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# Negligent liability in sport

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**Abstract**
Sport is becoming an essential ingredient of life. It instils determination, dedication, sportsmanship, and provides for increased fitness and relaxation from otherwise hectic lives. It further enhances 'social interaction and development of relationships', provides a sense of achievement, and improves teamwork skills. However, participation in sport undoubtedly involves elements of risk of injury, and where there is negligence there is scope in the sporting arena for those harmed to take legal action.

**Keywords**
sport, liability, negligence, tort law

**Disciplines**
Entertainment, Arts, and Sports Law

# NEGLIGENT LIABILITY IN SPORT

**By Natasha Schot**[1]

## Finding a balance?

Sport is becoming an essential ingredient of life. It instils determination, dedication, sportsmanship, and provides for increased fitness and relaxation from otherwise hectic lives. It further enhances 'social interaction and development of relationships',[2] provides a sense of achievement, and improves teamwork skills.[3] However, participation in sport undoubtedly involves elements of risk of injury, and where there is negligence there is scope in the sporting arena for those harmed to take legal action.

Glesson CJ and Kitto J have both stated that the law of negligence applies even to those engaging in risky games.[4] Several other causes of action under tort,[5] contract,[6] and criminal law[7] are also applicable. Liability can further arise vicariously[8] and under health and safety regulations.[9] Consequently, there have been outcries that tort law in particular has 'gotten out of hand',[10] with the potential result of forcing numerous sporting organizations and recreational facilities to cease operation.[11] We are allegedly witnessing an 'insurance crisis', with premiums for sports insurance rapidly becoming excessive. This sparked calls for reform, with government investigating and legislating recommendations at speed.

'Previously, injured recreational, contact sports players rarely sought compensation for their injuries because it was generally accepted that they had assumed the risk of injury when they agreed to compete. That is no longer the case'.[12] We live in a time of blame[13] and opportunism, rather than acceptance of responsibility. Athletes are increasingly asserting that injury suffered was the result of an intentional act of another, or the injury

[1] I would like to acknowledge and thank Professor Jim Corkery for providing assistance and advice on drafts of this article.
[2] Kylie Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts' (2002) 10 *Torts Law Journal* 11.
[3] Ibid.
[4] *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9 and *Rootes v Shelton* (1967) 116 CLR 383.
[5] For example, an action can be brought in assault (trespass to the person) as in *McNamara v Duncan* (1971) 26 ALR 584.
[6] For instance, 'when a patron purchases a ticket for entrance to a sports event, a contract is formed' - an injury subsequently sustained could result in a breach of contract – see Rick Sarre, 'Spectator Protection – The Legal Issues Confronting Sports Fixture Operators' (1995) 2 *Canberra Law Review* 32.
[7] *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331.
[8] *Bugden v Rodgers* (1993) Aust. Tort Reports 81-246.
[9] 'Review of Australian Sports Insurance: Summary of a Report Prepared for the Sport and Recreation Ministers' Council' [2002] *Standing Committee on Recreation and Sport* 6.
[10] Greg Sobo, 'Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defence Save Diving from Troubled Waters' (1998) *Syracause Law Review* 176.
[11] Dr J, 'Negligence Law: The Emperor Has No Clothes' (2002) 21 *Sports Health* 10.
[12] Dean Laing, 'Liability of Contact Sports Participants' (1993) 66 *Wisconsin Lawyer* 12, 12.
[13] Stuart Clark and Ross McInnes, 'Unprecedented Reform: The New Tort Law' (2004) 15 *Insurance Law Journal* 1 and Greg Sobo, 'Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defence Save Diving from Troubled Waters' (1998) *Syracause Law Review* 179.

was exacerbated by negligence.[14] It is evident that balance needs to be struck between allowing valid victims of negligence in sport to claim damages, with the fact that there are genuine inherent risks in sport and that individual responsibility needs to be taken for injuries sustained as a result. Recognition of the principle that, 'what is suffered voluntarily cannot be an injustice'[15] needs to prevail in the courtroom.

There is a real risk that, if this balance is not struck, participation in the socially desirable and physically beneficial activity of sport could decline.[16] Nevertheless, in attempting to find this balance one must ask (a) if there was any *real* need for the reforms already implemented, and (b) if they in their swiftness of creation have gone too far? It is suggested that claims of a tort insurance crisis were unfounded, and whilst certain reforms were desirable, their drafting has the potential to significantly swing the balance in favour of defendants. While emphasis on individual responsibility was crucial, the reforms could considerably restrict genuine victims of negligence from succeeding in their valid claims.

The following includes an examination of the state of the law of negligence as it applies to sport, defences available, criminal issues, public policy affecting the law, recent legislative amendments, and proposed methods of reducing negligent liability arising in the course of sporting endeavours.

## THE LAW OF NEGLIGENCE[17] AND ITS APPLICATION TO SPORT

'Negligence has been described as conduct that falls below the standard regarded as normal or desirable'.[18] Recent Australian examples of successful negligence actions in sport include (a) an amateur golfer held liable for failing to ensure it was reasonably safe to strike a ball before playing off,[19] which consequently stuck another golfer on the course ahead causing serious injury;[20] and (b) liability arose where a young rider in a motor cross event was seriously injured after falling off a jump and being struck by a following motorcyclist.[21] It was held there were insufficient safety marshals present to warn following riders a fall had occurred.[22]

### Duty of care

Finding that a duty of care exists is the first step in maintaining a negligence claim.[23] The following is a list of recognised duty of care relationships attributable to sport:

(i) Occupiers of sporting facilities owe a duty of care to all those on the premises[24] to make safe what would otherwise be unsafe,[25] and to guard against dangers.[26]

[14] Dr J, 'Negligence Law: The Emperor Has No Clothes' (2002) 21 *Sports Health* 8.
[15] Terence Ingman, 'A History of the Defence of Volenti Non Fit Injuria' (1981) 26 *Judicial Review* 1.
[16] Dean Laing, 'Liability of Contact Sports Participants' (1993) 66 *Wisconsin Lawyer* 14.
[17] This article does not examine all facets of the law of negligence and requirements necessary to succeed in a claim. Discussion focuses on the primary 'issues' regarding its application in the sporting world.
[18] Deborah Healey, 'Protecting Participants: Whose Responsibility?' [1997] *Sports Injuries: Legal and Risk Management Issues in Professional Sport – Seminar Papers* 2.
[19] Ibid.
[20] *Ollier v Magnetic Island Country Club* [2004] QCA 137.
[21] *Macarthur Districts Motor Cycle Sportsmen Inc v Ardizzone* [2004] NSWCA 145.
[22] Ibid. See also other Australian cases including *Standfield v Uhr* [1964] Qd R 66 and *Trevalie Pty Ltd v Haddad* (1989) Aust Torts Reports 80-286 for further examples.
[23] Glenn Wong, '*Essentials of Sports Law*' (3rd ed, 2002) 59.
[24] Rick Sarre, 'Spectator Protection – The Legal Issues Confronting Sports Fixture Operators' (1995) 2 *Canberra Law Review* 27.

(ii) A 'sport supervisor' has a duty of care to participants and spectators. Such supervisors include trainers, managers, medical advisors, administrators/organisers of events and volunteers.[27] In *Watson v Haines*[28] it was highlighted that the State as a 'sport supervising body' could also be liable for injuries sustained by pupils in Public school sport.

(iii) Participants owe one another[29] a duty to prevent foreseeable risks of injury.[30] This is also owed to officials and spectators.

(iv) Recent English decisions[31] have held that referees and other match officials also owe a duty to participants to ensure the rules of the game are enforced[32] and to penalise those infringing them.[33] They are also, 'under a duty to take care for the safety of participants'.[34]

(v) In the United States, coaches owe a duty of care to their students. The standard of such care includes, vigilant 'supervision, proper training, providing adequate medical care, and warning [participants] of the latent dangers'[35] of the sport.

(vi) Mothers also arguably owe a duty of care to their unborn children where injury results due to their mother's participation in sport during pregnancy.[36] Similarly, sporting organizations owe a duty to pregnant mothers to 'advise them that there are theoretical risks involved in participating while pregnant and … that they should obtain medical advice about whether to play and for how long'.[37] Attempts by administrators to prevent liability arising by restraining these women from participating could result in discrimination.[38]

(vii) Organisers may owe a duty to ensure participants are not suffering from conditions such as HIV or Hepatitis, which could be transmitted during the course of the sport. It is unlikely, however, that such a duty will arise unless the risk of transmission is sufficiently high[39] and discrimination issues regarding screening and prohibition of participation are overcome.[40]

Employers can be vicariously liable for the sports person's actions where they have encouraged the act in question or it is regarded as part of the ordinary course of the employment. *Budgen v Rodgers*[41] found that an employer who encouraged a dangerous tackle could be liable for the consequences of it.

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[25] *Francis v Cockrell* [1870] LR 5 QB 184.
[26] *Welsh v Canterbury* (1894) 10 TLR 478.
[27] D Rathie, 'Sporting Injuries and the Law' [1988] *Queensland Law Society Journal* 101.
[28] Unreported, 10 April 1987, Supreme Court (NSW) Allen J.
[29] *Rootes v Shelton* (1967) 116 CLR 383.
[30] *Fraser v Johnston* (1990) Aust Tort Reports 80-248.
[31] For example *Vowles v Evans* [2003] All ER (D) 134.
[32] *Smolden v Whitworth* [1996] TLR 249.
[33] *Vowles v Evans* [2003] All ER (D) 134.
[34] *Smolden v Whitworth* [1996] TLR 249 and Heyden Opie, 'Case Notes: Referee Liability in Sport: Negligent Rule Enforcement and *Smolden v Whitworth*' (1997) 5 *Tort Law Journal* 16.
[35] Thomas Hurst and James Knight, 'Coaches Liability for Athletes' Injuries and Deaths' (2003) 13 *Seton Hall Journal of Sport Law* 33.
[36] *Lynch v Lynch* (1991); *X v Powell* (1991) 23 NSWLR 26, and 'Pregnancy in Sport – Guidelines' *Australian Sports Commission* [Online] at http://www.ausport.gov.au/women/pregnancy.asp accessed on 31//08/04.
[37] 'Pregnancy in Sport – Guidelines' *Australian Sports Commission* [Online] at http://www.ausport.gov.au/women/pregnancy.asp accessed on 31//08/04.
[38] *Gardiner v National Netball League Pty Ltd* (2001) FMCA 500 and Anthony Dempsy, 'Balancing Discrimination and Liability in Court' [2002] *Law Society Bulletin* 31-32.
[39] *Hall v Victorian Amateur Football Association* (1999) VCAT AD 30.
[40] Gaethan Cutri, 'The Implications for the AFL after Hall's Case' (2001) 6 *Deakin Law Review* 149.
[41] (1993) Aust Tort Reports 81-246.

On the duty owed between participants, Barwick CJ in *Rootes v Shelton*[42] said that the rules of the sport are, 'neither definitive of the existence nor the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of that duty'.[43] Duties and their breaches therefore depend on the circumstances of the individual case.[44] This includes assessing the type of activity, the age of the participant, the ability of the participant, and the coach's, instructor's or administrator's level of training and experience.[45] As there are differing risks across the various sports the courts will apply separate standards of care, 'in different sports and in different standards or divisions of sport'.[46] Additionally, members of the High Court have recently suggested that it may be relevant in determining duty, standard and breach to consider the defendant's position as either a commercial operator or a volunteer organization.[47] If the defendant is a commercial entity they could be required to do more.[48]

While there has been no observed shift away from the negligence test in Australia[49] some United States' jurisdictions are increasingly adopting the 'recklessness rule' as the applicable test based on the fact that 'the ordinary negligence standard [if applied] would chill vigorous competition, discourage participation and open the floodgates to endless litigation'.[50]

## Reforms going too far?

The numerous duties on those who engage in the sporting industry made some sports activities unworkable. As such, it is recognised that the law either legislatively or judicially needed to 'swing the pendulum back' and rein in the more rampant claimants. In response, two Queensland statutes - the *Civil Liability Act* 2003 (Qld) and the *Personal Injuries Proceeding Act* 2002 (Qld) - have made it 'more difficult for claimants to succeed in their actions'.[51]

## Volenti non fit injuria

In the United States, the courts refer to the common law doctrine of volenti as the assumption of risk doctrine.[52] The doctrine involves the defendant establishing that the plaintiff knew of the risk of injury arising from participating and voluntarily assumed it by agreeing to participate.[53] The doctrine is, 'based on knowledge, comprehension and

[42] (1967) 116 CLR 383.
[43] Ibid.
[44] *Frazer v Johnston* (1990) 21 NSWLR 89.
[45] 'Negligence' [2003] *Sport and Recreation Queensland* [Online] at www.srq.qld.gov.au/negligence.cfm at 26 May 2004.
[46] *Condon v Basi* [1985] 1 QLR 866 and 'Tortious Liability – Breach of Duty' [2003] *Halsbury's Laws of Australia* [Online] at www.butterworthsonline.com at 25 May 2004.
[47] *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9 and Kylie Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts' (2002) *Torts Law Journal* 11.
[48] Ibid.
[49] *Johnston v Frazer* (1990) 21 NSWLR 89 and Hayden Opie, 'Case Notes: Referee Liability in Sport: Negligent Rule Enforcement and *Smolden v Whitworth*' (1997) 5 *Tort Law Journal* 16.
[50] Dean Laing, 'Liability of Contact Sports Participants' (1993) 66 *Wisconsin Lawyer* 12, 13.
[51] David Muir, John Devereux and Paul Telford, 'Civil Liability Act' *Deacons: Environment and Planning Article* [2003] 1 [Online] at www.deacons.com at 14 September 2004.
[52] These two terms will be used interchangeably. Laura Hess, 'Sports and the Assumption of Risk Doctrine in New York' (2002) 76 *St. John's Law Review'* 460.
[53] Glenn, M. Wong, '*Essentials of Sports Law'* (3rd ed, 2002) 71.

appreciation of the risk'.[54] This consent, according to Lord Denning, can be implied or express.[55] Where a defendant can establish this they are absolved from liability. However, there can be no successful defence where the plaintiff was under any compulsion to participate.[56]

Previously, it was insufficient to prove that the plaintiff ought to have known of the risk or that they merely perceived the existence of danger.[57] Rather, what needed to be established was that the plaintiff was, 'fully aware of the risks, fully comprehending their nature and extent, and that they voluntarily accepted the whole risk'.[58] The 2003 *Civil Liability Act*[59] however, has minimised the standard of knowledge required. Section 14 states that where volenti is pleaded, 'a person will be deemed to be aware of the type or kind of an obvious risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk'.[60] For obvious risks, the plaintiff will have consented, despite lack of full appreciation as previously required.

**Inherent risk doctrine**

The doctrines of inherent risk and volenti differ. *Volenti* requires that the plaintiff actually knew of the risk (and that this was an unaccepted, non-inherent one[61]) and consented to it. *Inherent risk* is an argument by the defendant that the risk was of common knowledge, that the plaintiff be imputed with this knowledge, thus reducing the standard of care owed.[62] It is the 'open and obvious danger' argument/defence.[63]

Stanley Yeo argues that the inherent risk doctrine plays a much more significant role in the defence of negligent sporting claims. Sport is distinct, since participants have mutually accepted inherent risks.[64] Barwick CJ stated in *Rootes v Shelton:*[65]

> By engaging in a sport or pastime the participants may be held to have accepted the risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are.[66]

Although not decisive, the rules of the game help determine inherent risks.[67] This assists when deciding the practicality of taking precautions (which usually cannot be taken where

[54] Deborah Healey, 'Protecting Participants: Whose Responsibility?' [1997] *Sports Injuries: Legal and Risk Management Issues in Professional Sport* 12.
[55] *Cummings v Grainger* [1977] 1 All ER 104 and Terence Ingman, 'A History of the Defence of Volenti Non Fit Injuria' (1981) 26 *Judicial Review* 1, and Alexander Drago, 'Assumption of Risk: An Age-Old Defence Still Viable in Sports and Recreation Cases' [2002] *Fordham Intellectual Property, Media and Entertainment Law Journal* 2.
[56] *Insurance Commissioner v Joyce* (1948) 77 CLR 39.
[57] Ibid.
[58] 'The Nature and Extent of the Defence' [1998] *Halsbury's Laws of Australia* [Online] at www.butterworthsonline.com at 25 May 2004.
[59] *Civil Liability Act* 2003 (Qld) – discussed further below.
[60] Ibid.
[61] Stanely Yeo, 'Accepted Inherent Risks Among Sporting Participants' [2001] *Tort Law Review* 128.
[62] 'Breach of Duty' [2003] *Halsbury's Laws of Australia: Entertainment, Sport and Tourism* [Online] at www.butterworthsonline.com.au accessed on 25/05/04 and Stanely Yeo, 'Accepted Inherent Risks Among Sporting Participants' [2001] *Tort Law Review* 118 and 128.
[63] Greg Sobo, 'Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defense Save Diving from Troubled Waters' (1998) 49 *Syracuse Law Review* 180.
[64] Stanely Yeo, 'Accepted Inherent Risks Among Sporting Participants' [2001] *Tort Law Review* 115.
[65] (1967) 116 CLR 383, 385.
[66] Ibid.
[67] *McNamara v Duncan* (1979) 26 ALR 584.

there are inherent risks[68]) and the social utility of the sport.[69] Importantly, while participants may be imputed with consenting to inherent risks, this does not include consent to a participant's flagrant disregard for the rules even though there is an inherent risk that this could occur.[70]

The *Civil Liability Act* 2003 (Qld) has amended this doctrine.[71] Section 13 provides that an obvious risk is one which would have been obvious to a reasonable person and includes risks that are a matter of common knowledge.[72] A risk may be classified as obvious even though it has a 'low probability of occurring … and is not prominent, conspicuous or physically observable'.[73] Section 16 provides that where there is an inherent risk, a defendant is not liable, as it cannot be avoided even when reasonable care is taken.

Previously, the inherent risk doctrine made establishing a breach of the duty of care difficult. The legislation adds that where there is an inherent risk there is no liability whatsoever. Such drastic legislation might prevent a claimant from succeeding where there has been *negligence causing the materialisation of an inherent risk*, which for all purposes would not have arisen but for the negligence. Such a result is too harsh.

**Further provisions**

Dangerous recreational activities get special mention. Section 18[74] says that a dangerous activity is one which involves significant risk of physical harm. Where there is a combination of a dangerous sport and an obvious risk there will be no liability for negligence,[75] even where the plaintiff was not aware of any risks whatsoever.[76] This might prevent a claimant succeeding where a negligent act caused the materialisation of the risk.

Lastly, contributory negligence. The defendant argues that the plaintiff was in some way liable for the injuries sustained.[77] Previously, at common law only partial reductions in damages were awarded. The *Civil Liability Act* provides that, if the defendant successfully raises this and in the circumstances justice or the equitable nature of the case requires it, a reduction of 100% can be ordered.[78] So a defendant might not be liable for the payment of any damages, even where it has been established that he owed a duty, breached it, and this causally resulted in the damage sustained. Such a provision may work unjustly. Why should someone who partially caused their own damage be precluded from recovering compensation for their remaining loss which was caused wholly by the negligence of another?

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[68] Alexander Drago, 'Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases' [2002] *Fordham Intellectual Property, Media and Entertainment Law Journal* 3.
[69] Stanley Yeo, 'Accepted Inherent Risks Among Sporting Participants' [2001] *Tort Law Review* 128.
[70] Alister Duff, 'Civil Actions and Sporting Injuries Sustained by Professional Footballers' [1994] *Scotts Law Times* 177 and Alexander Drago, 'Assumption of Risk: An Age-old Defence Still Viable In Sports & Recreation Cases' [2002] *Fordham Intellectual Property, Media & Entertainment Law Journal* 3.
[71] *Civil Liability Act* 2003 (Qld)
[72] Ibid.
[73] Ibid.
[74] Ibid
[75] Ibid and s 19.
[76] 'Statutory Limitations to Liability and Damages', [2003] *Halsbury's Laws of Australia: Entertainment, Sport and Tourism* [Online] at www.butterworthsonline.com accessed on 25/5/04 and *Civil Liability Act* 2003 (Qld) ss 13,18 and 19.
[77] 'Spectator Protection' (1995) 2 *Canberra Law Review* 31.
[78] David Muir, John Devereux and Paul Telford, 'Civil Liability Act' *Deacons: Environment and Planning Article* [2003] 3.

## A severe result?

Other Australian jurisdictions have similar legislative reforms. Spigelman CJ of New South Wales has stated that the recent changes have prevented some seriously injured people from suing for damages.[79] Whilst this was the very point of the reforms, Stephen Southwood QC, President of the Law Council of Australia, has argued that the tort reforms are nevertheless too restrictive.

The effect of the new legislation in Queensland is that, if a defendant can prove that there were inherent or obvious risks involved in the sport, they will not be liable despite any negligence on their part causing the inherent or obvious risk to materialise. Improved drafting, for instance: *'But for the negligence of the defendant, the defendant will not be liable for damage sustained as a result of the materialisation of an inherent or obvious risk'*, would have had the desired effect of instituting individual responsibility without precluding valid negligence cases from succeeding.

Moreover, if volenti is to be imputed more readily, then recreational facilities should be required to provide more information in regard to dangers associated with the sport in order for participants to be in a better position to weigh the risks, which they would otherwise not have known the extent of, yet under the reforms, be held to have consented to in any event.

## NEGLIGENCE AND SPORT IN THE CRIMINAL SPHERE

> It is generally accepted that society tolerates rough and potentially injurious contact sports because of the benefits it derives from sporting endeavour … There are limits however and participation in sporting contests should not be viewed as a licence to abandon the restraints of civilisation.[80]

Neither volenti nor the inherent risk doctrine apply in the criminal context. *R v Coney*[81] held that, 'though a man may by his consent debar himself from his rights to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public'.[82] It would be contrary to public policy for participants to be viewed as giving consent to grievous bodily harm.[83] The rationale for the encroachment of criminal justice into the sporting world is that no segment of society can act criminally without impunity.[84] Nevertheless, several cases say that players give legal consent to a certain level of violence in their sport.[85]

Whilst Australia tends to leave disciplinary measures to private sports tribunals,[86] and prosecutorial charges are rare in regard to criminal acts committed in sport,[87] criminal

[79] Chris Merritt, 'Lawyers Push for Bigger Injury Payouts' 22 October 2004 *Australian Financial Review*.
[80] Paul Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 472.
[81] (1882) 8 QBD 534.
[82] Ibid 553.
[83] *R v Billinghurst* [1978] Crim LR 553.
[84] C Clarke, 'Law and Order on the Courts: Application of Criminal Liability for Intentional Fouls During Sporting Events' (2000) 32 *Arizona State Law Journal* 1151.
[85] *R v Bradshaw* (1878) 14 Cox CC 83 and *R v Moore* (1898) 14 TLR 229.
[86] Paul Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 484.
[87] 'Criminal Prosecution for Foul Play' [2003] *Halsbury's Laws of Australia: Entertainment, Sport and Tourism* [Online] at www.butterworthsonline.com at 25 May 2004.

responsibility still applies to injuries and deaths inflicted in the course of sport. There can be criminal prosecutions for assault and manslaughter[88] and for gross negligence.[89] This requires that the defendant fall so substantially short of the standard of care that the act merits criminal punishment. The private sporting tribunals lack the scope to deal with this serious type of act. *R v Maki*[90] ruled that they lack the power to negate or override the demands of criminal law.[91]

New Zealand's *Police v Osborne*[92] - involving the deaths of several spectators fatally injured whilst watching a motor race and being struck by a stray car - emphasised that criminal liability is applicable where there has been serious negligent disregard for safety.

However, 'the demarcation between violence that is part of the game and that which is illegitimate – and therefore blameworthy – is not always apparent'.[93] Furthermore, society emphasises the need to win in sport rather than the need to care. Therefore, the courts will need to be cautious in how they apply criminal liability to the sporting industry so as not to diminish the essential nature of competitive sport. There is a certain level of violent contact during sport[94] and players are not necessarily negligent or grossly negligent for contact arising in the usual course of the game.

Nevertheless, the threat of prosecution helps prevent otherwise negligent acts – particularly on the part of organisers. After *Police v Osborne,*[95] 'the prospect of criminal sanctions for serious administrative mistakes suddenly made sports officials acutely aware of their responsibilities for ensuring safety'.[96] Further, negligently violent acts have a 'detrimental impact … on both spectators and aspiring young players'.[97] It is in the public interest to reprimand such conduct as a means of deterrence. As the threat of civil liability is reduced, the risk of criminal punishment for negligent acts will play a vital role in ensuring safety measures are maintained in sport.

## AN UNFOUNDED INSURANCE CRISIS?

Many argue that society is seeing a litigious outbreak and a subsequent an insurance crisis. Some commentators believe that this is because 'the tort law system now supports the unsustainable notion that people should be able to enjoy the benefits of participation in sport without accepting the known risks involved'.[98] The insurance crisis has been blamed on substantial increases in quantum damages being awarded, mounting legal expenses, as well as a shift towards consumer protection.[99] 'Insurance companies have

[88] *R v Billinghurst* [1978] Crim LR 553.
[89] *Police v Osborne* (2001) 145 NZLR 31.
[90] (1970) 1 CCC (2d) 333.
[91] Paul Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 487.
[92] (2001) 145 NZLR 31.
[93] C Clarke, 'Law and Order on the Courts: Application of Criminal Liability for Intentional Fouls During Sporting Events' (2000) 32 *Arizona State Law Journal* 1153.
[94] Ibid 1152.
[95] (2001) 145 NZLR 31.
[96] C Clarke, 'Law and Order on the Courts: Application of Criminal Liability for Intentional Fouls During Sporting Events' (2000) 32 *Arizona State Law Journal* 1153.
[97] Paul Farrugia, 'The Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law' (1997) 8 *Auckland University Law Review* 477.
[98] Dr J, 'Negligence Law: The Emperor Has No Clothes On' (2002) 20 *Sport Health* 8.
[99] 'Insurance Premiums and State Sporting Associations in Victoria – An Issue Escalating Out of Control' [2002] *Executive Summary of the Report Prepared by VicSport and Presented to the Director, Sport and Recreation Victoria* 1

[correspondingly] responded by increasing premiums and in some cases, refusing high risk liability insurance contracts'.[100] A respected former judge blames the judiciary: 'we have allowed the tests for negligence to degenerate to such a trivial level that people can be successfully sued for ordinary human activity. When I say 'we', I mean all levels of adjudication, right up to the High Court'.[101]

Other factors affecting insurance premiums, include international insurance trends, extraordinary events (for example, 11 September 2001) and inadequate risk management by sporting bodies.[102] Lastly, whilst claims may not always succeed, there has been enormous frequency in the number of claims being raised. The cost of investigating these claims has also increased premiums.[103] 'From the period June 2001 to May 2002, [statistics reveal] that premium increases averaged 22% with some industries such as outdoor sport and recreation, being particularly hard hit, facing premium increases in the range of 100-500%'.[104]

But the question remains –is there an 'insurance crisis'? US studies show that, despite the alarmist cries, 'researchers have been unable to confirm the existence of a 'litigation explosion' [with] tort filings in state courts [actually] having declined by 9% since 1992'.[105] Justice Davies of the Court of Appeal Queensland has highlighted that, in Australia, plaintiff success rates generally (including personal injury cases) have actually declined from 1987 onwards.[106] He further notes that damages payouts have not increased over a substantial period and that the *insurance industry has actually profited* in more recent years.[107] Australian analysis revealed there was no evidence for the need for recent tort reforms which were based on claims that the, 'legal system had been skewed in favour of plaintiffs'.[108] Furthermore, it was argued that if the reform recommendations of the Ipp Report[109] were implemented (which most have been) that they would deliver, 'an initial reduction of 13.5% in public liability premiums, and an 80% drop in the number of small claims'.[110] However, *the reforms implemented throughout the 2002-2004 period have triggered no reductions in insurance premiums* suggesting there was no cause-and-effect relationship between tort reform and insurance.[111] The tort insurance crisis was therefore unfounded and subsequent reforms were unnecessary. Research shows that, 'any pro-plaintiff tendencies by the courts had been reversed before the nation's governments

[100] Ibid.
[101] The Honourable Justice James Thomas. Judge of the Qld Court of Appeal (1998-2002). *Insurance Crisis Blamed on Judges 'Playing Santa'.* The Daily Telegraph, Edition 3 - MetroSAT, 23 March 2002, Page 4.
[102] 'Review of Australian Sports Insurance: Summary of a Report Prepared for the Sport and Recreation Ministers' Council' [2002] *Standing Committee on Recreation and Sport* 6.
[103] Ibid.
[104] Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review* September 2002; Office of Small Business – Department of Industry, Tourism and Resources, *Submission to the Senate Economic References Committee Inquiry into the Impact of Public Liability and Professional Indemnity Insurance Costs Increases*, May 2002 and Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.
[105] 'Slay the Beast of 'Reform' Rhetoric' [2004] *Trial* 26.
[106] A Commentary delivered at the Supreme and Federal Court Judges' Conference on the Ipp Report, Adelaide, 23 January 2003.
[107] Ibid.
[108] Chris Merritt, 'Insurance Crisis not lawyers' fault: Report' 22nd October 2004 *Australian Financial Review* 53.
[109] *Review of the Law of Negligence Report*, Commonwealth of Australia, August 2002 (the Ipp Report).
[110] Stuart Clark and Ross McInnes, 'Unprecedented Reform: The New Tort Law' (2004) 15 *Insurance Law Journal* 1.
[111] Ibid.

introduced a system of caps, thresholds and other restrictions aimed at limiting damages payouts'.[112]

## FURTHER LIMITING LIABILITY?

There are contractual defences to negligence claims. The law will interpret such instruments not by their form (what they are called) but by their substance (what they actually purport to do).[113]

### Exclusion clauses and waivers

Courts are now more willing to give credence to contractual terms, holding that parties have freedom of contract. Previously, courts were reserved in upholding exclusion clauses as they deprived people of their valid rights.[114] In the sporting context, this provides scope for those offering recreational activities to contract out of their duty owed to their clients. This can be via a waiver, whereby participants relinquish their right to sue or via an exclusion clause. In *Gowan v Hardie,*[115] a plaintiff injured during a parachute jump could not succeed against the pilot for his negligent operation of the plane. The pilot was an agent for the parachute instructor and could therefore rely on the contract for her parachute training, which excluded liability for negligence.[116]

Three types of exclusion clauses apply to negligence: first, those which exclude rights and remedies otherwise usually possessed under the contract; secondly, there are those which restrict/limit these rights and remedies; and lastly, there are those which qualify them.[117] Three main questions should be asked in determining the validity of these clauses: (1) was the clause properly incorporated into the contract? (2) are those seeking to rely on the clause a party to the contract and (3) as a matter of construction does the clause specifically exclude/limit liability in relation to the actual issue in dispute?

As s 68B of the *Trade Practices Act 1974 (Cth)* does not provide for how these clauses are to be drafted, common law precedents apply. This increases complexity, as there will be interaction between the *Trade Practices Act,*[118] contract and tort law, and any relevant State legislation.[119] However, in *Wallis v Downard-Pickford (North Queensland) Pty Ltd*[120] the High Court ruled that State legislation inconsistent with the *Trade Practices Act* will not be upheld.[121]

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[112] Ibid.
[113] Deborah Healey, 'Disclaimers, Exclusion Clauses, Waivers and Liability Release Forms in Sport: Can They Succeed in Limiting Liability' in Mark Fewell, '*Sports Law: A Practical Guide'* (1995) 194.
[114] Andrew Farr, 'Signing Your Life Away' (1998) 21 *Sports Coach* 18.
[115] Unreported, 8 November 1991, Supreme Court NSW.
[116] Deborah Healey, 'Protecting Participants: Whose Responsibility?' [1997] *Sports Injuries: Legal and Risk Management Issues in Professional Sport* 13.
[117] 'Types of Exclusion Clauses' [2003] *Halsbury's Laws of Australia* [Online] at www.butterworths.com at 25 September 2004.
[118] Ibid.
[119] Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.
[120] (1994) 179 CLR 388.
[121] Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.

To be effective, exclusion clauses need to be carefully, clearly and specifically worded.[122] Such clauses are to be read according to their ordinary natural meaning and in light of the contract as a whole.[123] Where a clause does not contain an express reference to 'negligence' then the courts will have to determine if it was the implied intention of the parties to exclude liability for this.[124] 'Clauses purporting to exclude 'all liability' for 'any loss' have generally been treated as insufficient to exclude liability for negligence'.[125] However, where the words, 'whatever its cause' or 'howsoever caused' are incorporated[126] it will likely be treated as satisfactory. Exclusion clauses can also become contractual through 'notice'[127] at the point of entry - entrants will be impliedly taken to have accepted this term as a condition to entry. However, to be valid the notice must be given before the contract is entered into.[128] Where an exclusion clause is particularly onerous and restricting, then actual notice of this needs to be brought to the consumer's attention before a contract is formed.[129]

To prevent confusion and evidential difficulties, exclusion clauses should be in a written contract, which is signed by the participant, who has opportunity to read the provisions.[130] However, under *L'Estrange v F Graucob Ltd,*[131] even if the person did not read the provisions or understand them, they will nevertheless be bound. Those presenting the contract must not mislead or deceive as to the nature and effect of the clause.[132]

Despite recent legislative reform by s 68B of the *Trade Practices Act 1974* (Cth) with regard to enforcing these clauses, if there is any doubt as to their effect, they will likely be resolved in the consumer's favour.[133] Additional problems may arise over the scope of 'recreational services'. For example, activities such as swimming not for leisure but as a part of a prescribed regime of physiotherapy may not be covered,[134] and as such any relevant exclusion clause will not be upheld under the *Trade Practices Act.*[135]

This amendment has changed the way exclusion clauses are viewed, particularly with sporting and recreational activity.[136] As the Act only applies to corporations, individuals are

[122] Michael Fredericks and Andrea Layt, 'Waivers No Longer Void, But Will They Have Teeth?' [2003] *Ebsworth & Ebsworth* [Online] at www.findlaw.com.au accessed on 25/5/04.
[123] *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500.
[124] 'Rules Applicable to Negligence' [2003] *Halsbury's Laws in Australia* [Online] at www.butterworths.com accessed on 25/9/04.
[125] *BHP Petroleum Ltd v British Steel Plc* [2000] 2 Lloyd's Rep 277 and 'Rules Applicable to Negligence' [2003] *Halsbury's Laws in Australia* [Online] at www.butterworths.com accessed on 25/9/04.
[126] *Davies v Pearce Parking Station Pty Ltd* (1954) 91 CLR 345 and 'Rules Applicable to Negligence' [2003] *Halsbury's Laws in Australia* [Online] at www.butterworths.com accessed on 25/9/04.
[127] Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.
[128] *Oceanic Sun Line Special Shipping v Fay* (1988) 165 CLR 197.
[129] *Interphoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] 2 QB 433.
[130] Andrew Farr, 'Signing Your Life Away' (1998) 21 *Sports Coach* 18.
[131] [1934] 2 KB 394.
[132] *Curtis v Chemical Cleaning and Dyeing* Co [1951] 1 KB 805. This could amount to a breach of the *Trade Practices Act* 1974 (Cth) for misleading and deceptive conduct. Andrew Farr, 'Signing Your Life Away' (1998) 21 *Sports Coach* 18.
[133] Michael Fredericks and Andrea Layt, 'Waivers No Longer Void, But Will They Have Teeth?' [2003] *Ebsworth & Ebsworth* [Online] at www.findlaw.com.au at 25 May 2004.
[134] Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.
[135] 1974 (Cth).
[136] Anthony Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete Solution or Deficient Response?' (2003) 11 *Competition and Consumer Law Journal* 69.

still prevented from contracting out of liability[137] as there are no other legislative provisions in existence, which aim to uphold these clauses in relation to individuals. In any event, the Amendment Bill was, 'stated to achieve a balance between protecting consumers and allowing them to take responsibility for themselves'.[138] Section 68B,[139] allows for the implied warranties in s 74[140] (particularly that services will be rendered with due care and skill) to be excluded, which previously were prevented from such exclusion. This helps those seeking to limit their liability, but it has been argued that the provision has gone too far,[141] in that it has the scope to be applicable to *all* sporting/recreational activities contrary to the intent that it would operate only against 'inherently risky activities' as stated in the Explanatory Memorandum.[142]

Arguably, such clauses should not be operational against children, as they are to be accorded a high level of protection.[143] Additionally, with waivers, minors are generally not bound by such contracts entered into either by them or their parents/guardians.[144] With regard to unborn children, it is submitted that exclusion clauses will also not operate against them because (a) an unborn child cannot sign an exclusion clause or consent; and (b) mothers cannot do so on behalf of their child.[145]

Lastly, there can be inequality in bargaining power. Sporting participants usually have no choice but to sign a contractual waiver or exclusion clause. Otherwise they cannot participate. If they do sign then they lose their rights to claim in legitimate situations. This is why the common law previously scrutinised such clauses closely[146] and often found them ineffective. This inequality remains today and should continue to be considered by the courts. Also, waiver terms are frequently legalistic in nature and the consumer often does not understand them or their effect.[147]

Legitimising exclusion clauses will have consequences. Participants might find that the risk of losing their right to damages is too onerous and will decrease their participation levels. Further, if claimants cannot bring actions, then the cost burden of the injuries sustained may be placed on the community through the social security system.[148] Also, 'a provision excluding liability for negligence may undermine the incentives for service

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[137] 'Trade Practices Amendment (Liability for Recreational Services) Bill 2002' [2002-2003] *Department of the Parliamentary Library* [Online] at www.gov.au at 4 May 2004.
[138] Commonwealth, House of Representative, *Parliamentary Debates* No 9, 27 June 2002, p4692.
[139] *Trade Practices Act* 1974 (Cth).
[140] *Trade Practices Act* 1974 (Cth).
[141] Anthony Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete Solution or Deficient Response?' (2003) 11 *Competition and Consumer Law Journal* 74.
[142] Explanatory Memoranda, The Trade Practices Amendment (Liability) for Recreational Services) Bill 2002 (Cth).
[143] DA Ipp J, P Cane, D Sheldon, and J Macintosh (The Panel), *Review of the Law of Negligence – Final Report* 2 October 2002 (Online) at www.revofneg.treasury.gov.au\content\review\2.asap and Anthony Haly, 'The Trade Practices Amendment (Liability for Recreational Services) Act 2002: Complete Solution or Deficient Response?' (2003) 11 *Competition and Consumer Law Journal* 80.
[144] Joachim Dietrich, 'Liability for Personal Injuries Arising from Recreational Services: The Interaction of Contract, Tort, State Legislation and the Trade Practices Act and the Resultant Mess' (2003) 11 *Tort Law Journal* 16.
[145] 'Pregnancy in Sport – Guidelines' *Australian Sports Commission* (Online) at www.ausport.gov.au accessed on 25/05/04 and Deborah Healey, 'Disclaimers, Exclusion Clauses, Waivers, Liability Release Forms in Sport: Can They Succeed in Limiting Liability?' in Mark Fewell, '*Sports Law: A Practical Guide'* (1995) 213.
[146] 'Trade Practices Amendment (Liability for Recreational Services) Bill 2002' [2002-2003] *Department of the Parliamentary Library* [Online] www.gov.au at 4 May 2004.
[147] Ibid.
[148] Ibid.

suppliers to maintain safety standards so as to avoid liability'.[149] To remedy any potential 'overkill' caused by giving all such clauses effect, courts may well interpret s 68B[150] in light of the Explanatory Memorandum, which highlighted that they were only to be upheld in cases of serious dangerous activity. The valid reasons for why they were not previously upheld remain today.

**Warnings**

Warnings give notice of the known risks involved in sport to potential spectators and participants. This helps participants to look after their own interests. If they then proceed to observe or participate after being warned, then they will be deemed to have consented to the risks. The defendants will have the defence of volenti.

Nevertheless, the High Court in *Woods v Multi-Sport Holdings*[151] upheld the decision in *Romeo v Conservation Commission*[152] that 'where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that an occupier must warn the entrant about the risk is neither reasonable nor just'.[153] So occupiers, organisers and administrators of sporting events/facilities cannot be found negligent for failing to provide a warning in regard to risks that are deemed obvious. However, courts will differ on what is obvious and it is advisable for organisers to still provide some form of warning. Overall, these should be, 'obvious and direct, specific to the risk, comprehensible and at the point of hazard'.[154]

**Reducing insurance premiums**

Sporting bodies can reduce liabilities with risk management plans.[155] These are 'a systematic plan to identify particular hazards of an activity and devise strategies to neutralise or minimise their potential to cause injury or death to participants'.[156] Law suits tend to decline because a good risk management plan,

> Identifies maintenance problems, forces agencies to keep records of facility inspections, encourages the analysis of why accidents occur, heightens awareness of when warnings of hazardous areas and practices are needed, [and] ensures good facility design.[157]

More than half of those already maintaining such a plan in Australia have seen a positive effect on their insurance premiums.[158]

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[149] Ibid.
[150] *Trade Practises Act* 1974 (Cth).
[151] *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9.
[152] *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431.
[153] *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9.
[154] Deborah Healey, 'Protecting Participants: Whose Responsibility?' [1997] *Sports Injuries: Legal and Risk Management Issues in Professional Sport* 13.
[155] For the most comprehensive analysis/discussion on risk management plans see: 'Sporting Chance: A Risk Management Framework for the Sport and Recreation Industry' [1999] *Office of Sport and Recreation Tasmania* [Online] www.tas.gov.au at 25 May 2004.
[156] Graham Cuskelly and Christopher Auld, 'Retain, Reduce, Transfer or Avoid? Risk Management in Sport Organizations' [1989] *Achper National Journal* 17.
[157] 'Review of Australian Sports Insurance: Summary of a Report Prepared for the Sport and Recreation Ministers' Council' [2002] *Standing Committee on Recreation and Sport* 18.
[158] Ibid 10.

Sporting bodies can also consider pooling arrangements. This is where, 'a group of organizations form together to obtain efficiencies in pricing. The main benefits in pooling are achieved through greater buying power and administrative efficiencies'[159] against insurers.

Lastly, in *Smolden v Whitworth*[160] their Honours suggested that it would be, 'beneficial if all players were, as a matter of general practice, insured not against negligence but against the risk of catastrophic injury'[161] in order to decrease the need for litigation because, 'insurance [is] a much better way of rendering financial assistance to the seriously injured than is litigation and its need for proof of fault'.[162]

## Conclusion

The legislators and the judiciary may need to moderate these far-reaching reforms in tort law to allow for claims in the many instances where there is genuine negligence. The hasty changes have fundamentally altered a body of tort law that has taken decades to develop,[163] on the basis of an unfounded insurance crisis. More emphasis should have been placed on the encroachment of criminal law regarding gross negligence, a demise in 'no win, no fee' schemes which continue to instil in society a notion of blame and opportunism, and the placement of more emphasis on corporate responsibility by ensuring safety through risk management plans and providing adequate warnings.

The balance now favours defendants, whereas the desired intention was that it lay somewhere in the middle. Whilst the call for individual responsibility was justifiable, the reforms now mean the individual must take responsibility not only for their own actions but also for another's negligent act.

[159] Ibid 12.
[160] *Smolden v Whitworth* [1996] TLR 249.
[161] Ibid.
[162] Ibid and Hayden Opie, 'Case Notes: Referee Liability in Sport: Negligent Rule Enforcement and *Smolden v Whitworth*' (1997) 5 *Tort Law Journal* 16.
[163] Bob Carr, 'Breaking Down the Culture of Blame' 10th July 2002 *Australian Financial Review.*