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A REVIEW OF 20TH CENTURY LITERATURE RELATED TO SPORT LAW

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ABSTRACT

The growing interaction between sport and the law has created a need for a greater understanding of how the law relates to the world of sport and physical recreation. This is a highly dynamic and rapidly expanding area of scientific inquiry. In this review article an attempt is made at reviewing the local literature related to the field of sport law, and to undertake a content analysis of international literature sources on the topic.

Key Words: Sport law; Safety; Liability; Negligence; Risk management.

INTRODUCTION

Administrators, supervisors and teachers of physical activity as sport, recreation and physical education or fitness have become increasingly concerned, over the years, about the possibility of being implicated in a lawsuit. Because of an increase in the amount of time dedicated to physical activity, and more intense levels of participation, an increase in the number of accidents and injuries is imminent (Van Heerden, 1996; Singh, 1999). As the number of injuries increase, victims turn to someone other than themselves to blame. Further, when the extent of the injury is such that medical assistance and rehabilitation expenses become excessive, victims will also look to someone else to share the expense.

Physical activity is a risk profession. It provides one of the few environments in which people can experience risks in a controlled setting. Today many people are willing to take substantial risks in physical activity (Clement, 1988; Nygaard & Boone, 1989). This is borne out by the growing popularity of many forms of high-risk activities such as white-water rafting, bungee jumping and scuba-diving. Professionals need to communicate to participants that activities involve risk and at the same time, these professionals must learn to control the environment so that only the risks inherent in the activity remain. To do this, they need to be legally literate. In South Africa today, there are a number of reasons why an investigation into safety and general issues in sport law is relevant and imperative.

(i) The country has adopted a new constitution (Act 108 of 1996) which regulates all social activities, including sport.
(ii) The bill of rights enshrines the rights of all people in the country.
(iii) South Africa's re-entry into international sport. Players, management and spectators have to be aware of legal issues and responsibilities.
(iv) There is a growing interest in the academic study of the legal regulation of sport (Gardiner *et al*., 1998).

(v) "Sport Law" or "Sport and the Law" has now arrived as a legitimate legal subject in Britain, U.S.A., Canada, Australia, South Africa, the Netherlands, Germany and New Zealand.

(vi) There is increasing importance on the role of law in contemporary sport and a growing body of statutory and case law specific to sport.

PROBLEM STATEMENT

In order to create awareness of safety issues and to promote legal literacy among sport personnel, it is essential to develop a body of knowledge on sport law. The study of sport law is a relatively new worldwide phenomenon (Gardiner *et al*., 1998). Countries such as the USA, Canada and England have witnessed the emergence of a recognizable body of statutory and case law that can be designated as a distinct legal area, namely sport law. Some of the contributory reasons are that these countries originated and developed the system of professional sport; their high levels of commercialism in sport; and the litigious nature of these societies.

In South Africa, however, such a body of sport law has not developed. Very few cases concerning sport reach the courts. In the few cases that appeared in court, decisions were based on common law principles relating to negligence. Further, the courts have stifled the development of this area of the law by relying on Anglo-American developments as authority (Parmanand, 1987). Scott (1991) maintains that while a definite body of sport and recreation law does exist, the only reason for it not being widely recognised in South Africa is probably that there was no need for such an applied field of law. This situation has however, been drastically altered by the circumstances outlined above. There is clearly a serious need for the country to have a comprehensive and ordered set of guidelines to regulate the legal liability of sports persons.

AIMS OF THE STUDY

The aim of the this study is twofold: firstly, to provide a critical review of South African literature on the following:

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

The second aim is to determine the concerns, principles and practices, from an international perspective, that sport departments should address to reduce the risk of litigation.

METHODOLOGY

The methodology used in addressing the first aim was library research and a review of legislation and case law. The South African Sports Information (SASI) database was used for the review of South African literature relevant to the investigation. In addition, the law

libraries at the University of Durban-Westville, University of Pretoria and University of South Africa were utilized. The literature was analyzed with the particular aims of this study in mind.

For the content analysis, the databases of the Sports Law Institute at Marquette University, Wisconsin, as well as the Society for the Study of Legal Aspects of Sport and Physical Activity (SSLASPA) were used. The methodology utilized for this part of the study involved the analysis of the contents of eighteen articles, journals and books published by sport law experts between 1975 and 1998 (figure 1). Articles that focussed on a single topic, such as insurance, were not included. The most frequently listed risk management practices were categorized into specific areas: supervision and instruction; equipment and facilities; medical care; travel and transportation; insurance; and civil rights (Rushing, 1986; Girvan, 1990).

LITERATURE STUDY AND DISCUSSION

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

The precise methodology used in the study was not outlined, apart from the fact that it "was based on self-observation through self-participation". A questionnaire was used to elicit information on accidents and injuries resulting from physical education activities. The study sample and sampling procedure were not described, but it was delimited to schools in the Free State Province. Van der Merwe provides a valuable entry point in an investigation of the field of Sport Law in South Africa. However, his research is rather limited in that it confines itself to legal principles related to the subject of physical education that is applicable mostly in schools. The study had a strong focus on the teaching of gymnastics and the specific safety precautions that should be taken into account. Prior to this investigation there was no documented research on the topic in the country. However, there existed Department of Education circulars that gave directions to teachers of the subject.

The Human Sciences Research Council (HSRC) completed a national sports investigation in 1980. The law committee had been briefed to conduct a jurisprudential investigation into sports legislation. Report number one was entitled: "The Report of the Law Committee on Legislation hampering the normalization of Sports Relations in the Republic of South Africa". It can therefore be concluded that this study was narrowed in focus to one problem area which centered around discriminatory legislation and other official enactments and decisions which hampered the normalization of sporting relations and the achievement of autonomy in sport. Further, the investigation was conducted only at national level. Provincial and municipal legislation and enactments and their impact on sport were not researched (HSRC, 1980).

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

Interviews were held with senior officials of the Department of National Education (Branch: Sport Advancement), the Department of Cooperation and Development, national sporting

bodies and persons and institutions (HSRC, 1980). The study was delimited to an analysis of and investigation into four acts of parliament that formed the major obstacles to the normalization of sporting relations. These acts were as follows:

(i) The Group Areas Act, No.36 of 1966, as amended;
(ii) The Liquor Act, No. 87 of 1977, as amended;
(iii) The Reservation of Separate Amenities Act, No. 49 of 1953, as amended;
(iv) The Blacks (Urban Areas) Consolidation Act, No.25 of 1945, as amended.

The concepts that were dealt with were the right to participate in sport, discrimination in sport, sporting autonomy, the relation between sport and politics, legislation which places curbs on sport, sport policy, multi-nationalism in sport, the normalization of sport and sporting relations, and basic rules of interpretation of statutes (HSRC, 1980).

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

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

(i) documenting the contribution of sport to the holistic development of the individual
(ii) tracing the historical development of universities and the role of sport in these institutions
(iii) determining what the sports management policies and practices were in selected Afrikaans-medium and English-medium universities.

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

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

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

(i) The strong feeling of camaraderie amongst athletes, their adherence to the macho-man syndrome, and their ill-founded belief that "cowboys don't cry".
(ii) The belief that violence is part of the game dissuades players from even contemplating legal action.
(iii) It is simply not sporting to seek judicial relief (Parmanand, 1987).

He stated that South Africa did not have a body of sport law. He found that the several problems that plagued this field of law, in most countries, arose from the judges and juries who tried strictly to interpret and manipulate laws which had evolved without the problem of sport injury litigation in mind. His study thus aimed to add to the body of knowledge of sport law proper.

Parmanand's approach was to focus on the *volenti non fit iniuria* principle which he found received the widest respect and acceptance internationally. The investigation primarily considered the following aspects: injuries to participants inter-se; injuries between participants and spectators.

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

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

Gouws (1997) included a chapter on sport law in his book on "Sport Management". Unfortunately, the author dealt very cursorily with the following aspects: factors that may prevent legal action in sport, liability, negligence, and contract law. The foregoing issues were presented factually as responsibilities of a sport manager. There were no references made to case law, legislation or to the constitution. Except for the section on contract law, in the entire chapter only one dated American reference work was acknowledged. The author did not provide an analysis or an evaluation of the law in sport.

CONTENT ANALYSIS OF RISK MANAGEMENT PRACTICES

The topic of sport risk management began appearing in the literature in 1982 and by 1986, books by sport law experts surfaced (Kaiser, 1986; Parmanand, 1987; Clement, 1988). The potential for litigation permeates all of society, including sport. The purpose of conducting a content analysis was to complement the review of South African literature on legal aspects of sport. This was achieved by focusing on international concerns, principles and practices that sport organisations should apply in order to promote safety in sport.

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

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

FIGURE 1. **CONTENT ANALYSIS OF RISK MANAGEMENT PRACTICES**

The content analysis (figure 1) revealed that instruction to staff, from staff to students, and from staff to the community dominated the literature. Nine specific concerns surfaced in this area, with virtually every author addressing at least four aspects of supervision and instruction. Firstly, staff must be trained to adopt existing legal standards (Carpenter, 1995). Secondly, qualified personnel must be hired to utilize safe teaching methods and techniques and to provide safe environments. The active supervision of activities was cited by all authors. The responsibility to adequately warn participants and spectators of the risk of injuries was discussed by all but one writer. The matching of participants in sport was mentioned by most

of the writers. The importance of educating the public in reducing litigation cannot be underestimated (Parmanand, 1987; Girvan, 1990; Peterson & Hronek, 1992; Gardiner *et al*., 1998).

The duty to provide safe facilities for athletes and spectators and proper equipment for athletes was another area that was outlined by all authors. All but two of the authors recognized the importance of well-defined emergency procedures for an accident or injury to athletes. Only half the researchers saw the necessity for accurately compiled injury reports based on facts. Even fewer (four) authors discussed the issue of medical permission to return to activity following an injury incurred by an athlete.

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

The majority of authors indicated civil rights, including discrimination, free speech, search and seizure procedures, due process, drug testing, privacy and policies for hiring and terminating personnel. According to Girvan (1993), this could well become a much greater loss for sport programmes than recovery for the treatment of serious injuries.

The one approach recommended by every author to identify and reduce risk was the use of printed forms to record what had been done and to provide evidence as a solid defense against liability (Tempelhoff, 1983; Trisley, 1990; Carpenter, 1992; Opie, 1992; Carpenter, 1995).

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

CONCLUSION

The literature study has revealed that most of the investigations had a very specific or narrow focus, such as safety in gymnastics lessons, and that they lacked a legal basis for an explanation of responsibility for safety in sport. Further, several components of legal liability were only cursorily dealt with. The methodology used by most studies did not involve an approach that is common in sport law, where a combination of case law, legislation and constitutional provisions are analyzed.

The content analysis not only revealed areas of concerns to be addressed by sport departments, but also the most prominent concerns that have surfaced over the past two decades. These concerns are a sign of the times and those that have created problems for managers of sport programmes. The study points to the need for awareness of current risk management concerns and practices that could help everyone involved in the production and management of sport.

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