Parmanand⁵⁷ holds that there is a need to recognise the basic principle that in addition to players consenting to certain specific "acts of aggression", they also consent to the risk of injuries from other players in a particular lawful sport. This basic principle is however circumscribed by the following provisos:

1. The injury must flow from the scope of the particular risk assumed.
2. The injury must flow from a risk regarded as inherent to that sport. To determine how inherent that risk is to the particular sport, regard may be had to the frequency of occurrence of the particular injury in that sport as well as whether the plaintiff foresaw the risk. In *Simms v Leigh Rugby Football Club Ltd*⁵⁸ the court held that "the risk of breaking one's leg in a tackle is one of the risks which is

⁵⁴ Labuschagne " Die Rol van Spelgang by Bepaling van Aanspreeklikheid vir Besering Tydens 'n Hokkiewedstryd Opgedoen" 1999 *THRHR* 469 471

⁵⁵ Labuschagne 1999 *THRHR* 471

⁵⁶ Van der Walt and Midgley *Delict* 115

⁵⁷ Parmanand 1986 *Obiter* 53

⁵⁸ 1969 2 All E R 923 926 F

quite inseparable from the game played under Rugby League Football rules".

3. The specific risk which has resulted in the plaintiff's injuries must have been foreseen by the plaintiff.
4. The injury must be one that the community accept may reasonably possibly occur or may be considered to reasonably possibly occur within that particular sport. Injuries are actionable when received as a result of contact that is not necessary for effective play, such as a punch thrown in the scrum, contact that is not reasonably related to the competitive goals of the game, or is inconsistent with the ideals of the game.⁵⁹

*(f) the consent must be freely given and the risk voluntarily assumed.*⁶⁰

*(g) Consent or voluntary assumption of risk will only be a defence only in respect of injuries and harm actually subjectively foreseen appreciated and assumed by the plaintiff.*⁶¹

*(h) The consent must not be contra bonos mores.*⁶²

⁵⁹ The object of the game of rugby is that two teams of fifteen players... observing fair play according to the laws an sporting spirit should by carrying, passing, kicking and grounding the ball score as many points as possible, the team scoring the greater number of points being the winner of the match. *IRB Laws of the Game - Preamble*

⁶⁰ Van der Walt and Midgley *Delict* 115

⁶¹ Van der Walt and Midgley *Delict* 116

⁶² Van der Walt and Midgley *Delict* 116

(i) *Consent or voluntary assumption of risk as a state of mind must be disclosed by some form of conduct.*⁶³

In the case of *Boshoff v Boshoff*,⁶⁴ the leading sports injury case on the issue of consent to injury, although not specifically referring to rugby, the court held:

"Every intelligent person is, to a certain extent at least, regarded as master of his own fate and it is clearly not contra bonos mores for a person capable of forming an intention to consent, in the course of lawful sport or physical recreation, to sustaining particular, reasonable physical injuries. Likewise it is not unlawful in itself to consent to (running) the risk of physical injuries accompanying the reasonable conduct of fellow players. For that reason, it is necessary for a bona fide sportsman who accidentally, as it is put in general everyday language, inflicts an injury in a reasonable manner on a fellow player should have this defence, having broadly stated, 'knowledge, appreciation and consent' as its content, available to him."⁶⁵

The court also pointed out that in this connection consent did not require a subjective desire to be injured, but only a "juridical will to be injured or run the risk of injury".⁶⁶ As the consent can be given expressly or tacitly it is widely accepted that voluntary participation in sport is a manifestation of consent to the risk the injury inherent to a specific sport.⁶⁷

⁶³ Van der Walt and Midgley *Delict* 117

⁶⁴ 1987 2 694 at 695 F - H The plaintiff sustained an injury to his eye after a flying squash racquet hit his head during a friendly game.

⁶⁵ 700 F – G (Own translation)

⁶⁶ 700 I (Own translation)

⁶⁷ Prinsloo 1991 *TSAR* 43

(j) *the plaintiff must have the legal capacity to consent to injury or voluntarily assume the risk.*⁶⁸

(k) *Consent is a unilateral act and therefore may be revoked at any time.*⁶⁹

The onus of proving the defence of consent in a delictual action is on the party that alleges it. In the case of *Sibley v Milutinovic*⁷⁰ the plaintiff during a friendly football match effected a slide tackle on the defendant poised to score and repeated it shortly afterwards. The defendant retaliated by punching and fracturing the jaw of the plaintiff who then sued for damages and assault. Defendant counter-sued for damages for a bruised ankle. Both parties raised consent as a defence. The court held that as the onus rests on the party alleging consent and the plaintiff failed to discharge the onus, both parties are held to be liable to the other party in assault.

(b) Defence

An act of defence is lawful conduct directed at a wrongdoer for the protection of the plaintiff or a third party's interest, which is threatened or infringed, by the wrongdoer⁷¹. If a player were to defend himself against a violent attack by a member of the opposing team and injures that member of the opposing team in the process, such a player would be able to rely on private defence, thereby alleging that he acted reasonably and not wrongfully.⁷²

⁶⁸ Van der Walt and Midgley *Delict* 117

⁶⁹ Van der Walt and Midgley *Delict* 117

⁷⁰ 1990 Australian Tort Reports 81-013 as cited by Grayson "Foul Play" 1991*New Law Journal* 742

⁷¹ Van der Walt and Midgley *Delict* 99

⁷² Basson and Loubser et al *Sport and the Law* 5-47

Conduct will only qualify as an act of defence if certain requirements are present.⁷³ This means that the defence must be directed against the aggressor himself, it must be necessary to protect the threatened right, and the act of defence must not be more harmful than is necessary to ward off the attack.⁷⁴ The attack must consist of a wrongful human act that has already commenced, or be imminently threatening but must not have yet ceased.⁷⁵ Self-defence is likely to be raised within the context of sport only with regards to off-the-ball incidents. Consent would be the more appropriate defence to raise for on-the-ball assaults.⁷⁶

(c) Provocation

In the course of a contact sport such as rugby, provocative conduct towards an opponent can lead to violent action that may lead to injury.⁷⁷ Although provocation cannot negate unlawfulness, it may serve as a complete defence,⁷⁸ which will exclude intention, in a limited number of categories of cases.⁷⁹ This will mean that although the conduct remains wrongful, no liability will arise because there is no fault. Provocation may however in all cases be raised in mitigation of damages.⁸⁰ Proportionality plays an important role, therefore physical retaliation to verbal provocation will not be justified.⁸¹ Physical retaliation to physical provocation may however be justified. In *Moreland v De*

⁷³ Van der Walt and Midgley *Delict* 99

⁷⁴ Neethling et al *Delict* 81 - 84

⁷⁵ Neethling et al *Delict* 77 - 80

⁷⁶ Gardiner et al *Sports Law* 487

⁷⁷ Basson and Loubser et al *Sport and the Law* 5-47

⁷⁸ *Bester v Calitz* 1982 3 SA 864 875

⁷⁹ Van der Walt and Midgley *Delict* 110

⁸⁰ *Winterbach v Masters* 1989 1 SA 922 E 925

⁸¹ Van der Walt and Midgley *Delict* 110

*Villiers*⁸² the defendant retaliated by hitting the plaintiff, causing extensive facial injuries after the plaintiff attempted to rake him in the face during a ruck. On behalf of the defendant it was argued that the defendant had no knowledge of unlawfulness with regards to the assault, as the defendant believed that he was entitled to react in this manner to the provocative behaviour of the plaintiff.

By allowing the defence of provocation the law recognises a person's natural inclination not to take an unwarranted assault lying down as well as the human desire for proportionate and reasonable revenge. The onus of proof in regard to provocation rests on the party who alleges it.⁸³

4.2.2 Liability of the Coach⁸⁴

The concept "coach" at professional level in sport is used to describe the person who is responsible for the most talent from the players under his care.⁸⁵ Between the coach and player there may be a contract with an implied term of reasonable care. Where the sporting body employs the coach, his contractual agreement will be with the sporting organisation.⁸⁶

⁸² Cape Town District Magistrate's Court 1994-10-28 Case No 4387/94

⁸³ Van der Walt and Midgley *Delict* 111

⁸⁴ See 3.3.2 for the criminal liability a coach may incur

⁸⁵ Labuschagne "The Liability of a Coach for a Sport Participant's Injury" 1999 *Stell LR* 158 158

4.2.2.1 Basis of the Coach's Liability

Although the liability of the coach's activities is found in delictual principles they are somewhat modified to accommodate the nature and unusual activity of the sport in question.⁸⁷ The basis of liability of a coach is usually based in the principles of negligence.⁸⁸

The following requirements must be met before a cause of action for negligence of a coach will follow:

- (a) a duty requiring a person to conform to a standard of conduct that protects the players from an unreasonable risk of harm;
- (b) a breach of this duty;
- (c) a causal connection between the breach of the duty and the resulting injury;
- (d) resulting injuries or damages.⁸⁹

The most critical factor in determining whether a coach is liable for the injury of a player in his care is whether the duty of protecting the players from harm has been complied with.⁹⁰ The content of the duty of standard of care of a coach will depend on the circumstances of each case.⁹¹ He will have to exercise the level

⁸⁶ Kelly *Sport and the Law: An Australian Perspective* (1987) 176
⁸⁷ Labuschagne 1999 *Stell LR* 183
⁸⁸ Labuschagne 1999 *Stell LR* 159
⁸⁹ Labuschagne 1999 *Stell LR* 159
⁹⁰ Labuschagne 1999 *Stell LR* 159
⁹¹ Kelly *Sport and the Law* 177

of skill and care to be reasonably expected of him in the circumstances.⁹² If a coach foresees the possibility that a player can be killed or hurt during a manoeuvre, he is not only negligent but *dolus eventualis* will be present.⁹³

Labuschagne⁹⁴ refers to the following as specific duties of the coach:

(i) Supervision

Specific supervision is necessary when an activity is being performed for the first time and when an activity is potentially dangerous.⁹⁵ The more dangerous a sport or activity, the closer the supervision of a coach should be. The level of supervision will also be affected by the nature and tempo of the sport.⁹⁶ It is respectfully submitted that a contact sport such as rugby will require a higher level of supervision than a non-contact sport such as tennis.

(ii) Proper Instruction

This is the broadest of the duties placed on the coach, as it would be unreasonable to expect of a coach to prevent every form of injury especially in a contact sport such as rugby.⁹⁷ The coach has to provide the player with the knowledge that he needs to play the sport in the correct and safe manner.⁹⁸ In

⁹² *Chaudry v Prabhakar* 1988 3 All ER 718 as cited by Moore *Sports Law* 100

⁹³ Labuschagne " Deliktuele Aanspreeklikheid van 'n Afrigter vir 'n Besering Opgedoen Deur 'n Gimnas" 1999 *THRHR* 132 135

⁹⁴ 1999 *Stell LR* 159

⁹⁵ Labuschagne 1999 *Stell LR* 161

⁹⁶ Labuschagne 1999 *Stell LR* 161

⁹⁷ Labuschagne 1999 *Stell LR* 163

⁹⁸ Labuschagne 1999 *Stell LR* 164

*Vendrell v School District No 26C*⁹⁹ a high school football player sustained a neck injury and became paraplegic when he charged headfirst into approaching tacklers. The court held that the coach had discharged his duty of minimising of possible injury, as the players had undergone extensive training and practice under competent supervision and instruction in the fundamentals of the game.¹⁰⁰ The player therefore assumed the risk of being injured during a tackle.¹⁰¹ Twenty years later in the landmark case of *Thompson v Seattle Public School District*,¹⁰² in a similar factual setting as *Vendrell*, the court held that the assumption of risk doctrine can only be used as a defence if the coaching staff can prove that the plaintiff knew of the inherent risks involved, understood the full implications of the risk and then voluntarily chose to participate. Hereby the court weakened the effect of the assumption of risk doctrine as used in *Vendrell*.¹⁰³

A coach who allows a player to undertake an activity without proper instruction or preparation will put himself in a vulnerable position.¹⁰⁴ In *Woodson v Irvington Board of Education*¹⁰⁵ a football player was injured when he tackled an opposing player. He had attended only one practice session on tackling and was not instructed to keep his head up whilst executing the tackle.

⁹⁹ 376 P 2d 406 1962 as cited by Kelly *Sport and the Law*178

¹⁰⁰ Kelly *Sport and the Law*178

¹⁰¹ Quirk (ed) *Sports and the law: Major Legal Cases* (1999) 15

¹⁰² 1982 Unreported Case as cited by Huddleston in Quirk *Sports and the law*15

¹⁰³ Quirk *Sports and the law* 15

¹⁰⁴ *Larson v Independent School District No 314* 1979 289 NW 2d 112 as cited by Kelly "Prospective Liabilities of Sports Supervisors" 1989 *Australian Law Journal* 669 670

¹⁰⁵ Docket no ESX-L-56273 NJ Super Ct Law Div Nov 19 1988 as cited by Labuschagne 1999 *Stell LR* 165

The court held the head coach and line coach to be liable, as the injury in all probability would not have occurred if the plaintiff had been properly instructed in the fundamentals of tackling.

In addition to this a coach will be held liable if he teaches his players an illegal manoeuvre and an opposing player is injured as a result thereof.¹⁰⁶ In *O'Brien v Mitchell College of Advanced Education*¹⁰⁷ the plaintiff was paralysed in a rugby union match. Evidence showed that the opposing team's coach instructed his players to employ a manoeuvre known as the "flying wedge". When attempted this caused severe spinal cord injury of the plaintiff. The case was however settled out of court. A coach cannot however be held liable for the aggressiveness of his players for a faulty manoeuvre or technique he did not teach his players.¹⁰⁸

(iii) Facilities and equipment

Coaches have the responsibility to take reasonable measures to ensure that participants have the proper equipment to compete in practices and games. A coach may be held liable for the injury of a player if he does not require a player to use the available equipment and use it properly.¹⁰⁹

¹⁰⁶ Prinsloo "Liability in Sport and Recreation" 1991 *TSAR* 42-49

¹⁰⁷ Unreported Supreme Court of New South Wales 17 November 1985 as cited by Kelly *Sport and the Law* 112-113

¹⁰⁸ Prinsloo 1991 *TSAR* 49

(iv) Medical Care

Coaches have the duty to provide medical assistance as soon as possible. The coach is however not required to act as physician, it is only required of them to act reasonably under the circumstances.¹¹⁰

The coach has a duty to provide prompt medical assistance¹¹¹ or if he cannot offer such medical assistance, ensure that the player receives prompt medical assistance.¹¹² In *Mogabgob v Orleans Parish School Board*¹¹³ the coach neglected to call a doctor when a player suffered from heat stroke. The player was subsequently taken to hospital but died soon thereafter. In the ensuing wrongful death case instituted by the player's parents it was found that the coach erred in denying proper medical treatment and administering ill chosen first aid.¹¹⁴

In *Kelci Stringer v Minnesota Vikings Football Club LLC*¹¹⁵ Korey Stringer, Minnesota Vikings offensive lineman died of multiple internal organ failure, internal bleeding and brain swelling brought on by heat stroke after collapsing during drills at a pre-season practice session. The coach, one of a number of defendants, was sued for negligence for the reason that he did not discharge his duty of care towards Stringer in that he taunted, mocked and humiliated him in the presence of this team-mates, displaying a newspaper photograph depicting

¹⁰⁹ Labuschagne 1999 *Stell LR* 166

¹¹⁰ Labuschagne 1999 *Stell LR* 168

¹¹¹ Labuschagne 1999 *Stell LR* 168

¹¹² Kelly *Sport and the Law* 180

¹¹³ 239 So. 2d 456 1970 as cited by Kelly *Sport and the Law* 180

¹¹⁴ Kelly *Sport and the Law* 180

Stringer doubled over, vomiting and gasping for breath. Furthermore the coach forced Stringer to engage in intense full-contact practice in full uniform, full pads and a helmet during extreme hot and humid conditions despite the lingering effects of the heat exhaustion Stringer had suffered the previous day.¹¹⁶

A coach will also be held liable if he provides medical treatment in a negligent manner or if he moves an injured player.¹¹⁷ In *Harper v Vayo*¹¹⁸ a high school coach was found to be negligent after moving a wrestler that sustained a severe knee injury. He also failed to contact the proper medical authorities. A coach's conduct will therefore be closely scrutinised relating to promptness in assessing a difficulty and seeking assistance if necessary.¹¹⁹

(v) Knowledge of Participants

The coach should be aware of the background and potential of participants so that they do not risk aggravation of existing injuries or weaknesses, are not required to perform beyond their capabilities and are not mismatched.¹²⁰ A coach has a duty to perform considerable care in identifying injuries and incapacitating conditions during the course of practise and play. When he observes such conditions he must adjust a player's participation. He must be very careful about permitting a player to play too soon after an injury.¹²¹

¹¹⁵ Unreported as cited in "Family Sues in NFL Player Stringer's Death"
<http://news.findlaw.com/sports/s/20020115/bcsportsnflstringerdc.html>

¹¹⁶ Complaint filed in the district court of the Fourth Judicial District, County of Hennepin, State of Minnesota page 7 <http://news.findlaw.com/hdacs/docs/sports/strngrvkngs011502cmp.pdf>

¹¹⁷ Labuschagne 1999 *Stell LR* 168

¹¹⁸ 210 ILL Add 3d 81 as cited by Labuschagne 1999 *Stell LR* 168

¹¹⁹ Kelly 1989 *Australian Law Journal* 671

(vi) Matching and equating participants

By reason of the fact that the coach ultimately determines who will participate in the game or activity, the coach will have the duty to select participants that are qualified to compete against other participants to reduce the risk of serious injury.¹²²

In *Vendrell v School District No 26C*¹²³ the court held that " it is possible that two football teams may be so disparate in size and ability that those responsible for supervising the athletic program would violate their duty in permitting the teams to play. This if properly alleged would be a question of fact to be established by the evidence".¹²⁴

A number of factors should be taken into account when matching participants. These are skill, experience, injuries or incapacitating conditions, maturity, height and weight, age, mental state, sex, sexual orientation and religious convictions.¹²⁵

(vii) Anticipating and Warning Against Risks and Dangers

A coach will be exposed to liability if the risks inherent in the relevant activity are not made known to the participant.¹²⁶ This disclosure requirement is analogous

¹²⁰ Kelly 1989 *Australian Law Journal* 671

¹²¹ Labuschagne 1999 *Stell LR* 172

¹²² Labuschagne 1999 *Stell LR* 174

¹²³ 300 P 2d 282 (SC Oregon 1961) 288 as cited by Labuschagne 1999 *Stell LR* 174

¹²⁴ Labuschagne 1999 *Stell LR* 174

¹²⁵ Labuschagne 1999 *Stell LR* 174 - 177

¹²⁶ Kelly 1989 *Australian Law Journal* 670

that of the medical one of informed consent.¹²⁷ The duty to warn only includes those dangers that are not obvious. The coach therefore does not have to warn the players of dangers they are already aware of.¹²⁸ In *Hammond v Board of Education of Carroll County*¹²⁹ a player's claim that she would not have played football had she been warned of the risk of being injured in a scrum, had been rejected by the court. The judge observed that:

“the hazard alleged – the possibility of injury to a voluntary participant in a varsity high school tackle, football game – was ‘the normal obvious and usual incident’ of the activity”¹³⁰

A coach cannot however assume that a player is aware of all the possible risks and should take care to ensure that the players under his charge are well informed.¹³¹

4.2.2.2 The Role of Assumption of Risk in the Liability of the Coach

A participant assumes the risk of injury that is inherent to playing the game. The participant does however not assume the risk of injury caused by the violation of the duty of care owed by the coach to the player.¹³² Where the coach raises the defence of *volenti non fit iniuria* to a claim of negligence, the normal requirements for the defence will have to be complied with. An important part of

¹²⁷ Kelly *Sport and the Law* 177

¹²⁸ Labuschagne 1999 *Stell LR* 177

¹²⁹ 100 Md App 60 639 A 2d 223 as cited by Labuschagne 1999 *Stell LR* 177

¹³⁰ at 227 as cited by Labuschagne 1999 *Stell LR* 177

¹³¹ Labuschagne 1999 *Stell LR* 178

¹³² Labuschagne 1999 *Stell LR* 181

the inquiry will however be whether the injured person has shown adequate regard for his own safety.¹³³

In the case of *Novak v Waverley Municipal Council*¹³⁴ the players, coach, club and League were all involved in the decision to proceed with the match despite the danger of protruding sprinklers. The coach and team had inspected the sprinklers and discussed them with officials. The coach expressed the opinion that they should not play and forfeit the game. A meeting of players however voted in favour of playing. During the game a player broke his leg when he stubbed his foot on one of the sprinklers. The occupier was held liable in damages as the grounds were not reasonably safe for the purpose it was used for. The liability of the coach was not in issue here, but Kelly¹³⁵ suggests that a coach who extracted consent from his players to play in such circumstances would not be absolved from liability.

4.2.2.3 Conclusion

Coaches, especially at the professional level of a sport such as rugby, face considerable legal exposure. Their duty is far more than simply instructing players to perform certain actions. Coaches should familiarise themselves with the complete extent of their duties¹³⁶ and take care in the exercising of such duties so as to minimise exposure to legal liability. Labuschagne states “preparation, knowledge and anticipation of foreseeable consequences are

¹³³ Kelly *Sport and the Law* 181

¹³⁴ 1984 Aust Tort Reports 80 – 200 as cited by Kelly *Sport and the Law* 93 – 94, 121, 181

¹³⁵ Kelly *Sport and the Law* 181

¹³⁶ Labuschagne 1999 *Stell LR* 183

probably the best mechanism coaches can utilise to legally equip themselves in the preparation for sporting events".¹³⁷

4.2.3 Liability of the Referee¹³⁸

In the law of delict widespread misconception exists as to the legal immunity of the referee.¹³⁹ The general principles of delict, if somewhat modified, apply to where the referee is responsible for a player's injury.¹⁴⁰ A referee will be held liable for an injury or other harm to a participant that is caused by his unlawful or culpable behaviour.¹⁴¹

4.2.3.1 Basis of the Liability of the Referee

More often than not the liability of a referee for the injury of a player will be based on the duty of the referee not to inflict injury negligently, recklessly or intentionally on a player.¹⁴² The standard of care expected from the referee will be that of the reasonable referee within his sport and at his level.¹⁴³ A person who acts as referee must have the basic competence of a referee in that sport. Competence in this context will entail knowledge of the sport and the correct application of the rules, as well as unbiased and careful conduct in the interests

¹³⁷ Labuschagne 1999 *Stell LR* 183

¹³⁸ See 3.3.3 for the criminal liability the referee may incur as an explanation of the status of the referee in terms of the Laws of Rugby.

¹³⁹ Kelly 1989 *Australian Law Journal* 676

¹⁴⁰ Prinsloo 1991 *TSAR* 50

¹⁴¹ Prinsloo 1991 *TSAR* 49

¹⁴² Kelly 1989 *Australian Law Journal* 676. The incidences where the referee intentionally inflicts serious injury on a player are much rarer than the situation where the referee is assaulted by players. In America the assault of a sports official or referee is specifically legislated on and criminalised in no less than 15 states. Transgression of these statutes can earn you a fine of up to \$2000 or a year's imprisonment. Viljoen "Punish Them" 2002 (November) *SA Rugby* 53 53

¹⁴³ Prinsloo 1991 *TSAR* 50

of fairness to, and the safety of the participants.¹⁴⁴ Care should be exercised by the referee especially in the application of safety rules as opposed to applying the rules facilitating play.¹⁴⁵

In a rapidly developing sport such as rugby union continuous rule changes and new emphasis on existing rules have consequential effects on the referee's function on the playing field. In rugby rucks and mauls should be broken up quickly and scrum collapses should be avoided at all costs.¹⁴⁶ These changes in rules that are specifically designed to ensure the safety of the players make the situation the referee finds himself in all the more onerous.

Kelly¹⁴⁷ poses the question whether if three scrum collapses occur, without incident and without a player getting injured, and the referee imposes no penalty for such scrum collapses, and a player suffers traumatic spinal injuries in the fourth scrum collapse, did the referee discharge his duty of care?

4.2.3.2 *Smoldon v Whitworth and Nolan*¹⁴⁸

In this case, a first of its kind, a referee was found liable for the very serious injuries suffered by a player in a colts rugby union match as a consequence of a collapsed scrum.¹⁴⁹

¹⁴⁴ Prinsloo 1991 *TSAR* 50

¹⁴⁵ Basson and Loubser *Sport and the Law* 5-27. This would entail sending a player off that might cause injury to others by way of repeated foul play and ensuring that the playing surface is fit to play a match on. For a complete discussion of the duties of the referee as set out in the Laws of Rugby see 3.3.3.3

¹⁴⁶ Kelly 1989 *Australian Law Journal* 679

¹⁴⁷ Kelly 1989 *Australian Law Journal* 679

¹⁴⁸ as reported in *The Times* (18 – 12 – 1996) and cited by Moore *Sport and the Law* 95 – 99

¹⁴⁹ Moore *Sport and the Law* 95

The plaintiff, Ben Smoldon, was a seventeen-year-old player aiming for a place in his under-19 county squad when he fractured a vertebrae in an intentionally collapsed scrum, causing permanent paralysis in his lower body and limbs. The laws at the time issued by the IRB contained special provisions for under-19 players. Strict observance of the crouch-touch-pause engage sequence was required when a scrum was formed. The very aim of this law is to minimise injury. The referee did however not enforce this procedure at all. In addition to this he allowed the scrum to collapse twenty five times during what was generally an ill-tempered match, without instructing or disciplining the players accordingly.¹⁵⁰ The referee failed to take control of the match despite the warnings of the linesman that someone would be hurt unless he took a firm grip.¹⁵¹ The final scrum in which Smoldon's injury was sustained was collapsed and reformed twice.¹⁵²

The court recognised that there were two competing interests at play. On the one hand the plaintiff had been deprived of an active and independent life and needed compensation for the loss of such amenities of life, and on the other hand there was the very real concern that judgment for the plaintiff would strangle a game enjoyed by millions.¹⁵³ The court also recognised that a referee's function often had to be performed in the context of a fast-moving, competitive and vigorous game, which often calls for split-second decisions and judgements. His job is difficult and demanding one, he cannot be in all parts of

¹⁵⁰ Viljoen "Can You Blame the Ref" 2001 (October) *SA Rugby* 44 - 45

¹⁵¹ Moore *Sports Law* 95

¹⁵² Viljoen 2001 *SA Rugby* 44 – 45

¹⁵³ Moore *Sports Law* 96

the field on the same time and cannot possibly hope to see everything that is going on.¹⁵⁴

The defendant based his defence on the fact that there had been no negligence on his part. It was submitted that although he owed a duty of skill and care, nothing short of a reckless disregard for the plaintiff's safety would suffice in order to establish breach of that duty.¹⁵⁵ On behalf of the plaintiff was submitted that the appropriate standard of care was that of the standard set out in *Condon v Basi*.¹⁵⁶ The duty was to exercise such degree of care as was appropriate in all the circumstances.¹⁵⁷ On this issue the court held that the level of care required was that which was reasonable in all the circumstances and therefore the circumstances are of utmost importance. The Court of Appeal held that in the circumstances the referee had fallen below the standard of a reasonably competent referee in his control of the scrummages in the game.¹⁵⁸

In alternative the defendant raised the defence of *volenti non fit iniuria*. It was argued that the plaintiff had consented to the risk of injury of the type he sustained by voluntarily playing in the front row and by participating in the practice of collapsing scrums, thereby increasing the risk that the opposing front row might similarly follow.¹⁵⁹

¹⁵⁴ Moore *Sports Law*96

¹⁵⁵ Moore *Sports Law*97

¹⁵⁶ 1985 All ER 453 CA

¹⁵⁷ Moore *Sports Law*97

¹⁵⁸ Moore *Sports Law*97

¹⁵⁹ Moore *Sports Law*99

The Court of Appeal held that the court a quo had rightly rejected the defence. The plaintiff consented to the ordinary incidences of injury for the game of rugby in which he was taking part. Given that the rules pertaining to the scrum had been formulated for the protection of players against the type of injury he suffered, he could not have consented to a breach of a duty on the part of an official whose duty was to apply the rules and ensure that they were observed.¹⁶⁰

4.2.3.3 Conclusion

Prinsloo¹⁶¹ contends that the *Smoldon* case will serve as precedent in most large rugby-playing countries, as their principles for establishing liability are similar.¹⁶² This does not however mean that referees will be liable for every bad decision made during a rugby match. It should be appreciated that for a plaintiff to establish that a referee failed to exercise the reasonable care and skill to be expected from him in a game of rugby is not at all easy.¹⁶³ However, referees should require that the organising bodies obtain adequate insurance cover against future claims of this nature.¹⁶⁴

¹⁶⁰ Moore *Sports Law*99

¹⁶¹ "Aanspreeklikheid van 'n Skeidsregter vir die Besering van 'n Rugbyspeler" 1996 *TSAR* 793

¹⁶² Prinsloo 1996 *TSAR* 799

¹⁶³ Moore *Sports Law*99

4.2.4 Liability of the Team Physician

In professional sport the pressure on the team physician is extreme. Kelly¹⁶⁵ submits:

" In remedial treatment, the physician is expected to be a miracle worker. In preventative medicine and fitness enhancement, the task is implied, like that of the medieval alchemist, is to transmute base metal into gold."

Medicine concerns itself with the health of the patient while professional sport concerns itself with performance of the player. It is submitted that very often these two goals are at odds. The team physician is often an employee of or retained by the sporting organisation rather than the individual player, and this may cause that the Hippocratic duties to the patient may be diluted.¹⁶⁶

One of the goals of the team physician is to develop a trusting relationship with the athlete. That trust may however be difficult to achieve in the light of the circumstances surrounding the employment relationship between the team physician and the sporting organisation. Several issues exert an influence on a physician's decision. In professional rugby a profitable team is a team with players playing games, even though some of that players may be playing with injuries.

¹⁶⁴ Basson and Loubser *Sport and the Law* 5-27

¹⁶⁵ Kelly *Sport and the Law* 172

¹⁶⁶ Landis "The Team Physician: An Analysis of the Causes of Action, Conflicts, Defences and Improvements." 2002 *De Paul Journal of Sports Law and Contemporary Problems* (13-8-2002) http://www.law.depaul.edu/sportslaw/articles/the_team_physician.asp

Physicians find themselves caught in the middle of safeguarding the player's health and a player's desire or insistence to play, even though that player may have been injured. At the same time the union may find that the players may be questioning whether or not the physician is providing medical decisions for his own financial gain.

4.2.4.1 Basis of the Duty of Care of the Team Physician.

In medical negligence cases, the same basic principles as those relating to other supervisors are normally applied.¹⁶⁷ Where professional care is undertaken, skill and knowledge for the purpose will be implied. At its most basic level the standard of care may be determined by a degree of care that the physician has exercised under similar circumstances.¹⁶⁸

In South African Law the usual standard of care, that of the reasonable person, is not applied in considering conduct of the defendant where such conduct calls for expertise. In the case of a physician, some factors taken into account when determining the standard of care are: The branch of the medical profession; the general level of skill and diligence possessed and exercised at the time by the members of such branch¹⁶⁹ and the duties the physician is carrying out at the time of treatment.¹⁷⁰

¹⁶⁷ Kelly 1989 *Australian Law Journal* 673

¹⁶⁸ Landis "The Team Physician: An Analysis of the Causes of Action, Conflicts, Defences and Improvements." 2002 *De Paul Journal of Sports Law and Contemporary Problems* (13-8-2002) http://www.law.depaul.edu/sportslaw/articles/the_team_physician.asp

¹⁶⁹ *Van Wyk v Lewis* 1924 AD 438 444

¹⁷⁰ *Van der Walt and Midgley Delict* 158

It is submitted that in the case of a physician who is a specialist in sports medicine, as is so often the case with a team physician, the standard of the reasonable sports physician should be applied.¹⁷¹ Where the physician is not a specialist, he must apply the skill and care that the average physician would display in similar circumstances.¹⁷²

Where a physician however undertakes the treatment of a professional player and he knows that for such treatment of the specific injury he lacks the requisite expert knowledge and should not treat such a player, he will be negligent.¹⁷³ Depending, however, on the severity of the injury and the availability of better-qualified professionals, the physician may attempt measures that go beyond his or her training or experience.¹⁷⁴

Where the physician makes an judgement error, the law will normally regard it as indicative of negligence.¹⁷⁵ However if such error of judgment was reasonable, whether in law or fact, such reasonableness will exclude the imputation of negligence. The deciding factor will be whether or not the error in judgement was bona fide and reasonable in the circumstances.¹⁷⁶

Where the player does not follow the physician's treatment requirements or where the injured player continues to play despite the physician's warning not to

¹⁷¹ Neethling et al *Delict* 136, Van der Walt and Midgley *Delict* 158

¹⁷² Strauss *Doctor, Patient and the Law* 3ed (1991) 95

¹⁷³ Neethling et al *Delict* 137

¹⁷⁴ Strauss *Doctor, Patient and the Law* 96

¹⁷⁵ Van der Walt and Midgley *Delict* 154

¹⁷⁶ Van der Walt and Midgley *Delict* 154

or where there was failure to disclose such injury to the team physician, the physician will be able to raise the defence of contributory negligence.¹⁷⁷

4.2.4.2 Conclusion

As peak health is of utmost importance for the professional rugby player, the team physician is often a very important factor in his ability to play. A negligent or erroneous decision made by the physician can permanently affect a player's career. For this very reasons the relationship of trust between the player and the physician is of utmost importance and the player should be able to rely on the advice given to him by the team physician as being the best possible advice concerning his health and not concerning the team's immediate need to win. The physician should be careful to advise the player of all options and consequences of playing with an injury, to administer treatment with the necessary skill and obtain specialist advice if and when necessary.

4.3. Vicarious Liability

Vicarious liability is generally described as the strict liability of one person for the delict of another.¹⁷⁸ Vicarious liability is based on a particular relationship between the two persons.¹⁷⁹ In the case of professional sport, vicarious liability

¹⁷⁷ Landis "The Team Physician: An Analysis of the Causes of Action, Conflicts, Defences and Improvements." 2002 *De Paul Journal of Sports Law and Contemporary Problems* (13-8-2002) http://www.law.depaul.edu/sportslaw/articles/the_team_physician.asp

¹⁷⁸ Neethling et al *Delict* 373

¹⁷⁹ Neethling et al *Delict* 373

will be based on the employer-employee relationship between the sporting organisation and the professional player.

4.3.1 Requirements for liability

There are three requirements that have to be met in South African law before an employer will be held vicariously liable for the delict of the employee:

- (a) There must be an employer-employee relationship at the time when the delict is committed;¹⁸⁰
- (b) The employee must commit a delict;¹⁸¹
- (c) The employee must act within the scope of his employment when the delict is committed.¹⁸²

4.3.2 Vicarious Liability in Professional Rugby

With regards to the third requirement, an employer will only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but also completely disengaged himself from the duties of the contract of employment.¹⁸³

¹⁸⁰ 5.2.1 and 5.2.2 sets out the nature of the employer-employee relationship in professional rugby.

¹⁸¹ This will mean that the employer may raise any defence that would have been available to the employee. Neethling et al *Delict* 376-377

¹⁸² *Minister of Police v Rabie* 1986 1 SA 117 (A) 134 sets out the test to determine whether an act would fall within the scope of employment.

¹⁸³ Neethling et al *Delict* 377

In professional sport where injury is caused by the action of a player playing the sport according to the rules or within the playing culture of the game, it is submitted that certain elements of foul play will be tolerated as within the course of employment if they are committed in the furtherance of the employer's interests - that of winning the game.¹⁸⁴ An example would be where a player injures another when making a tackle. Whether or not that tackle was within the rules, the employer will be vicariously liable as the act is for the benefit of the employer and within the scope of employment.¹⁸⁵

In the case of *Watson and Bradford City AFC v Gray and Huddersfield Town FC*¹⁸⁶ the court found that Gray's tackle on Watson was so forceful and high, that the reasonable professional player would have known that it carries a significant risk of serious injury. Huddersfield Town FC was held to be vicariously liable for the negligence of its employee in the scope of its employment. In the case of *Bugden v Rogers*¹⁸⁷ the court held the Bugden's club vicariously liable for the injury he caused Rogers as his actions constituted a mode, although improper, of acting within the scope of his employment. It was held that Bugden's employment contract authorised him to use force to tackle an opposing player.

Certain acts by professional sportsmen will be purely personal such as when a player assaults a fan on his way back to the dressing room after having been

¹⁸⁴ Gardiner et al *Sports Law* 485

¹⁸⁵ Gardiner et al *Sports Law* 485

¹⁸⁶ reported in *The Times* (26-11-1998) and cited by Moore *Sports Law* 79

¹⁸⁷ 1993 ATR 81 - 246 as cited by Gardiner et al *Sports Law* 514 - 515

sent off.¹⁸⁸ It is therefore submitted that in professional rugby the employer union may be held vicariously liable for delicts committed by players in the furtherance of the employer's interests. An example of this would be a high tackle causing injury. Conversely the union will not be held vicariously liable for injuries sustained during fights and off-field incidents.

4.4. Conclusion

It is clear from what is stated and argued above that an injured professional player has recourse in the civil law against any of the parties to the sporting relationship that has caused such injury whether it is caused intentionally or negligently.

Not only will players be liable in damages to another player that they injured intentionally or negligently, but coaches and referees may also be held personally liable for injury that they have caused to the player through failing to comply with the duty of care they owe to the players due to their position. The employer union or sporting organisation may also be held liable vicariously for injury caused by one of their employees, where such injury was caused by the player when he acted in the scope of his employment.

As with the application of the criminal law, the application of the civil law to rugby injuries caused by violent or negligent actions of another, although it compensates the player for loss and injury suffered, does not entirely the

¹⁸⁸ Eric Cantona of Manchester United FC kicked Crystal Palace fan Matthew Simmons in the chest on

problem. Violent and negligent behaviour must be eradicated, not by the courts, but inside the sport itself. Proper instruction, coaching and education must be given to the players and proper training must be a pre-requisite for all officials concerned in the sport. Injury at professional level may have serious financial consequences for all parties concerned and risks should therefore be minimised at the most basic levels of the sport – as it is the breeding grounds of future professional players.

Chapter 5: The Labour Law Implications of Rugby Injuries.

5.1 Introduction.

Since Rugby has obtained professional status in South Africa after the 1994 World Cup, honour, which was sufficient award for participation in sport at the highest levels, has given way to endorsements and very lucrative salaries to those players who make top-level teams.¹ The status of the professional rugby players was initially found to be uncertain. While the unions initially argued that the players are independent contractors, a workgroup consisting of the South African Rugby Player's Association² and the South African Rugby Football Union³, on 31 May 1999 formally recognised the SARPA viewpoint that rugby players receiving remuneration for their services, are in fact employees of either their provincial union or SARFU.⁴ This followed shortly on the CCMA ruling⁵ that provincial player Botha Rossouw was in an employee of his provincial rugby union. This issue will be discussed in detail below.

¹ Van Niekerk "Labour Law in Sport: a Few Curved Balls" 1997 *Contemporary Labour Law* 91 91

² Hereafter SARPA

³ Hereafter SARFU

⁴ Prinsloo "Enkele Opmerkings oor Spelerskontrakte in Professionele Spansport" 2000 *Tydskrif vir Suid Afrikaanse Reg* 229 230

⁵ As reported in the SARPA Newsletter of 1 June 1999 6 and cited by Prinsloo 2000 *Tydskrif vir Suid Afrikaanse Reg* 229 230

In South Africa the relationship between a professional player and the provincial union is not only governed by the individual employment contract between the parties, but also by the collective agreement between SARPA and SARFU, the common law and labour legislation, of which the most important are: the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998, the Occupational Health and Safety Act 85 of 1993 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Injury or illness, of whatever origin or nature⁶ will affect the employment relationship as the player needs to be in perfect health in order to render the majority of services as stipulated in the contract. The only service stipulated in the contract that the player will be able to render, if ill or injured but not totally incapacitated, will be the participation in the promotional activities of the employer.⁷ The Standard Player Contract⁸, the collective agreement and the relevant statutory and common law will therefore be examined to determine the legal implications that injury or illness may have on the employment relationship.

⁶ See 2.2 for the different categories of injury sustainable in the game of Rugby.

5.2 The Individual Employment Contract

5.2.1 Nature of the Relationship

As stated above⁹ it is accepted by all parties to this relationship that the relationship is in fact that of an employment contract. Even in the absence of such acceptance it is clear that the legal relationship between a professional rugby player and his union qualifies as an employment contract, as all the elements of an employment contract are present: It is a voluntary agreement between two parties, in terms of which the employee agrees to perform specified duties for the employer, for an indefinite or specified period, in return for which a fixed or ascertainable wage is payable to the employee, and which entitles the employer to prescribe the duties of the employee and usually to control the manner in which the employee discharges them.¹⁰ This is in line with international rulings such as that of the court in *Jones and Another v Welsh Rugby Football Union*¹¹ where it was held that a contract exists between the parties by virtue of the player's registration with the Welsh Rugby Football Union and his agreement to be subject to their disciplinary proceedings.

Standard practice in the United States, which has also found application in our labour practice concerning professional team sport, is that of determining a standard players contract by collective agreement, allowing individual

⁷ As stipulated by Clause 3.1.6.3 and 3.1.6.4 of the Standard Player Contract 2002

⁸ Hereafter referred to as the SPC

⁹ See 5.1

¹⁰ Grogan *Workplace Law 6ed*(2001) 27

negotiation only for specific matters such as remuneration and the duration of the contract.¹² The 2002 collective agreement between SARPA and the Provinces¹³ refers to the parties' agreement on the standard terms of employment.¹⁴ The SPC between the players and the respective unions contains the following clause:

"The province shall employ the Player as a professional rugby player [for] the remuneration and terms and conditions as set out in this agreement"

The contract contains the condition that it will only come into operation once the player has passed a medical and fitness examination as prescribed and paid for by the province.¹⁵ The contract is a fixed term contract¹⁶ and will therefore terminate automatically when the agreed period has expired.¹⁷

5.2.2 Who Qualifies As A Professional Rugby Player?

Any player that has signed the SPC will automatically regarded as an employee and therefore a professional rugby player. It may however be possible that a player who has not signed with the union may also be regarded as a professional player or employee. Although SARFU has issued a directive that only players at provincial and national level may be remunerated for their services, in practice, club level players do receive remuneration for their services. It is therefore necessary, in the light of the statutory definitions and

¹¹ reported in *The Times* (6-3-1997) and cited by Moore *Sports Law and Litigation* (2000) 171

¹² Wise and Meyer *International Sport Law and Business Vol 1* (1997) 122 - 123

¹³ This collective agreement is the third agreement concluded between the parties to regulate the employment of rugby players in South Africa.

¹⁴ which are embodied in the SPC 2002.

¹⁵ Clause 2.3 of 2002 SPC

¹⁶ Clauses 2.2 of 2002 SPC

common law tests, to determine whether a player is in fact a professional player.

Section 1 of the Basic Conditions of Employment Act¹⁸ and section 213 of the Labour Relations Act¹⁹ state that an employee means any person, excluding an independent contractor, who works for another person or for the State, and who receives or is entitled to remuneration or any other person who in any manner assists in carrying on or conducting the business of an employer.

It is not always easy to distinguish between an employee as defined and an independent contractor. To facilitate this distinction courts have in the past applied a range of tests developed by various jurisdictions, including the English and South African courts. The control test, organisation test and multiple or composite tests are among the tests developed.²⁰ The dominant impression test was ultimately accepted by the Labour Appeal court as the appropriate test to determine if an employment relationship exists.²¹ According to this approach the relationship as a whole must be examined and serve as the basis for a conclusion as to the nature of the relationship.²²

Attempts by employers to structure the relationship between them and their employees as something other than an employment relationship, have led to demands by unions that the statutory definition of employee be expanded.²³

¹⁷ Grogan *Workplace Law* 73

¹⁸ Act 75 of 1997

¹⁹ Act 66 of 1995

²⁰ Grogan *Workplace Law* 17

²¹ Grogan *Workplace Law* 17

²² Grogan *Workplace Law* 18

²³ Van Niekerk and Le Roux "A Comment on the Labour Relations Amendment Bill" 2001 *ILJ* 2173

The Labour Relations Amendment Act²⁴ introduced in Section 200A a rebuttable presumption, which places the onus on the employer to show that the person is fact not an employee. The section provides that until the contrary is proved, a person who works for or renders services to any other person is, regardless of the form of the contract presumed, to be an employee if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control of another person;
- (b) the person's hours of work are subject to the control or direction of another person;
- (c) In the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for who he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

This section only applies to persons who earn an amount

²⁴ 12 of 2002, which took effect on the 1st of August 2002

equal to or less than the amount of R 89 600.²⁵

It is therefore apparent that a player, in the absence of a contract between himself and his provincial union, can still be regarded as an employee in the light of the above. The manner in which the player conducts himself on the field of play is largely under control of the union; the union determines times for training, practice sessions and matches; the time the player is engaged in duties owing to the union far exceeds 40 hours per month; and very often, due to the demanding training schedules, the player is economically dependent on the union. Therefore, until the union rebuts these presumptions, the player will be deemed to be an employee of such union and will be entitled to the basic employee rights entrenched in labour legislation.²⁶

5.2.3 Special Terms And Conditions Included In The Standard Players

Contract Relating to Injury

(i) Clauses relating to the physical condition and fitness of the player.

(a) Medical Testing

The contract between the union and the player only comes into existence once the player has passed a medical and fitness

²⁵ Which is the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997

²⁶ These presumptions will have far reaching effects on the situation where a non-contracted player is simply dropped from the team without being given any reason. If the Union fails to rebut the

examination, which is prescribed and paid for by the union.²⁷ Medical testing is regulated by the Employment Equity Act.²⁸ Section 7 provides that the medical testing of an employee is prohibited unless the inherent requirements of the job demand such testing.

The criteria that are taken into account in establishing whether medical testing is justified will include:

- Whether the work includes physical activity
- Whether the medical test relates to the actual and reasonable requirements of the job
- Whether the applicants have been adequately informed of the nature and purpose of the test.²⁹

It is submitted that the job requirements of a professional rugby player, which demand a high level of physical fitness, fall within the ambit of this exclusion.

(b) Maintaining an appropriate level of fitness and skill

Furthermore, the player agrees to maintain an appropriate level of fitness and skill³⁰ and is under an contractual obligation to:

presumptions, it would amount to an unfair dismissal. A more detailed discussion however falls outside the ambit of this study.

²⁷ Clause 2.3 of the 2002 SPC

²⁸ 55 of 1998

²⁹ Du Toit, Woolfrey, Murphy, Godfrey, Bosch and Christie *Labour Relations Law : A Comprehensive Guide 3ed* (2000) 454

³⁰ Clause 3.1.3

- Keep himself in match condition as prescribed and regulated by the province;
- Disclose, as soon as he becomes aware of it, any illness, disability, injury or other condition that might affect his physical condition or performance as a rugby player;
- Attend and participate in any physical or fitness examination required by the province;
- Obtain and undergo any necessary medical treatment that is prescribed by any registered medical practitioner approved by the province concerning any disability, injury, illness or other condition that affect the player's ability to play rugby;
- Comply with reasonable instructions by the team doctor or dietician; and
- Not engage in any other sports or pastimes, including but not limited to, abseiling, polo, steeplechasing, parachuting, ice-hockey, wrestling, boxing, martial arts, hang-gliding, paragliding and speed or duration tests or racing other than by foot or in a yacht.³¹

whilst that player is employed as a rugby player by a union.

A clause such as this endeavours to secure the highest possible level of fitness by the players. It is a common clause in American

standard players' contracts, and breach of this clause could be a reason for termination of the contract.³²

(c) Clauses relating to the disclosure of physical conditions affecting the player's ability to play rugby.

The SPC³³ stipulates that the player undertakes to disclose, as soon as he becomes aware of it, any illness, disability, injury or other condition that might affect his physical condition or performance as rugby player.

In addition to this, rugby players sign a written undertaking, which is incorporated into the SPC,³⁴ that at the time of conclusion of the contract, such player is one hundred percent fit to play rugby. If that is not the case, he is required to disclose the reason therefore.

An issue that is quite contentious is that of testing the player for the HIV virus and disclosure of the HIV status of a player to his union. Even though medical testing could be justified by the inherent requirements of the job, an employer is still not permitted to test an employee or job applicant for his HIV status³⁵. Such

³² Prinsloo 2000 TSAR 235

³³ Clause 9.1.2

³⁴ Schedule 4 of the 2002 SPC

³⁵ Tinarelli *Employers' Guide to the Employment Equity Act* (2000) 33

testing will only be allowed if declared justifiable by the Labour Court.³⁶

³⁶

Section 7(2) of the Employment Equity Act 55 of 1998. This is also provided for in Item 5.3.3 of the Code of Good Practice on Key Aspects of HIV/ Aids and Employment Notice R1298 of GG 21815 1 - 12 - 2000. Item 7 of the Code of Good Practice provides the following with regard to HIV testing and disclosure:

HIV TESTING, CONFIDENTIALITY AND DISCLOSURE

7.1. HIV Testing

- 7.1.1. No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.
- 7.1.2. Whether s 7 (2) of the Employment Equity Act prevents an employer-provided health service supplying a test to an employee who requests a test, depends on whether the Labour Courts would accept that an employee can knowingly agree to waive the protection in the section. This issue has not yet been decided by the courts.
- 7.1.3. In implementing the sections below, it is recommended that parties take note of the position set out in item 7.1.2.
- 7.1.4. **Authorised testing**
Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:
- (i) during an application for employment;
 - (ii) as a condition of employment;
 - (iii) during procedures related to termination of employment;
 - (iv) as an eligibility requirement for training or staff development programmes; and
 - (v) as an access requirement to obtain employee benefits.
- 7.1.5. **Permissible testing**
- (a) An employer may provide testing to an employee who has requested a test in the following circumstances:
 - (i) As part of a health care service provided in the workplace;
 - (ii) In the event of an occupational accident carrying a risk of exposure to blood or other body fluids;
 - (iii) For the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.
 - (b) Furthermore, such testing may only take place within the following defined conditions:
 - (i) At the initiative of an employee;
 - (ii) Within a health care worker and employee-patient relationship;
 - (iii) With informed consent and pre- and post-test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and
 - (iv) With strict procedures relating to confidentiality of an employee's HIV status as described in clause 7.2 of this Code.
- 7.1.6. All testing, including both authorised and permissible testing, should be conducted in accordance with the Department of Health's National Policy on Testing for HIV issued in terms of the National Policy for Health Act 116 of 1990.
- 7.1.7. Informed consent means that the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test. It implies that the individual understands what the test is, why it is necessary, the benefits, risks, alternatives and any possible social implications of the outcome.
- 7.1.8. Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research. Where such research is done, the information obtained may not be used to unfairly discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.
- ##### **7.2. Confidentiality and Disclosure**
- 7.2.1. All persons with HIV or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.
- 7.2.2. Where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is not possible, steps must be taken to confirm that the employee wishes to disclose his or her status.
- 7.2.3. Mechanisms should be created to encourage openness, acceptance and support for those employers and employees who voluntarily disclose their HIV status within the workplace, including:
- (i) encouraging persons openly living with HIV or AIDS to conduct or participate in education, prevention and awareness programmes;
 - (ii) encouraging the development of support groups for employees living with HIV or AIDS ; and

Where an application is made to allow for HIV testing, the applicant would have to satisfy the court of an objective need to identify people with HIV in order to exclude them from employment or subject them to special measures.³⁷ This will only be the case where the testing is considered compulsory.

In the recent case of *Irvin and Johnson v Trawler and Line Fishing Union and Others*³⁸ the Labour Court held that there is good reason to conclude that the legislature did not intend section 7 of the Employment Equity Act to apply to voluntary testing.³⁹ It stated that although employees are to be protected against compulsory testing, it is quite another thing to place obstacles in the way of voluntary testing.⁴⁰ The court explained the difference between compulsory and voluntary testing as follow:

" By compulsory testing is meant, in this context, the imposition by the employer of a requirement that employees (or prospective employees - see s9 of the Act) submit to testing on the pain of some or other disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the employee to decide whether he or she wishes to be tested and where no disadvantage

(iii) ensuring that persons who are open about their HIV or AIDS status are not unfairly discriminated against or stigmatised.

³⁷ Du Toit et al *Labour Relations Law* 454

³⁸ 2003 4 BLLR 379 LC

³⁹ 388 A - B

⁴⁰ 387 A - B

attaches to a decision by an employee not to submit to testing." ⁴¹

No express HIV-testing is required in the SPC. The SPC does however include a suspensive condition requiring the player a medical examination prescribed by the employer.⁴² If the clause can be taken to include a test to determine HIV status, it is submitted that the employer will have to comply with the statutory requirements, as it would fall within the ambit of the definition of compulsory testing as set out above.

Both the Employment Equity Act⁴³ and Labour Relations Act⁴⁴ afford employees and AIDS sufferers protection against discrimination on the basis of HIV status.

⁴¹ 386 G - J

⁴² Clause 2.3

⁴³ Section 6 of the Employment Equity Act 55 of 1998 provides that "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV Status, conscience, belief, political opinion, culture, language and birth.

⁴⁴ Section 187(1)(f) of Act 66 of 1995 provides that a dismissal will be automatically unfair if the reason for the dismissal is that the employer unfairly discriminated unfairly against the employee on any arbitrary ground. It is respectfully submitted that this provision would also encompass discrimination on the basis of HIV status.

In *Joy Mining Machinery (A Division of Harnischfeger(SA) (Pty) Ltd) v NUMSA & Others*⁴⁵ the court held that the following factors should be taken into account when deciding on an application to grant permission for HIV testing, insofar as they are applicable to the circumstances of the case:

- The prohibition on unfair discrimination;
- The need for HIV testing;
- The purpose of the test;
- The medical facts;
- Employment conditions;
- Social policy;
- The fair distribution of employee benefits;
- The inherent requirements of the job;
- The category or categories of jobs and employees concerned.⁴⁶

In all likelihood the Labour Court will be cautious in authorising such testing since in most occupations there is no real danger of being exposed to a situation where HIV can be transmitted occupationally.⁴⁷

⁴⁵ 2002 4 BLLR 372 (LC)

⁴⁶ *Joy Mining Machinery (A Division of Harnischfeger (SA) (Pty) Ltd) v NUMSA and Others* 2002 4 BLLR 372 (LC) 378 G-J

⁴⁷ Du Toit et al *Labour Relations Law* 454

Rugby, as a contact-intended⁴⁸ sport, does pose a danger where two players making hard physical contact can cause a situation where a player with an open wound can possibly come into contact with another player's HIV-infected blood.

Two arguments in favour of pre-employment HIV testing are relevant to a contact-intended sport such as rugby:

1. *It is necessary to ensure that a person who is to be employed is healthy enough to work efficiently.*⁴⁹

Efficient work in professional rugby would mean that the player attends all training sessions and is match fit for all matches, without the added risk of not being able to fulfil these obligations, as a result of HIV infection. The strenuous physical regime players are subjected to can place strain on the immune system of the HIV patient, creating the opportunity for AIDS-related opportunistic infections that may incapacitate the player, causing him not to "work efficiently".

⁴⁸

See 3.1 fn 3 for a definition of a contact-intended sport.

In the *Joy Mining Machinery*⁵⁰ case the court held that the purpose of an employer knowing the extent of HIV infection among its workforce is to :

- Be pro-active regards prevention of employees becoming infected with HIV;
- Treat at a minimum, the symptoms of the disease;
- Plan for contingencies and other eventualities.

2. *Employers often justify pre-employment testing by stating that it is intended to ensure the safety of other employees.*

The Occupational Health and Safety Act⁵¹ imposes a duty on employers to ensure working conditions that are safe for all employees.⁵² "Safe" in the context of this act is defined as "free from any hazard".⁵³

This may be construed as a justification for not appointing a potential employee who is HIV positive or suffering from AIDS.⁵⁴ Although ordinary working conditions may not facilitate the transmission of HIV occupationally,⁵⁵

⁴⁹ Grosset *Discipline and Dismissal 2ed* (1999) 131
⁵⁰ 2002 4 BLLR 372 (LC) 379 F-J
⁵¹ 85 of 1993.
⁵² Section 8(1) of Act 85 of 1993
⁵³ Section 1
⁵⁴ Grosset *Discipline* 130
⁵⁵ Grosset *Discipline* 131

professional contact sport does not amount to ordinary working conditions.

There is no contractual duty on an HIV positive player to disclose his HIV status to his employer, provided that he complies with the undertaking in schedule four of the SPC, to be fit to do the work he is contracted to do, in other words, play rugby. It could be possible to argue that failure by a player to disclose HIV infection, even though he is one hundred percent fit to play rugby, could leave his employer in a predicament if he becomes ill very early in the season.⁵⁶

For a professional sportsman to only inform the employer that he is HIV positive, once he cannot play at all, is too little too late.⁵⁷

(ii) Clauses relating to indemnification of the player for injury suffered

In the United States professional team sport, players' contracts as a rule stipulate that an injured player will receive his service

⁵⁶ Item 1 of the Code of Good Practice on Key Aspects of HIV/Aids and Employment recognises that the HIV/AIDS pandemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on all aspects of the workplace.

⁵⁷ Item 11 of the Code of Good Practice on Key Aspects of HIV/ Aids and Employment provides for the instance where dismissal of an employee is necessitated by the fact that the employee is too ill to perform his duties by reason of his HIV/AIDS status. In this instance the employer will still be obliged to follow accepted guidelines regarding dismissal for incapacity as set out in the Code of Good Practice in

fee either until the termination of the contract or the end of the season, in the event of such player being injured whilst playing the sport he is employed in.⁵⁸

In South African law, whether an employee can claim indemnity for injury suffered will depend on the terms of his contract of employment.⁵⁹ The parties can also agree on the circumstances in which the employee will be entitled to make such a claim.⁶⁰ The rugby players employed by SARFU are contractually obliged to become members of an income replacement insurance scheme, to insure the player against loss of remuneration as a result of being unable to play rugby due to accident, injury or illness.⁶¹

The union as employer is however contractually liable for payment of the player's remuneration for a period of sixty days of incapacity due to accident, injury or illness, to accommodate the "window" period where the contract insurance does not pay any benefit or the case of a player who was unable to obtain cover under an income protection scheme.⁶²

Schedule 8 of the Labour Relations Act. The employer should however see to it that the employee's right to confidentiality regarding his HIV status is maintained during such incapacity proceedings.

⁵⁸ Prinsloo 2000 *TSAR* 233

⁵⁹ Brassey *Employment Law*(2000) E4:17

⁶⁰ Brassey *Employment Law*E4:19

⁶¹ Clause 10.1 of the 2002 SPC

⁶² Clause 10.3 and 10.4 of the SPC

5.3 Rights of a Player Potentially Affected by Injury

(i) Right to be preserved from injury and harm

The common law imposes a duty on the employer to refrain from wrongfully causing the employee loss or injury.⁶³

Where harm has been caused to the employee, the employee will have a claim for damages against the employer if it can be proven that the employer's wrongful act or omission was either intentional or negligent.⁶⁴ This duty to refrain from harming the employee exists in both contract and delict.⁶⁵ The court is likely to consider the convictions of society and the contractual duty, by reference to the tacit understanding between the parties in deciding the ambit of the delictual duty that rests on the employer.⁶⁶ The employee will be free to choose whichever action he prefers, but the choice he makes may be important.⁶⁷ The contractual action will only be available within the scope of the agreement between the employer and employee.⁶⁸ Therefore, unless a contract between a player and his union states that he will be protected from harm by the employer, the player will not have an contractual action. The delictual action knows no such limits. The employee finds himself in the same

⁶³ Brasseley *Employment Law* E4:19
⁶⁴ Brasseley *Employment Law* E4:19
⁶⁵ Brasseley *Employment Law* E4:20
⁶⁶ Brasseley *Employment Law* E4:20
⁶⁷ Brasseley *Employment Law* E4:20
⁶⁸ Brasseley *Employment Law* E4:20

position as a third party who happened to be injured by the employer.⁶⁹

In *Hyde v Agar, Worsley v Australian Football Union Ltd*⁷⁰ the court held in principle that the union owed a duty of care towards the players in the formulation of rugby rules, so that the formulation of the rules does not create unnecessary risks for the players.⁷¹

The normal defences in delict will apply in the employment relationship. In this way the *volenti non fit iniuria* principle, will operate as a defence to the claim of a rugby player who suffers harm from the dangers inherent in his employment.⁷²

The duty of care owed by the employer has been statutorily entrenched in the Occupational Health and Safety Act.⁷³ Section 8 of said Act provides that the employer is obliged to provide and maintain, as far as it is reasonably practicable, a safe working environment that is without risk to the employees. The Act covers both conventional and casual employees.⁷⁴

⁶⁹ Brassey *Employment Law* E4:20

⁷⁰ 1998 45 NSWLR 487 as cited by Basson (2000) *Sport and the Law in South Africa* 5-23

⁷¹ Basson *Sport and the Law* 5-25. This duty is implicitly accepted by the unions as employers in the foreword to the SA Rugby Law Book in that it is stated that "It is the duty of the Unions to ensure that the Game at every level is conducted in accordance with disciplined and sporting behaviour".

⁷² Brassey *Employment Law* E4:22

⁷³ 85 of 1993

⁷⁴ Brassey *Employment Law* E4:39

An employee will be able to claim compensation under the Compensation for Occupational Injuries and Diseases Act⁷⁵ if he suffers personal injury in a work-related accident, even if that employee is responsible for the accident. The employee will only be precluded from claiming successfully if the accident is caused by serious and wilful misconduct on his part, and then only if his disablement is minor.⁷⁶ A work related accident means an accident arising out of and in the course of an employee's employment.⁷⁷ These two requirements are cumulative and both must be satisfied before the Act applies.⁷⁸

⁷⁵ 130 of 1993

⁷⁶ Section 22(3) of Act 85 of 1993

22 Right of employee to compensation

(3) (a) If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act, unless-

(i) the accident results in serious disablement; or
 (ii) the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.

(b) Notwithstanding paragraph (a) the Director-General may, and the employer individually liable or mutual association concerned, as the case may be, shall, if ordered thereto by the Director-General, pay the cost of medical aid or such portion thereof as the Director-General may determine.

⁷⁷ Section 22 read with the definition of accident in Section 1: '**accident**' means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee;

⁷⁸ Brassey *Employment Law* E4:40

A rugby player who is paralysed as a result of an impermissible high tackle during a match will therefore satisfy the requirements of the Compensation for Occupational Injuries and Diseases Act and be entitled to compensation under this Act. The injury would have been sustained in the course of the player's employment, since being tackled is part and parcel of the game of rugby and the accident would not have occurred had he not been going about his duties as a player.

A rugby union as employer must comply with safety regulations promulgated in terms of the Occupational Health and Safety Act insofar as they apply to the rugby employment relationship and workplace. In particular it will have to adhere to the standards set for change rooms in the Facilities Regulations.⁷⁹

(ii) Right to Sick Leave

The right to sick leave only accrues when the employee cannot perform in terms of the employment contract due to incapacity, which means he is unable to work due to illness or injury.⁸⁰ The right to sick leave is entrenched in the Basic Conditions of Employment Act.⁸¹ The SPC entitles the players to 14 days' sick

⁷⁹ Regulation 4 of the Facilities Regulations GN R2362 GG12777 of 5 October 1990

⁸⁰ Grogan *Workplace Law* 63

⁸¹ 75 of 1997

22 Sick leave

(1) In this Chapter, 'sick leave cycle' means the period of 36 months' employment with the same employer immediately following-

- (a) an employee's commencement of employment; or

leave per year⁸² with the proviso that in the event that a player misses a match or practice due to ill health or injury, or is unable to comply with any of the duties in his contract, the player must undergo a medical examination by a medical practitioner appointed by the union to establish the extent and nature of the illness or injury.⁸³ The player will be required to make full disclosure of the results of the medical examination to the union.⁸⁴

The previous Basic Conditions of Employment Act contained the requirement that the illness or incapacity must not have been caused by the employee's conduct.⁸⁵ Grogan holds the view that this requirement no longer applies and that the only circumstance in which sick leave cannot be claimed is when the incapacity was caused by an illness or accident defined in the Compensation for Occupational Injuries Act,⁸⁶ and then only for

(b) the completion of that employee's prior sick leave cycle.

(2) During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.

(3) Despite subsection (2), during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked.

(4) During an employee's first sick leave cycle, an employer may reduce the employee's entitlement to sick leave in terms of subsection (2) by the number of days' sick leave taken in terms of subsection (3).

(5) Subject to section 23, an employer must pay an employee for a day's sick leave-

(a) the wage the employee would ordinarily have received for work on that day; and

(b) on the employee's usual pay day.

(6) An agreement may reduce the pay to which an employee is entitled in respect of any day's absence in terms of this section if-

(a) the number of days of paid sick leave is increased at least commensurately with any reduction in the daily amount of sick pay

⁸² Clause 17.1 of the 2002 SPC

⁸³ Clause 17.2.1

⁸⁴ Clause 17.2.2

⁸⁵ Grogan *Workplace Law* 64

⁸⁶ 130 of 1993

the period in respect of which compensation can be claimed under the Act.⁸⁷

Brassey, however, points out that in contract the principle exists that the person who culpably created it cannot rely upon impossibility of performance.⁸⁸ In such an instance failure by the employee to perform constitutes a culpable breach of contract and has to be dealt with accordingly. In the case of *Fairclough v Buckland*⁸⁹ the court held that the boxer in casu would have been liable to pay the £25 penalty for failure to perform, had his illness been the result of his own fault. In addition the court held:

" If a man is so unwell that he cannot perform a personal service, he cannot be sued for not doing that service, unless the man is the cause of the illness. In the case of a fight, one of the fighters might do some small damage to his hand and be unable to fight, but I am not considering that question. If the illness from which the [boxer] was suffering was anything due to his wrong intention, he would not, of course, be able to raise the illness as an excuse."⁹⁰

⁸⁷ Grogan *Workplace Law* 64

⁸⁸ Brassey *Employment Law* F1:12

⁸⁹ 1913 SR 186 as cited by Brassey *Employment Law* F1:13

⁹⁰ *Fairclough v Buckland* 1913 SR 186 as cited by Brassey *Employment Law* F1:13

The SPC places a duty on the player not to engage in sport or pastimes that would increase the risk of the player sustaining injuries that would render him unable to play rugby.⁹¹

A player disregarding this duty, and sustaining injury as a result thereof, may be liable for breach of contract to his union.

(iii) The Right to Fair Labour Practices

All employees have the right to be treated fairly by their employers.⁹² This applies equally in the rugby employment relationship, despite the unique features of the industry. The right to fair labour practices is entrenched in the Labour Relations Act.⁹³ The Act defines an unfair labour practice in section 186 as *inter alia*:

"any unfair act or omission that arises between an employer and an employee involving

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;"

⁹¹ Clause 9.1.6. Also see 5.2.3 (i)(b)
⁹² Grogan *Workplace Law* 68
⁹³ 66 of 1995

When the situation arises that a player is injured and becomes unable to perform at full capacity, it is quite possible that a player can be omitted from the team of which he would usually be considered a key member. A situation can be foreseen where the player's loss of match fees and status as a regular player when omitted from the team can be considered to be a demotion for the purposes of the unfair labour practice definition.

The labour court held in *Ndlela v SA Stevedores Ltd*⁹⁴ that "Demotion is not a word which has some special meaning in labour law. It bears its ordinary meaning, namely 'to reduce to a lower rank or category'. The opposite of demotion is promotion".

A demotion that is fair will be a demotion that is implemented to avoid retrenchment or a dismissal for incapacity, or as a disciplinary penalty imposed for a valid reason after compliance with a fair procedure.⁹⁵ Rugby unions will have to comply with these obligations in their treatment of injured employees when making decisions about their playing career. Fair procedure has to be followed at all times, even though in the context of professional rugby it may not be so simple.

⁹⁴1992 13 *ILJ* 663C⁹⁵Grogan *Workplace Law* 236

(iv) The Right not to be Unfairly Dismissed

The right not to be unfairly dismissed is entrenched in the Labour Relations Act.⁹⁶ In the context of professional sport there are usually three grounds on which the player can be dismissed: Failure of the player to perform in terms of his contract, unsatisfactory performance and skills in comparison with rival players and conduct of the player that objectively is to the detriment of the employer club or union.⁹⁷ These grounds will now be dealt with.

(a) Dismissal for Misconduct

A dismissal for misconduct in terms of the Labour Relations Act must be for a fair reason and in accordance with a fair procedure.⁹⁸ The Code of Good Practice: Dismissal contains the guidelines that has to be followed when dismissing an employee.⁹⁹ There are two cases in which conduct of the player

⁹⁶ Section 185 of the Act 66 of 1995 provides that every employee has the right not to be unfairly dismissed.

⁹⁷ Prinsloo 2000 *TSAR* 233 Due to the nature of the professional sports employment contract, and the short duration thereof, retrenchment is a form of dismissal not often encountered in sport, especially not due to injury. It is therefore falls outside the ambit of this discussion.

⁹⁸ Section 188 of Act 66 of 1995 provides that:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
- (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
 - (b) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

⁹⁹ The code is contained in Schedule 8 of the Labour Relations Act 66 of 1995. Item 7 of the Code provides for Dismissals for Misconduct.

7 Guidelines in cases of dismissal for misconduct

Any person who is determining whether a dismissal for misconduct is unfair should consider-

will amount to dismissible misconduct. The first instance is where the player conducts himself in such a manner that he "brings the game into disrepute" when he is not playing a match or attending practice, but his conduct nevertheless impacts on the employment relationship, such as when the team is on tour.¹⁰⁰

The second, less complicated, instance is where the player commits misconduct on the field of play during a match or practice session. For both these instances the player can be disciplined, either in terms of the misconduct clause contained in the SPC¹⁰¹ or SARFU's judicial procedure.¹⁰² Where a player assaults another during a match, and he is either disciplined by the referee or cited by the opponent union afterwards, he will be disciplined according to this procedure.

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- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
 - (b) if a rule or standard was contravened, whether or not-
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.

¹⁰⁰ See Viljoen "Sports Celebrities: License to Misbehave?" *East Cape Sports Action* (November/ January 2002) 28 for a brief overview of off-field misconduct of professional player and the legal consequences thereof.

¹⁰¹ Clause 12 of the SPC provides that the player must conduct himself in a manner consistent with his employment as a rugby player and further provides for the disciplinary procedure to be followed in the event of misconduct.

¹⁰² SARFU's judicial procedure provides for the constitution and appointment of the judicial committee, the disciplinary proceedings and hearings and the procedure to be followed.

It is therefore conceivable that in extreme cases a player could possibly be dismissed for wilfully and unlawfully causing injury to another player. This dismissal will however only be fair if there is compliance with both the internal prescribed procedure and the statutory requirements.

(b) Dismissal due to Incapacity

An injured player will not be able to perform his duties to the same extent as a player that is not injured. To the employer union, injured players pose a great problem, as they hamper the team's ability to perform and win matches and generate revenue for the employer.

The union obviously needs to replace a player that cannot play as soon as the next practice session. The nature of the physical activity and the culture of the game will have to be taken into account by the courts when they are faced with dismissals based on incapacity due to poor health or injury.¹⁰³

In rugby, most players are only contracted for a season, and the unions may elect to simply await expiry of the contract instead of following the prescribed procedures for dismissal.¹⁰⁴ For this purpose the SPC obliges a player to become a member of an

¹⁰³Le Roux "Under Starter's Orders: Law, Labour Law and Sport " 2002 *ILJ* 1195 1199

income protection scheme and provides that the employer union will not be liable to remunerate a player in respect of any period during which the player is unable to perform in terms of his contract, except for any period of sick leave that is due to the player.¹⁰⁵ Although the player's contract is not terminated, payment of remuneration by the employer union will cease. This clause replaced the clause in the 1999 SPC¹⁰⁶ that stated that if a player is unable to play for 90 consecutive days due to medical reasons the union reserved the right to terminate the employment relationship on notice.¹⁰⁷

If the player is however not performing satisfactorily with no medical reason for such unsatisfactory performance, the union employer will have to follow the procedure set out in Item 9 of the Code of Good Practice on Dismissal.¹⁰⁸

5.4 Conclusion

The employment relationship in professional rugby, becomes fraught with difficulties where a player is injured. At the amateur level of the sport, an

¹⁰⁴ Le Roux 2002 *ILJ* 1199

¹⁰⁵ Clause 10 of the SPC

¹⁰⁶ Clause 15.2.1

¹⁰⁷ The 1999 SPC contained numerous problematic clauses including an extremely problematic and ill-drafted restraint clause that gave rise to the high profile and much publicised case of *Golden Lions Rugby Union v Venter* Unreported Case no 2007/2000 Transvaal Provincial Division.

¹⁰⁸ Item 9 of the Code of Good Practice provides that:

Any person determining whether a dismissal for poor work performance is unfair should consider-

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and

injured player would simply be omitted from the team and replaced as soon as possible. The injured player would have recourse against the person who had injured him had he been deliberately or negligently injured. That would be the end of the matter.

Due to the fact that an employment relationship exists where a player is contracted, or may possibly even exist in the absence of such a contract, the employer union must comply with labour legislation in the conclusion of the contract and during the employment relationship. Medical testing and disclosure of medical conditions have been extensively legislated and adjudicated on and the employer will have to take cognisance hereof when enforcing the clauses in the SPC relating hereto.

The employer will have to ensure that in its dealing with the injured player, the employee's rights to be indemnified for injury, to be preserved from harm, to sick leave, to fair labour practices and not to be unfairly dismissed, must be protected despite the unique features of the relationship.

Good labour relations contribute greatly to the success of a particular industry. Well cared for and fairly treated employees deliver the desired results. The employer in a team sport such as rugby, should not only be adhering to labour legislation because it is forced to do so, but also to

(iii) dismissal was an appropriate sanction for not meeting the required performance standard.

ensure that employee morale is good. This will serve the most important objective of professional team sport: Winning.

Chapter 6: Conclusion

With rugby attaining professional status in 1995, the legal consequences of an injury to a player changed as drastically as the dynamics of the game itself. Not only did the relationship between the parties within the sporting relationship change, the parties themselves became more specialized and diverse.

Where previously it was only the player, coach, referee, linesmen and the executive committee of the particular union the spectrum of parties involved in professional rugby now comprise of:

- The player
- The player's agent or legal representative
- The union who acts as employer
- The coach and various assistant coaches
- The referee and linesmen
- The medical team comprising of the team physician, physiotherapist and biokineticist.
- The team manager
- Various other professionals attending to the business side of the team's activities

With this rapid development of the game of rugby as an industry, and the development of the sports industry in general, a body of law has developed that comprises of unique application of general principles of law to sport and sporting activities. Sadly they are increasingly needed to an extent that was non-existent in the days of a more stable and less violent society.¹ In South Africa this body of law is still very much undeveloped and until sufficiently developed by legislation and the courts, foreign sources, especially that of the United Kingdom, Australia and America will have to be relied heavily upon to guide our courts in the application of the legal principles applicable to sport.

Where the law is asked to provide a remedy for an injury suffered by a player, the process commences by having regard to the medicolegal principles applicable to the game of rugby. Determining the mechanism of injury and the and the possible cause thereof will aid in determining a possible defendant or accused when instituting legal action. Reports of medical experts will be heavily relied upon in proving the mechanism of injury. Cooperation between medicine and the law is not confined to where an injured player seeks a remedy in some form but may aid in minimising the danger of injury in the game itself as the opinion and input of these parties often prompt changes in the rules of the game that are designed to enhance the safety of the game.

¹ Grayson *Sport and the Law 3ed* (2000) 290

An element of violence has always been present in contact-intended sports, such as rugby. Where that violence falls outside the scope of consent, the player perpetrating such violence or official failing to prevent the players from harm will incur criminal liability in the form of an assault, culpable homicide or murder charge. In the same situation a person would also be civilly liable for any patrimonial and non-patrimonial loss caused by such injury caused by him.

In a contact-intended sport such as rugby, injuries intentionally or negligently caused by another frequently occur, but comparatively few cases ever reach the courts.² Several reasons may be offered to explain this phenomenon. Firstly the injuries suffered may be minor and accepted by the player as part of the game.³ The notion that the occasional punch or high tackle during a game is acceptable still exists, and the injured player may want to avoid being perceived as a complainer, and the resultant negative publicity surrounding litigation.⁴ It is submitted that due to the patrimonial consequences caused by an injury, this attitude will change in the future, especially as not only the player is affected by a injury that would render him unable to play.

Secondly, Basson⁵ submits that there is the tendency for such incidents to be handled by the sporting body internally by means of their disciplinary procedure. Penalties imposed by a disciplinary process are often perceived as

² Basson & Loubser Sport and the Law in South Africa (2000) 5-49

³ Basson & Loubser Sport and the Law 5-49

⁴ Basson & Loubser Sport and the Law 5-49

⁵ Basson & Loubser Sport and the Law 5-49

adequate, more so than instituting a claim for damages against another player, an official or a sporting body.⁶ The vast majority of the civil cases that do reach the courts are settled outside of court “in the interests of Rugby” and none are reported. The benefit of civil litigation in sport, that is lost sight of, is that it may have a deterrent effect causing the player to play within the rules and customs of the game or else be liable for the injuries caused.⁷ It is submitted that similarly the team doctor, coach and referee and sporting body would take the utmost care in ensuring that no injury is caused by omission or negligence on their part.

The picture regarding criminal prosecution of injury caused during a game of rugby is quite different. Incidents of violence, although they sometimes occur in view of thousands, are not reported to the police by the victims. The role of the police is confined to crowd control, rather than being concerned with on-field violence.⁸ It is evident from the absence of criminal cases in South Africa that prosecution of sports injuries caused by the violent act of another meets with fierce disapproval in rugby circles.

Although the criminal law clearly has reason to interfere, there is the general attitude that problems with reference to violence should be dealt with by the sportsmen themselves.⁹ This attitude in most cases will probably cause the greatest obstacle to obtaining sufficient and reliable evidence, in the event of a case being tried. Rugby is a team sport involving team spirit, and this has

⁶ Basson & Loubser Sport and the Law 5-49

⁷ Beumler “Liability in Professional Sports: An Alternative to Violence” 1980 Arizona Law Review 919
937

serious consequences. To tell the truth under oath is one thing, but telling on a team-mate is another.¹⁰ This would cause most witnesses called during a criminal prosecution to be recalcitrant or biased.¹¹

Basson however submits that from a public interest point of view, criminal prosecution for sports-related violence will seem inappropriate as the player who commits an assault on the field arguably poses little threat to society.¹² It is submitted that this view is too narrow. The fact that on-field violence in a rugby match is extensively televised and publicised does pose a threat to society. On-field violence that goes unpunished may be perceived as acceptable behaviour, which would spill over in to a society that is already too violent.

An area of the law the law that promises exciting developments, pertaining to sport injury, is that of labour law. The progressive nature of the South African body of labour law leaves room for much development. The CCMA¹³ has already heard cases where a player's contract has been terminated due to injuries. The awareness of employee rights among the players and the fact that they are represented by a trade union in the bargaining process will mean that litigation will more readily occur in this field of the law pertaining to the issues surrounding injury, than in the field of criminal law or delict.

⁸ Basson & Loubser 5-9
⁹ Prinsloo 1991 *TSAR* 42 53
¹⁰ Kelly *Sport and the Law* 254
¹¹ Basson & Loubser *Sport and the Law* 5-9 – 5-10
¹² Basson & Loubser *Sport and the Law* 5-10
¹³ Commission for Conciliation, Mediation and Arbitration

Although many arguments have been voiced both against and in favour of legal involvement where sports violence and injury is concerned, the reality is that although such issues may be handled internally by the sport, the law of the land still applies and may be utilized in addition to the internal disciplinary procedures. In addition to this the courts may scrutinize the disciplinary procedures if some irregularity has occurred.¹⁴

Professional sport, and rugby in particular, is a specialised business enterprise, with unique features and unique legal problems. It therefore needs specialised legal counseling and a well-developed body of legal principles to cater for these unique features and problems. All concerned with professional rugby and other professional sports, will have to work together in developing this body of sports law in South Africa. It is not a process that will occur in an academic vacuum. Cooperation and participation on every level will ensure that the legal principles, as they are applicable to rugby, will be practical and will not hamper the development and nature of the game, but preserve it.

¹⁴ *Middelburg Rugbyklub v Suid -Oos Transvaalse Rugby Unie* 1978 1 SA 484 T

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