

GSLTR

Global Sports Law and Taxation Reports

Contents

The contemporary global Olympic movement

CAS at the London 2012 Olympics: a question of jurisdiction

Liability for sports injuries

General characteristics of sports law in Bulgaria

No gambling allowed: the ban on sports gambling in the United States

CAS in the light of football

Host city contract as a basis for tax exemption for major sporting events: towards privatization of sports tax law?

Cyprus: Tax planning for incoming professional team sports players

Poland: Tax planning for incoming professional team sports players

Turkey: Tax planning for incoming professional team sports players

Ukraine: Tax planning for incoming professional team sports players

India: Tax planning for incoming professional team sports players

Liability for sports injuries

by Steve Cornelius¹

Introduction

Since the middle of the twentieth century sport has become a significant part of our society. Professional sport in particular has developed into a multibillion dollar global industry. In addition, the idea of sport as nothing more than recreation or pastime has long since disappeared. International sports stars can almost overnight become rich and famous. Professional athletes are not only generously rewarded for their skills on the field of play, but famous sports stars have an inherent goodwill and marketers are willing to fork out astronomical sums to use sports stars in advertising.

But the world of professional sport is a highly competitive and often cruel place where loyalties are thinly strewn. Sports stars are often shooting stars, shining brightly for a few fleeting moments before fading into obscurity. And while their stars shimmer, they have to reap the maximum rewards for their efforts. As soon as their skills and abilities begin to wane, the sports heroes of yesterday are all too easily forgotten to make way for the bright new stars of tomorrow. In particular, the risk of injury is an ever present shadow looming over the life of any professional athlete and many promising careers have ended prematurely due to serious injuries. One would then expect that professional athletes who have sustained serious injuries would from time to time institute legal action to claim damages from those responsible for their injuries.

It is however ironic that the majority of

these kinds of claims in South Africa and elsewhere have mostly involved junior or amateur athletes. The case of *Hattingh v. Roux*² is yet another occasion where a junior rugby union player instituted a delictual (tort) claim against another player as a result of a serious neck injury which the player sustained during a rugby match.

Facts

Hattingh was a rugby player who played at hooker in the front row for the under nineteen A-team of Labori high school. In July 2005 the team from Labori played against Stellenbosch high school. In the Stellenbosch team, Roux was at hooker the direct opponent of Hattingh.³

The laws of rugby provide that a scrum must be formed in a very specific manner. In this case, law 20.1(g) is of particular importance. This law states that the front rows of the two opposing teams, each consisting of three players, must engage in a scrum to interlock in such a manner that no player's head is next to the head of one of his own team mates. To achieve this, the front rows form certain "channels" into which the players must alternately slide their heads when the scrum engages.

Early on in the game concerned, the referee awarded a scrum. While the players were forming the scrum formation, Roux called a code word "jack-knife". This code was then repeated by the other players in the Stellenbosch scrum.⁴ The code was apparently the sign for the Stellenbosch forwards to execute a particular tactic aimed at physically overpowering the Labori forwards.⁵ When the scrum engaged, Roux deliberately moved to the right and forced his head into the channel where Hattingh's head was supposed to go. Not only was this not in accordance with rugby law 21.1(g), but it was also a very dangerous manoeuvre. Hattingh's head impacted Roux's shoulder with so much force that Hattingh broke his neck.⁶

Because of this dangerous manoeuvre, Hattingh's father, as legal guardian of his minor son, instituted a claim in delict

(tort) against Roux, the coach of the Stellenbosch rugby team, the principle of Stellenbosch high school and the Western Cape Member of the Provincial Executive Committee (MEC) for Sport and Culture. Although it clearly transpired that the coach was unaware of the code word "jack-knife" and never taught the Stellenbosch players to use this dangerous and illegal tactic,⁷ he, along with the principle and the MEC reached a settlement with Hattingh, and the case proceeded against Roux only.⁸

Roux firstly denied the allegations that he had executed a dangerous manoeuvre. His defence secondly centred on the fact that by participating in a contact sport such as rugby, Hattingh had accepted the risk of injury and therefore Roux could not be liable for the injuries Hattingh sustained.

Judgment

In the South African law of delict or tort, a wrongdoer is liable for an injury caused to another person if five requirements are satisfied: There must be (i) a voluntary human conduct (ii) which is wrongful and (iii) culpable and (iv) which causes (v) harm or injury to another person.⁹

The court considered evidence lead on behalf of Hattingh and Roux, as well as the testimony of the expert witnesses (two retired Springbok rugby players who were now front row coaches, and one of the most experienced international rugby referees in the world). Not only did Roux contradict himself to some extent, but photographs taken of the particular scrum during the game in question also discounted his version of events.¹⁰ The court found that Roux had indeed acted contrary to the laws of rugby by forcing his head into the wrong channel during the formation of the scrum. The court also concluded that Roux did so deliberately and therefore acted with the necessary culpability.¹¹ The court further accepted that Hattingh indeed suffered an injury and that the cause of this injury was the dangerous manoeuvre performed by Roux.¹²

¹ Professor in Private Law and Director of the Centre for Intellectual Property Law, University of Pretoria, South Africa; Visiting Fellow, Anglia Ruskin University, UK.

² 2011 5 SA 135 (WCC).

³ Par. 1.

⁴ Par. 10 and 50.

⁵ Par. 59.

⁶ Par. 10.

⁷ Par. 52.

⁸ Par. 2.

⁹ R. Cloete, *Introduction to sports law in South Africa* (2005), p. 105 *et seq.*

¹⁰ Par. 55.

¹¹ Par. 66 and 72.

Hattingh succeeded in proving that Roux's actions complied with four of the aforementioned delictual elements. In respect of the remaining element, the court was called upon to determine whether or not the actions by Roux could be construed as unlawful.¹³

Unlawfulness is determined by using the *boni mores*- or legal convictions of society principle. In determining whether an action is unlawful or not, the court must make a value judgment based on the surrounding circumstances, reasonableness, the positive morals, public policy and the legal convictions of the community.¹⁴ And even if the actions of the defendant are at first glance unlawful, there might be certain grounds of justification that would redeem the actions of the defendant.

In the context of sport it is often the rule *volenti non fit iniuria* that provides the justification and prevents an injured player from successfully claiming compensation for injuries suffered on the sports field.¹⁵ In this regard, judge Fourie explained that rugby is a physical contact sport that is played at a very fast pace, resulting in an ever present risk of injury¹⁶ and players accept this risk of injury when they elect to participate in a game of rugby. However, this inherent risk of injury that rugby holds does not necessarily in all cases preclude a player from succeeding with a delictual claim against the other party.

In the case of a claim based on a sports injury the specific culture of that sport as set out in the rules, customs and common practice, play an integral part in determining to what extent a player indeed accepts the risk of injury when he participates in sport. The circumstances surrounding the injury and how it was sustained also plays an important part here.¹⁷

Obviously every player accepts the risk of injury which can be sustained during regu-

lar play in accordance with the laws of the sport in question. Furthermore there are certain kinds of conduct which, although not strictly speaking within the laws of the game, can be expected in any rugby match and therefore a player can be said to have consented to the risk of those injuries as well. Here one thinks of incidents, such as a player being tackled from an off-side position or a player being tackled after he had already passed on the ball.¹⁸ As these kinds of transgressions take place relatively often, every player is deemed to have accepted the risks associated with such incidents and therefore a player injured in the course of such a transgression will most likely not be able to succeed with a claim.

On the other hand, if an injury is sustained because of a serious transgression that cannot be tolerated at all under the laws of the game, the specific action will be unlawful and the injured party should be able to succeed with a delictual claim.¹⁹

According to the expert witnesses and the evidence led, the "jack-knife" tactic was unheard of and extremely dangerous. No player would reasonably expect a hooker to wilfully place his head into the wrong channel during the formation of a scrum.²⁰ This clearly classifies Roux's actions as a dangerous and serious transgression which cannot be viewed as an inherent risk of injury that rugby players consent to.²¹ Accordingly the court found that Roux was in fact liable for the injuries Hattingh sustained during the formation of the particular scrum.

Comparative survey

Cases resulting from serious neck injuries sustained during rugby matches, and in particular during scrums, are nothing new. In the 1980's two Australian rugby players, Hyde and Worsley, who had both sustained neck injuries during scrums in instituted claims in tort against members of the International Rugby Council management, amongst others. At the time of their respective injuries, Hyde was 18 years old and Worsley was 19 years old and both of them played at hooker. Both were injured when the opposition prematurely attempted to engage the scrum before the other team had properly formed their own scrum. This was clearly against the rules of the game.

Both plaintiffs alleged that the defendants,

being council members of the International Rugby Board, were negligent in that they had not adapted the laws of rugby to ensure that scrums would be safer. In 2000 this matter was jointly taken on appeal to the Australian High court.²² Judge Gaudron explained that rugby was a dangerous game, well known for the fact that players often aggressively made contact with each other.²³ All players, but especially those in the front row positions run the risk of being seriously injured. The applicants could not have been unaware of this risk. Where players participate freely in a sport it is assumed that they know the rules of the specific game and that they are aware of the risks related to participation. Therefore the court found that the claims could not succeed.

In *Rootes v. Shelton*²⁴, a water skier was injured. In the Australian High Court chief justice Barwick held that someone who participates in a certain sport is assumed to have accepted those risks inherent in that particular sport. The court must make a decision based on the facts of each case to determine which risks are deemed to be accepted in this way by the participant. The laws or rules of the specific game are a factor which the court must take into account in this regard, but it is not necessarily decisive. This means that a mere transgression of the rules would not negate the above mentioned acceptance of risk.

Legal proceedings based on injuries sustained during rugby matches have also arisen in England. The case of *Simms v. Leigh Rugby Football Club Ltd*²⁵ dealt with a rugby player who sustained multiple fractures to his tibia and fibula in his right leg. The applicant had played as flank for the Oldham rugby club in a match against Leigh rugby club on the latter's home ground. During the course of the game the applicant received the ball and headed for the corner flag in an attempt to score a try. The applicant dove for the goal line but was tackled by two opposition players. In the process the players rolled over each other and the applicant's leg was broken. It is uncertain whether the injury was caused by contact with an opposing player's boot or with the wall which separated the playing field from the spectators' stands. The wall in question was approximately 2.2 meters (7' 3") from the sideline and ran the entire length of the field.

Judge Wrangham concluded that the claimant could not prove that his injuries were a result of his contact with the wall.

¹² Par. 66.

¹³ Par. 67.

¹⁴ Par. 16-17.

¹⁵ Par. 18.

¹⁶ Par. 11.

¹⁷ Par. 24.

¹⁸ Par. 26-27.

¹⁹ Par. 27.

²⁰ Par. 68-70.

²¹ Par. 71.

²² *Agar v. Hyde* 201 CLR 552.

²³ Par. 126.

²⁴ 1968 ALR 33.

²⁵ 1969 2 All ER 923 (Ass).

Even if the injury was sustained when the claimant hit the wall, it would not change the situation. The wall was slightly more than 2.14 meters (7 feet) from the sideline as required by the laws of rugby. This meant that it complied with all the rules and safety standards. While it was foreseeable that rugby players could sometimes be pushed far more than 2 meters beyond the field of play, this rarely happened, and therefore it would not be necessary to warn players against this risk.

He added that rugby is a particularly physical sport in which strong young players often make forceful contact with each other so that serious injuries could generally be expected to occur from time to time. Accordingly there was also no indication that any of the Leigh players acted inappropriately in tackling the claimant.

In *Smoldon v. Whitworth*²⁶ a rugby referee was held accountable because he neglected to take proper control of an under-nineteen rugby match. The referee apparently did not heed the rules aimed at ensuring safe scrums, allowing scrums to collapse. In particular he ignored the “crouch-touch-pause-engage” procedure for the formation of a scrum as prescribed at the time for under-nineteen matches by the Staffordshire Referees’ Association (and now required at all levels of rugby.)

In a circular sent to all its members the Referees’ Association instructed that the above-mentioned procedure had to be followed and failure to do so could result in referees being held accountable for any injuries sustained. In addition, the linesman, spectators and players warned the referee that the scrums were out of control and dangerous, but he chose to ignore the warnings. When the umpteenth scrum collapsed, one of the front row players injured his neck to such an extent that he was left a quadriplegic state. The injured player succeeded in his claim against the referee.

Griffith-Jones²⁷ is of the opinion that the court correctly found that, based on the English law principle, the referee did indeed have a duty of care towards the play-

ers. Therefore he can be held liable if a player is injured because he neglected this duty of care. Obviously not every form of neglect will lead to an infringement of this duty of care. The facts in *Smoldon v. Whitworth*²⁸ point to a serious neglect of duty by the referee. He disregarded rules set in place to ensure the safety of scrums, and ignored multiple warnings and requests to exercise proper control over the match.

In *Vowles v. Evans*²⁹ the courts of England and Wales were faced with a similar question. The claimant was injured during a game in which he played hooker for Llanharan Rugby club against Tondur rugby club. Quite a lot of rain had fallen the previous evening and the field was sodden and heavy under foot. During the first half of the game one of the Llanharan front row forwards dislocated his shoulder and had to leave the field. Llanharan did not have a substitute front row player to replace the injured player. In accordance with law 3.13(d) the referee indicated that the game should continue with uncontested scrums. This meant however that Llanharan would forfeit any league points for this particular match. After discussions between the referee and the captain of Llanharan and among the players, it was decided that one of Llanharan’s second row forwards, who played at front row years ago at a lower level, would take up the position of the injured player.

This decision was in conflict with law 3.5 that stated that only properly coached and experienced players may play in the front row of a rugby team. The player concerned was apparently out of his depth and after his substitution in the front row various scrums collapsed.

Towards the end of the game Llanharan was in the lead with three points. A scrum was awarded to Tondur close to the Llanharan try line. The Tondur front row players attempted to push the scrum over the try line and score a try which would clinch the match in their favour. The scrum did not engage properly. The substitute front row player was unable to take up or maintain the correct position. As a result of this the claimant hit his head against the shoulder of his opponent with such force that he broke his neck.

Based on this the claimant instituted a claim against, among others, the referee, his team mate who was the substitute front row player and the captain of Llanharan. The court held that the referee did not satisfy

the duty of care and therefore he could be held liable for this injury. Once again the facts point to a serious breach of duty by the referee. The laws of rugby make it very clear that during a rugby match the referee is the only adjudicator of the rules and facts.³⁰ Furthermore the laws clearly state that only well coached and experienced players are allowed to play in the front row, and that the referee should award uncontested scrums in situations where there are not sufficient substitute players to continue the game with contested scrums. The referee should simply have made the call, but in his discussion with the captain and players of Llanharan he effectively abrogated his authority and neglected his duty of care.

It is not only rugby injuries that have led to successful claims. In *Condon v. Basi*³¹ the court had to decide whether a football player could be held accountable for injuries caused to an opponent. During a local football match the respondent dribbled the ball. The appellant tried to intercept the ball and performed a tackle. This resulted in the respondent breaking his leg.

The court explained that the players also have a particular duty of care towards each other. The extent of this duty is dependent on various factors, including but not limited to the laws or rules of the game, and the customs and usages of the particular sport. Furthermore each player accepts the risks inherent to the sport he chooses to play. The court cited the Australian decision in *Rootes v. Shelton*³² with apparent approval and held that the laws of football were not conclusive in this case. The mere transgression of a law or rule of the game does not in itself mean that a player has neglected his duty of care towards the other players. In casu the tackle was against the laws, as it was performed late and the respondent had already passed the ball forward. Add to that the evidence led by the referee that the appellant lifted his feet between 25 and 40 centimetres (9 to 12 inches) from the ground and tackled the respondent feet first. Not only was this type of tackle extremely dangerous, but it was also a serious transgression of the rules, resulting in the appellant being sent off the field with a red card.

In the light of this the court held that the appellant had indeed neglected his duty of care towards the respondent, and upheld the decision of the trial court holding the appellant accountable.

²⁶ 1997 ELR 115. Upheld on appeal 1997 ELR 249.

²⁷ *Law and the Business of Sport* (1997) 23.

²⁸ 1997 ELR 115.

²⁹ 2003 1 WLR 1607 (CA).

³⁰ 1985 2 All ER 453 (CA).

³¹ 1985 2 All ER 453 (CA).

³² 1968 ALR 33.

Authorities in England took the question of accountability for sport injuries one step further by introducing criminal prosecutions in certain cases. In *R v. Bradshaw*³³ the accused tried to take the ball from an opponent during a football match by performing a tackle. In the process the players fell down and the accused's knee hit his opponent in the stomach with such force that his opponent later died as a result of his injuries. Lord Bramwell explained to the jury that the rules of sport cannot authorise something that is otherwise illegal. However, where the rules appear lawful and a player complies with them he cannot be deemed to have acted unlawfully if he injures another player during the course of the game. The jury acquitted the accused.

In *R v. Davies*³⁴ two opponents clashed into each other during a football match. A free kick was awarded, and while the players waited for the free kick to be taken, the accused hit his opponent in the face with his fist, resulting in a fractured cheek bone for the opponent. The court of appeal held that the actions of the accused were serious transgressions of the rules of football, and the jury in the trial court were correct in convicting the accused and imposing a six month prison sentence.

In *R v. Moss*³⁵ a conviction and eight month prison sentence was handed down to an accused who stood trial because he hit an opponent with his fist during a rugby match, fracturing the eye socket of his

opponent. Judge Potts reiterated the statement made by the trial court that rugby is a contact sport during which serious injuries can sometimes be sustained, but that it is not a license for thuggery.³⁶

A conviction and sentence to community service was overturned by the court of appeal in *R v. Barnes*.³⁷ The accused attempted to take the ball from an opponent during a football match by executing a tackle, resulting in the serious injury of the opponent's leg. Lord Woolf held that by participating in a dangerous sport the players tacitly agree to the inherent risk of injury. If however the actions of the injuring party go further than what could be reasonably expected or to which the players could legally agree, the party who caused the injury can be held liable.

Whether it is in tort or criminal law, assumption of the risk of injury is in English law the most important principle that negates unlawfulness where one player injures another. To determine the extent of the consent, one must first take into account the rules of the sport. The culture surrounding the sport, such as the customs, codes of conduct, tactics and transgression that occur often, also play an important role in determining the extent to which players assume the risk of injury.³⁸

Criminal prosecutions arising from actions on the sport field or in the boxing ring also occurred in New York. In *People v. Fitzsimmons*³⁹ a boxer was prosecuted after his opponent died because of injuries sustained during their boxing match. Judge Ross explains to the jury that where the rules and customs of a sport are fair, they are not likely to bring about serious injury or death and all the people involved agreed to them, injury or death arising from that sport would be deemed an accident and it would not be punishable. The jury found that the rules of boxing were fair and the blows received by the deceased were within the boundaries of the rules.

In Canada players were also prosecuted for injuries caused on the playing field. In *R v. Gray*⁴⁰ an ice hockey player in the province of Saskatchewan was convicted of assault. During the game a fight broke out between the players on the ice. One of the players stood back and watched the fight from a distance. The accused, who at that time was in the penalty box, leaped onto the ice and hit the player who had stood back. The player lost consciousness

because of the blow. Judge Allan accepted that ice hockey was a lively and competitive sport with a lot of physical contact. The actions of the accused were however outside of the normal course of the game on ice, as it took place after the game had been interrupted. This could not be brought in line with what would normally be expected during an ice hockey match.⁴¹

In *R v. Cey*⁴² an ice hockey player shoved an opponent into the safety barriers from behind during a match. Judge Gerwing held in the Saskatchewan appeals court that a player participating in an ice hockey match accepts a certain amount of physical contact and in doing so also accepts the risks of injury associated with it. In this regard the rules of the particular sport should be considered, but a player also agrees to the risk related to certain transgressions of the rules, that fall within the accepted norms according to which the game is played.

In *R v. Ciccarelli*⁴³ deputy chief justice Corbett held in Ontario that an objective test must be employed to determine to what extent the player accepted the risk of injury. Various factors are taken into account, including the nature of the sport, the level – be it amateur or professional –, the extent of the violence committed, the extent to which the action carried a risk of injury and the motive with which the party acted in causing the injury. In this case an ice hockey player was convicted of assault after hitting an opponent over the head with his hockey stick.

In contrast to this two ice hockey players in Saskatchewan were acquitted after they lost their cool during a game and hit and bumped into each other with their sticks. Both were prosecuted in criminal court.⁴⁴ The incident took place in the heat of the moment while the players were competing for the puck. In these two cases it was decided that the players reacted instinctively in the heat of the moment, and their actions fell within the reasonable boundaries of professional ice hockey.

Accountability for sporting injuries was also an issue in Germany, not with regard to rugby, but to football and basketball. In one case⁴⁵ dealing with football, a defender performed a tackle in an attempt to win the ball from an opponent. In the process the two players made contact and the opponent sustained an open fracture of his right ankle which later became septic. The *Bundesgerichtshof* decided that players

³³ 1878 14 Cox CC 83.

³⁴ 1991 12 Cr App R 308

³⁵ 2000 1 Cr App R 64.

³⁶ See also *R v. Johnson* 1986 8 Cr App R 343, where a rugby player was sentenced to six months in jail for biting off a piece of his opponents ear during a rugby match.

³⁷ 2005 1 Cr App R 30.

³⁸ Pendlebury, "Perceptions of playing culture in sport: The problem of diverse opinion in the light of Barnes", in: *Entertainment and Sports Law Journal Vol. 4 No. 2* (2006). Available at www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume4/number2/pendlebury (accessed on 13 September 2012).

³⁹ 11 NY Crim R 391.

⁴⁰ 24 CR 3d 109.

⁴¹ See also *R v. Henderson* 1976 5 WWR 119 for a similar situation in British Columbia, *R v. Watson* 26 CCC 2d 150 for a case in Ontario where an ice hockey player was convicted of assault for choking an opponent with his hockey stick.

⁴² 75 Sask R 53.

⁴³ 54 CCC 3d 121.

⁴⁴ *R v. Maki* 14 DLR 3d 164; *R v. Green* 16 DLR 3d 137.

⁴⁵ 1975 NJW 109.

participating in a football match in principle accepted that injuries are a common part of the game and cannot be avoided. This acceptance of risk is objectively adjudicated, so that any personal prejudices of a player are not taken into account. In a game where players compete for a ball it can be assumed that players will sometimes act with disregard for safety, which could lead to injuries. In the normal course of events, all players are equally subjected to this risk of injury and therefore players would not normally be held accountable if another player sustains an injury. This is even the case where a player commits certain transgression of the rules because of over-eagerness, anxiousness, lack of experience or fatigue. Players often need to make split second decisions in the heat of the moment and even the best of players will sometimes make a mistake. To succeed with a claim based on article 823 of the *Bürgerliches Gesetzbuch (BGB)* a claimant must prove that the other player in causing the injury, committed a serious transgression.

In the case of *Leitsatz/Gründe*⁴⁶ the *Bundesgerichtshof* had to determine whether a basketball player could be held accountable based on article 823 BGB for the injuries sustained by an opponent during the game because of a personal foul. A personal foul occurs when one player, contrary to the rules of the game, makes contact with another player by pushing, shoving or blocking him. The court in particular had to determine whether a player who committed such a personal foul, failed to act with the necessary care required in article 276 BGB. The court held that even the smallest of transgressions resulted in a neglect to act with the necessary care. It is however clear that any basketball player, competing for the ball would sometimes make a personal foul. Therefore a player could not be held accountable for injuries arising from actions that occur regularly during the normal course of the game even if they amount to minor infractions of the rules.

The case of *Hattingh v. Roux*⁴⁷ is not the first case where sporting injuries have led to litigation in South Africa. In *Boshoff v. Boshoff*⁴⁸ the plaintiff sustained an injury to his eye during a friendly squash game when the defendant's racket slipped out of his hand and hit the plaintiff against the head.

Judge Kotze explained⁴⁹ that it was apparently not contrary to public policy when participants freely accepted the reasonable risk of sustaining certain injuries during a game, sport or other form of physical recreation. Further it is not unlawful to accept the risk of sustaining personal injuries through the reasonable actions of the other participants. Therefore it is necessary for an athlete who in good faith accidentally injures another player, whilst acting reasonably, to have the exception of *volenti non fit iniuria* to his disposal.

He added⁵⁰ that in this case it was not proved that any unlawful actions were perpetrated against the claimant. An injury such as the one sustained can be reasonably expected during a social game of squash between amateurs and the general principle of reasonableness cannot dictate that this should be classified as an unlawful act.

Criminal prosecution based on the actions of participants on a rugby field have also occurred in South Africa. In June 2006 a local club rugby match was played between the Delicious rugby club from Ceres and the Rawsonville rugby club. From the outset tempers flared and the game was played in bad spirits. There were numerous instances of foul play and accusations of racist remarks made towards the players from Delicious rugby club. Almost at the end of the match there was an incident between Matthee, who played at centre for Delicious rugby club, and Loots, who played at flyhalf for Rawsonville. They were pushing and shoving each other. The game continued but Zimri, the captain and eight man of Delicious joined the scuffle and hit Loots on his throat. Loots fell to the ground and Zimri kicked his head. Loots later died as a result of his injuries. Both Zimri and Matthee were prosecuted in the Worcester magistrate's court. The charges brought against them varied from murder to assault with the intent to cause grievous bodily harm.⁵¹ Matthee was acquitted but Zimri was convicted of a lesser offence, culpable homicide and sentenced to five years' imprisonment.

Prinsloo⁵² explains with regard to this case that a participant in sport agrees to the risks inherent in that sport. A rugby player accepts that he may be injured during a tackle or as a result of a collapsing scrum. This acceptance however only extends to those risks lawfully and reasonably related to the specific sport and type of game played.

Discussion

Civil actions taken as a result of conduct on the sport field are usually regarded with a healthy measure of concern and suspicion. On the one hand there is a fear that if the courts intervene that sport will lose its autonomy and results will no longer be decided on the playing field but rather in the court room. On the other hand it is feared that litigation and the accompanying culpability in certain cases will bring the existence of the sport as a whole into question. A magnitude of claims or prosecutions and the fear of being held liable could lead to people no longer participating, be it as players, athletes, referees, administrators or support staff. An increase in these claims or prosecutions can also result in the sport becoming financially exhausted and therefore no longer sustainable. Furthermore this fear can also lead to the sports federation amending or adapting the rules of the specific sport to such an extent that the essence of the sport is affected.

The decision in *Hattingh v. Roux*⁵³ need not raise concern in the sporting community. The principle on which Roux was held liable has no relation to rugby as a sport or any other aspect of the game that occur during the normal course of play. In fact it is related to a serious and wilful transgression of the very rules and regulations set in place to promote and ensure the safety of players. The expert witnesses who together have decades of experience at the highest level of rugby agreed that the specific tactic was extremely dangerous and also completely unexpected and unheard of. In this case the controversy centred around the question of the unlawfulness of the Roux's actions. The answer to this controversial question depends on whether and to what extent the injured player had in fact accepted the risk of injury. If a player participating in a sport is injured as a result of the reasonable actions of a fellow player that fall within the scope of the accepted risks and legally accepted boundaries, the actions of the play-

⁴⁶ 1976 NJW 2161.

⁴⁷ 2011 5 SA 135 (WCC).

⁴⁸ 1987 2 SA 695 (O).

⁴⁹ 700F-I.

⁵⁰ 701H-I.

⁵¹ *S v. Zimri* case number WSH311/2006 unreported; for a discussion see Prinsloo, "Straftogtelike aanspreeklikheid op grond van 'n rugbybesering aan 'n opponent toegedien", in: TSAR 202 (2010).

⁵² TSAR 202 (2010).

⁵³ 2011 5 SA 135 (WCC).

er who caused the injury is not unlawful. Consequentially there is no possibility of liability for the injuries sustained.

Judge Fourie explained in *Hattingh v. Roux*⁵⁵ that unlawfulness was determined according to the settled *boni mores*-criterion.⁵⁶ This is an objective measure based on public policy, reasonableness, the weighing of conflicting interests and other relevant surrounding circumstances. He referred with apparent approval to Basson and Loubser⁵⁷ which indicates that reasonableness is determined with regard to the laws and customs of the particular sport, the level of skill and care that can be expected from the player and the surrounding circumstances of each case.⁵⁸

If the decision in *Hattingh v. Roux*⁵⁹ is compared with similar cases locally as well as internationally, there is clearly a general consensus with regard to accountability for sporting injuries. Worldwide, the cases where players or referees were indeed held liable all have one thing in common: a reckless disregard for the rules of the specific sport, which are generally aimed at promoting and ensuring the safety of players.

In most cases this disregard took place whilst play was interrupted. As opposed to split second decisions in the heat of battle, the defendants or accused therefore all had ample time to reflect on the situation on the field and to act according to the rules, but neglected to do so. Nonetheless, in *Hattingh v. Roux*⁶⁰ Roux made a deliberate decision to disregard the rules and to perform an extremely dangerous manoeuvre. The same can be said for the ice hockey players in *R v. Gray*,⁶¹ *R v. Henderson*⁶² and *R v. Watson*.⁶³ In *Smoldon v. Whitworth*⁶⁴ and *Vowles v. Evans*⁶⁵ the referees also had more than enough time

to assess the situation and apply the rules which were ultimately aimed at promoting the safety of the players. In spite of this both referees neglected to take control of the games as was expected from a referee.

However, the case of *Condon v. Basi*⁶⁶ stands out. Here the appellant tried in the heat of the moment to win the ball from his opponent and injured the opponent in the process. The appellant had to make a split second decision and perform a movement to try and thwart his opponent. He had no time to consider the rules and decide on a fitting course of action. At first glance it would appear unfair to hold the appellant liable in these circumstances. The facts of the matter however show that the appellant performed his tackle extremely aggressively by lifting his feet very high off the ground and diving at his opponent's legs. Add to this the fact that the tackle was performed late, after the opponent had already passed on the ball to another player. There was no way for the appellant to win the ball through this tackle and the full impact of his tackle was inevitably focused on his opponent's ankles. The usual penalty for an indiscriminate tackle during a football match is a free kick awarded to the opposing team. In serious cases where a player performed a dangerous tackle he would be warned with a yellow card to be more cautious. In this case however the appellant was sent off the field with a red card. This clearly illustrates the severity of his offence, and therefore it makes sense that he should be held liable for his actions.

It would appear that courts around the world employ the same objective test to determine whether a player's actions resulting in the injury of another player fall outside the scope of the acceptance of risk and are therefore unlawful. This test can be set out as follows.

- Firstly the rules of the sport in question must be reasonable and the players should not be exposed to an unreasonable risk of injury.
- Secondly, by participating in the sport each player accepts the risk of sustaining injuries reasonably expected during normal play.
- Thirdly, the scope of this assumption of risk is determined with regard to the rules of the game, the nature of the sport, the level – be it amateur or professional –, the ages of the players, the measure of violence committed, the extent to which the particular action holds a risk

of injury and the intention with which the player had acted.

If one applies this test to the facts in *Hattingh v. Roux*⁶⁷ and the tactic performed by Roux during the scrum in question, it is clear that it in no way falls within the scope of the risk accepted by Hattingh by participating in this rugby match. Roux's actions are in direct conflict with the laws of rugby and carried a very high risk of serious injury. This tactic caused Hattingh to thrust his neck into Roux's shoulder with considerable force. Add to this the fact that Roux willingly decided to use this tactic during the interruption of play before the forming of the scrum. This was not merely a lapse in judgement in the heat of battle. Roux had time to reflect on his decision and nonetheless chose to perform this dangerous movement. Therefore it is not surprising that the court held Roux liable for Hattingh's injuries.

Conclusion

The decision in *Hattingh v. Roux*⁶⁸ should not cause concern for athletes and the sporting community. On the contrary, it should be welcomed. A player who in good faith tries to act according to the laws or rules of a sport, will not be held accountable for the injuries sustained by his opponent, even if the player acted without proper regard for safety or committed a minor offence in the heat of battle. However, as judge Potts stated in *R v. Moss*⁶⁹ sport is not a licence for thuggery. A player who knowingly commits an offence or disregards the rules can be held liable if an opponent is injured in the process. Liability in this regard is also not limited to liability in tort or delict, but can also include criminal liability.

The facts in *Hattingh v. Roux*⁷⁰ could, while keeping in mind the different standards of proof which apply in civil and criminal cases, easily have given rise to criminal prosecution for assault. Players who make use of unauthorised tactics should understand that the law will not ignore their transgressions simply because they take place on the sports field. However, players who participate in good faith and try to play according to the laws should in turn be protected against thuggery on the field, just as any other citizen should enjoy this type of protection in all other walks of life.

⁵⁴ Cloete (2005) 109 et seq.

⁵⁵ 2011 5 SA 135 (WCC).

⁵⁶ Par. 16.

⁵⁷ Basson and Loubser, *Sport and the law in South Africa* 7 ed (2009) p. 5-13 et seq.

⁵⁸ Par. 24.

⁵⁹ 2011 5 SA 135 (WCC).

⁶⁰ *Idem*.

⁶¹ 24 CR 3d 109.

⁶² 1976 5 WWR 119.

⁶³ 26 CCC 2d 150.

⁶⁴ 1997 ELR 115.

⁶⁵ 2003 1 WLR 1607 (CA).

⁶⁶ 1985 2 All ER 453 (CA).

⁶⁷ 2011 5 SA 135 (WCC).

⁶⁸ *Idem*.

⁶⁹ 2000 1 Cr App R 64.

⁷⁰ 2011 5 SA 135 (WCC).