# GSLTR

## Global Sports Law and Taxation Reports

**Contents**




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# The expendibles: do sports people really assume the risk of injury?[1]

## Part one[2]

by Steve Cornelius[3]

**Introduction**

Sport has been a significant aspect of human society since the earliest times. Ancient rock art depicts scenes of cave people apparently competing in running, swimming, archery and wrestling while spectators look on.[4] And the practise of constructing sports stadia to host competitions and spectacles dates back to the earliest civilisations.[5]

It is probably fair to say that sports injuries have also been part and parcel of human society since ancient times. In this regard Spivey[6] explains that the Greek word "*agôn, or contest* [...] *leads to our word "agony*"" as often "*events were contested to the point of serious injury and fatality*".[7] It is also generally accepted that the roots of modern sports medicine can be traced back to the Greek sports-coach-turned-physician, Herodicus, who pioneered the treatment of athletes in the fifth century BC.[8] But ancient sports medicine was aimed not so much at the rehabilitation of injured athletes as ensuring optimal performance during the contest. In the quest for victory, athletes were expendable.[9]

This notion of expendable athletes has, to some extent, remained with us throughout the ages. Today, sports people believe in "no pain no gain" as an acceptable by-product of sport.[10] When asked why, former Dallas Cowboys running back Emmitt Smith said:[11]

> *"You do it for the game. You do it for the sake of your teammates. You do it because it's your team. Should you be out there? The answer's probably not. Would I do it again? Yes, I would. But that's football. That's the way I was raised. If you can't play with pain, you can't play the game."*

Lawyers rationalise it with volenti non fit iniuria: consent to injury or voluntary assumption of risk. Despite many centuries of change, the message has remained essentially the same: if you play and get hurt, that is generally your problem.

The aim of this article is, therefore, to reflect on the existing legal and management practices relating to sports injuries and to analyse consent to injury as a viable defence against civil claims resulting from sports injuries.

**History**

This acquiescence to the expendability of athletes endured in Europe throughout the Middle Ages,[12] into the Renaissance[13] and, eventually, became the accepted norm in modern legal systems derived from old Roman law.[14]

It also became the norm in common law jurisdictions as well. The concept of civil liability was not well developed in medieval English law and a person was only liable for causing an injury to another if it amounted to a trespass in breach of the King's peace.[15] Since King James I issued the *Declaration of Sports* in 1618,[16] it can be assumed that participation in lawful sports at the time would not have amounted to a breach of the King's peace and there would consequently have been no liability for injuries sustained in such sports.

From this, the English courts in the 19th century eventually developed the modern doctrine of implied sporting consent, which exempts participants from liability for sports injuries, as long as the rules of the sport are lawful and the players observe the rules and practices of the particular sport.[17]

**Administration of sport**

The notion of expendable athletes has also underpinned the administration of sport throughout the ages. Modern sports developed during the nineteenth century as the public schools and universities in England, in a quest to compete with each other on the sport's field, began to standardise the rules of sports.[18] But these standardised rules were mostly aimed at setting uniform sizes of playing fields, providing some measure of order to matches and separating players from spectators.[19] Player safety was not of much concern. And for the most part, this remained the position until the dawn of the 21st century.

No sport has exposed this resignation to the expendability of athletes more acutely than motorsport. In the 1960s and 1970s, it was said that "[t]*wenty-five drivers start every season in Formula One and each year two* [...] *die*".[20] At the time, replacing dead or critically injured drivers seemed to have almost become the norm for motorsports teams. Niki Lauda has always lamented the fact that, after his near-fatal crash in 1976, he had hardly reached the hospital with his condition largely still unknown, when the Scuderia Ferrari team had already pronounced him dead and begun to negotiate with other drivers in a bid to find a permanent replacement for him.[21]

As dangerous as it may seem, motorsport is by no means the only sport with a long list of fatalities on the playing field. It seems that almost every sport has a chequered history that would justify its own "war memorial" with the names of fallen athletes.[22] And that accounts only for the fatalities. The list of debilitating injuries is even longer and there are innumerable short-term injuries which require athletes to be withdrawn from training or participation for one or more sessions. But the

games must go on and every injured or deceased athlete will be replaced... and eventually forgotten.

Yet, in many ways, sport is not unique in this regard. It is often said that sport is a microcosm of society,[23] although Billings, Butterworth and Turman[24] are of the opinion that "*in the modern day, there are many instances in which the inverse also holds true as society is often a microcosm of sport*". Be that as it may, sport provides a mirror on society and the same cultures, issues and problems that occur in society are also reflected in sport and vice versa. Therefore, the notions of expendability and replaceability of athletes merely reflect larger social phenomena which are by no means peculiar to sport. Duina[25] explains that:

> *"we deem those who try hard to be winners: because we as a society benefit the most if people push themselves as hard as they can, even when this may hurt them in various ways. People who try hard are likely to work harder, generate more goods and services (including entertainment for us), create jobs, pay more taxes, and much more. It matters little that, after squeezing themselves for a long time, those people will "burn out," or that, by fully dedicating themselves to one task, they will neglect other aspects of their lives, their loved ones or friends, or their other interests and passions. From the point of view of the "system", people are expendable and replaceable resources – and, given what is needed at a given point in time, they should be exploited to the maximum. This is especially the case if they happen to be self-motivated, if they learn from a young age – as we try to ensure through our school system and other venues – to embrace our love for effort."*

In sport, "*high self-motivation is a characteristic of many champions* [that ...] *can be consciously manipulated*".[26] Professional sports clubs and leagues rely on this ability to manipulate and exploit the self-motivation of elite athletes. The co-founder of the College Athletes Players' Association in the United States, Kain Colter, summarised it this way:

> *"The 5 am workouts and conditioning sessions aren't televised. The late-night film sessions are not seen by anyone outside the team. [...] The difficulty of balancing a full-time job with a full-course schedule is not glamorized. The wear and tear that the player's body endures throughout the year is seen as a badge of honor. The concussions, surgeries and broken bones become just a part of the game."*[27]

And society loves to see its heroes push themselves beyond human abilities to achieve almost supernatural feats. That is why:

> *"*[p]*layers who play with pain are labeled courageous even if they risk permanent injury. Those who overtrain may be admired for their dedication until their overtraining interferes with their performance. Eating disorders, particularly among female athletes, are prevalent in certain sports in which body weight is a factor, even though these disorders may lead to death. Physical courage is expected, particularly of males as proof of their manhood. Risk taking without regard for the consequences is admired. Players who shy away from physical danger are labeled unworthy of the fraternity of male athletes."*[28]

That is why the exploits of Franz Beckenbauer during the 1970 World Cup semi-final is still applauded today as one of the most inspirational football stories. Beckenbauer had broken his clavicle during the match but continued to play for more than thirty minutes with his arm in a sling.[29]

That is why cyclist Tommy Simpson, who died on Mont Ventoux during the 13th stage of the Tour de France in 1967, is still very much celebrated for refusing to quit when he had fallen off his bicycle and reportedly said "Put me back on my bike"[30] despite being at death's door.[31] Simpson's death was almost immediately blamed on the use of drugs and, while there were traces of amphetamines in his body and tubes of amphetamines were found in his pockets,[32] no inquest was ever held in France or Britain and no clear scientific link between the drugs and his death has ever been established. In fact:

> *"Simpson was perfectly capable of riding himself to death without drugs in his system. He became "twice the man" when he pulled on the Union jack jersey [...] and was prepared to ride himself "into unconsciousness" for his country."*[33]

The official cause of death was heart failure due to dehydration and exhaustion.[34] In this, the team management who insisted that Simpson, who had been struggling to eat and suffering from diarrhoea and stomach pains since the 10th stage,[35] must improve his overall performance and the crew that put Simpson back on his bicycle, when he was clearly at the end of his strength, played a much larger part in his demise than any drugs could have done. And yet, hardly anyone has ever laid the blame on the management and crew who kept pushing him on. And the Tour continued without Simpson...[36]

**Unsuccessful claims**

No team manager or crew member has ever been held liable for the death or serious injury of an athlete and initial attempts to hold sports federations liable for catastrophic injuries, have largely met with failure. Even in situations where team managers had insisted that racing drivers compete despite the drivers' complaints that cars were unsafe to drive, state and sports authorities alike, seemed to have cared less when the inevitable occurred.[37] The same applies to almost all other sports.[38]

There seems to be an almost universal acceptance that sports federations and clubs can do no wrong. Players, who choose to take part in sport, are aware of the risks of injury (or death) and should not complain if that risk is realised. It is for this reason, in the Australian case of *Agar v. Hyde*[39], that rugby players who had sustained severe neck injuries, when scrums were formed improperly, unsuccessfully sought to hold rugby authorities liable for failing to ensure that scrums were safe. Gaudron J indicated[40] that rugby was notorious as a dangerous sport where players often made violent contact with each other. Players, who participate in rugby and particularly front row forwards, run the risk of injury and the claimants could not have been unaware of these risks. As a result, the High Court of Australia dismissed their claims.

English courts have followed suit. In *Simms v. Leigh Rugby Football Club Ltd*[41] a tackled player who broke his *tibia* and *fibula* when he hit a wall separating the spectators from the playing field, failed in his bid to claim damages from the rugby club that owned the field. Wrangham J ruled that the field complied with all the laws of rugby and, therefore, the claim could not succeed.

More recently, the English Court of Appeal held that a rugby club, which shared facilities with a cricket club, was not liable when a peg placed on the field to mark the boundary of the cricket pitch, caused an injury to the knee of a player.[42] The court concluded that an inspection of the pitch was done as required by the laws of rugby and that a court "*must not be too astute to impose duties of care which would make rugby playing as a whole more subject to interference from the courts than it should be*".[43]

It is noteworthy in these cases that none of the courts reviewed the applicable laws of rugby to determine whether those laws were reasonable and lawful. The courts seemed to have merely accepted the standing of those laws and, as a consequence, that the sports clubs or federations concerned acted lawfully when they complied with those laws.

This submission to the rules or laws of sport and the reluctance to impose liability where a participant gets injured, based on the principles of assumption of risk, seem to have become global norms. In cases across the globe, attempts to impose liability for injuries on sports federations, clubs or fellow competitors, have largely met with resistance from the courts.

In New York, criminal proceedings were instituted when a boxer died as a result of injuries sustained during a bout.[44] Ross J explained that, where the rules and customs of a sport were reasonable and all the participants agreed to the rules, there should not be liability for any injury or death which occurred in the course of that sport. The jury found that the rules of boxing were reasonable, that the blows to the opponent took place within the bounds of those rules and acquitted the accused. This is despite the fact that "boxing [...] *not only permits, but rewards ultimately the causing of grievous or actual bodily harm*".[45]

On the same basis, a Californian court concluded that someone, who participates in active sport, assumes the risk of injuries that fall within the range of the ordinary activity involved in the sport.[46] In this case, a football player who injured her hand and eventually had her finger amputated as a result of a collision on the pitch, failed in her bid to hold the other player liable. The California Court of Appeals confirmed this principle when it held that, neither the owners of a race course, nor the owners, trainer and jockey of the other horse, was liable when the plaintiff exercised his racehorse and collided with the other horse.[47] And neither could a golf player claim when she was struck by a ball that was mishit by another golf player.[48]

In Saskatchewan, the Court of Appeals found[49] that someone, who participates in an ice hockey match, agrees to the physical contact associated with ice hockey and assumes the risk of injury. In this case, the court took a significant further step when it ruled that the assumption of risk goes beyond the rules of the game and would also include transgressions of the rules that are a regular feature of the sport and falls within the generally accepted standards according to which the sport is played. As a result, a player who rammed his opponent into the safety screen was acquitted. Similarly, two ice hockey players who competed aggressively for the puck, so that tempers flared and a punch-up ensued, were acquitted, because the court found that they had acted instinctively in the heat of the moment and that their conduct fell within the bounds of what could reasonably be expected of professional hockey players.[50]

The German Federal Supreme Court followed[51] a similar approach when a football player instituted a claim for a broken ankle that resulted from a tackle during a football match. The court held that, by participating in football, players accept that injuries are an unavoidable part of the game as players compete for the ball and often have to make split second decisions. Players assume the risk for such injuries when they take to the playing field, even where an opponent commits basic violations of the rules due to over-eagerness, lapse of concentration, lack of skill, or fatigue. The court added that assumption of risk is judged objectively, so that any subjective reservations that a particular player may have had, are irrelevant.[52]

This approach was subsequently confirmed in later cases dealing with injuries which a basketball player sustained as a result of a personal foul committed against him;[53] head injuries sustained when a cyclist fell and hit his head against a guard rail during a road race;[54] and damages sustained as a result of a collision during a Porsche Cup motor race.[55]

In similar fashion, a court in South Africa declined to hold a squash player liable for injuries sustained when he accidentally hit his opponent on the eye.[56] The court held that, consenting adults, who engage in lawful sport, assume the risk that they may suffer injuries at the hands of other participants.[57] The court further explained that injuries of the nature under consideration in this case, can reasonably be expected in a social match played between two amateurs. As a result, the defendant could not be liable for the injury.[58] The outcome was the same when a golfer mishit the ball, which struck another player against the head, so that she lost her eye as a result.[59] Nor was the operator of a race track held liable after a spectator was killed when a race car crashed through a gate where the spectator was standing.[60]

Actions to hold sports federations, athletes and others liable for injuries have mostly failed in various jurisdictions, because there seems to be a general acceptance of the maxim volenti non fit iniuria and the doctrine of voluntary assumption of risk.[61] Badouin and Linden[62] explain that:

> *"*[c]*ourts have often applied (especially in relation to the practice of sports) the principle volenti non fit injuria, according to which victims must assume the normal consequences of exposing themselves to dangerous activities and cannot recover* [...]*."*

Hartley[63] also explains that:

> *"*[i]*f participants agreed implicitly or explicitly to assume, or accept or agree to the ordinary risks inherent in a sport activity, if they are injured or harmed as a result of those risks, they cannot then sue for such injury or harm."*

As already mentioned, the universal message essentially seems to be: if you play and get hurt, that is generally your problem. For this reason, it would appear futile to consider legal action to recover compensation or damages as a result of sports injuries.

**Analysis**

As explained above, in cases where claims are brought on the basis of sports injuries, it would appear that courts in general submit to the rules or laws of the sport concerned. The reason for this is that participation in any form of organised sport, whether as a beginner, amateur or professional player, takes place in terms of a contractual relationship between the sports federation,

sports league, sports club, organiser and players.[64] This contractual relationship is expressed, *inter alia*, in the rules or laws of the particular sport and players, therefore, agree to play in accordance with those rules. In this regard it is important to note that, in the law of contract, there is a presumption that parties intend to conclude a lawful contract and that the parties have contracted in accordance with existing law.[65]

This means that, in the context of sport, it is also presumed that the rules or laws of the sport, as contractual terms to which the parties have agreed through their participation, are in accordance with existing law. Accordingly, it is also assumed that the rules or laws of sport are valid and lawful, unless the party, who alleges otherwise, can convince a court that a particular rule is unlawful and, therefore, unenforceable or void. The onus rests on the party disputing the validity of a particular rule, to provide the necessary proof on which a court can legitimately hold that a certain rule is unlawful.[66]

Although the contractual relationship between the parties often does not feature as such in cases of claims based on sports injuries, it is important to keep in mind that the legal relationship, in the case of organised sport, is of a contractual nature. In the case of social participation, such as where friends or relatives play with each other for mere entertainment or recreation, the position will likely be different. It is generally accepted that a mere social engagement does not give rise to the conclusion of a valid contract. Therefore, Hutchinson and Pretorius[67] correctly explain:

> *"A and B agree to play tennis together on Saturday afternoon.* [...] *Quite clearly* [...] *these agreements could [not] be enforced in a court of law as binding contracts.* [...] *A moment's reflection will reveal that the parties to social and domestic agreements do not intend their agreements to give rise to legally binding obligations.*
>
> *With social participation in sport, one does not find the contractual relationship which is present in organised sports and social players do not necessarily adhere to all the rules of a particular sport. This can have important consequences when a court must consider a case pertaining to sports injuries."*

It is against this background that consent as a defence to a claim for a sports injury should be considered. Neethling and Potgieter[68] explain that:

> *"*[c]*onsent takes two forms:* ***consent to injury*** *and* ***consent to*** *(or acceptance of)* ***the risk of injury****. Since both are forms of the same ground of justification, the same principles apply to each.*
>
> *In the case of* ***consent to injury****, the injured party consents to* ***specific*** *harm* [...] *eg* [...] *the rugby prop-forward consents that his opponent may scrum against him* [...]
>
> *In the case of* ***consent to the risk of injury*** *the injured party consents to the risk of harm caused by the defendant's conduct."*[69]

If the cases referred to above are considered, it would appear that both forms of consent can be relevant in relation to sports injuries. An athlete agrees to play by certain rules and thereby also agrees to any obtrusion that occurs strictly in accordance with the rules. But the athlete also assumes the risk that other harm, such as physical injury, can possibly occur in the course of the game.

For example, a rugby player agrees that, in the course of a match, he may be tackled if he is in possession of the ball because the rules provide as much. But the player also assumes the risk that when he is tackled, he may fall badly and, in the process, might sustain an injury to his knee or shoulder. Similarly a judoka agrees that her opponent might throw her on her back in an ippon or pin her to the ground because the rules of judo provide for that. The judoka also accepts the risk that, in the process, she might sustain an injury if she lands or lies awkwardly.

It is, however, important to note that participation in sport, in itself, does not establish consent as a comprehensive defence against all claims for sports injuries. Claims for sports injuries have apparently thus far failed, to a substantial extent, because conduct, that would otherwise have been unlawful, can be excused on the basis that the participants in a particular sport consented to the risks generally associated with that sport.

Consent is a unilateral act, with the result that it is not necessary to determine whether there is any agreement between the injured player and the player who causes the injury.[70] As a German court correctly remarked, consent is determined objectively, so that any subjective reservations that a player may have, are irrelevant.[71]

This means that consent cannot merely exist in the mind of the player, but must, in one way or another, be made visible to the outside world. Consent can often be inferred from the behaviour of the consenting player and is, therefore, usually given tacitly. The mere fact that a player participates in sport, can justify the conclusion that the player concerned consents to the dangers and risks inherent in the particular sport. In other words, the question is whether a reasonable person can infer from the conduct of the player that the player should have foreseen the risks and dangers inherent in the sport[72] and, therefore, has assumed the risks and dangers associated with the sport.

But since consent is granted unilaterally, it can also be withdrawn unilaterally, with the result that any harm that may then occur would indeed be unlawful.[73] Since the existence of consent is determined objectively, the revocation of consent must also be determined objectively. A boxer, for example, consents to assume the risks and dangers inherent in boxing, but if the boxer should throw in the towel during a bout, this consent is clearly withdrawn and the opponent may not deliver any further blows to that boxer.

Consent is a juristic act that limits the rights of the consenting player.[74] This means that consent only serves as a defence against a claim by the consenting player and does not apply to claims by third parties. Here it is important to note that the same act (or omission) may cause harm to more than one person and could, therefore, constitute multiple wrongs committed against multiple parties. If a player is injured while participating in sport, it is not only the player who may potentially have a claim against the offender who caused the injury. Other parties, who suffer harm or prejudice as a result of the injury, may also have potential claims against the perpetrator. Here one can think of the dependents of the injured player, the club that employs a professional player, or the player's support staff, to name but a few. The player, however, cannot, when he consents to the risks associated with the sport, thereby also exclude the separate claims of all third parties.[75]

But if this is the case, why then did the

claim of the widow fail in *Van Wyk v. Thrills Incorporated (Pty) Ltd*,[76] where a spectator was fatally injured when a racing car crashed through a gate? The answer is simply that the plaintiff had failed to prove that the defendant, the owner of the racetrack, was negligent.[77] The court held that the defendant had taken all reasonable precautions to ensure the safety of spectators and the court did not even consider the defence of consent.[78]

*(End of part one)*

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1 An earlier Afrikaans version of this article appeared on Litnet Akademies Regte at www.litnet.co.za/wat-die-drome-nie-genees-nie-kan-toestemming-tot-benadeling-steeds-aanspreeklikheid-weens-sportbeserings-uitsluit (accessed on 11 September 2015).

2 Part two of this article will be published in the March 2016 issue of GSLTR.

3 BIuris LLB (Unisa) LLD (UP) FA Arb SA, L Akad SA, Professor and Head of the Department of Private Law, Director of the Centre for Intellectual Property Law and Assistant-director of the Centre for Sports and Entertainment Law, University of Pretoria (steve.cornelius@up.ac.za).

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63 *Sport, Physical Recreation and the Law* (2009), p. 69.

64 *Rowles v. Jockey Club of South Africa* 1954 1 SA 363 (A) 364D; *Jockey Club of South Africa v. Transvaal Racing Club* 1959 1 SA 441 (A) 446F, 450A; *Turner v. Jockey Club of South Africa* 1974 3 SA 633 (A); *Jockey Club of South Africa v. Forbes* 1993 1 SA 649 (A) 645B, 654D; *Natal Rugby Union v. Gould* 1999 1 SA 432 (SCA) 440F; *Johannesburg Country Club v. Stott* 2004 5 SA 511 (SCA).

65 *Kotze v. Frenkel & Co* 1929 AD 418; *Claasen v. African Batignolles Construction (Pty) Ltd* 1954 1 SA 552 (O); *Douglas v. Tromp & Sons (Tvl) (Pty) Ltd* 1959 4 SA 752 (T); *Cape Town Municipality v. F Robb & Co Ltd* 1966 4 SA 329 (A); *Lesotho Diamond Works v. Lurie* 1975 2 SA 142 (O); *Karstein v. Moribe* 1982 2 SA 282 (T); *Nuwe Suid-Afrikaanse Prinsipale Beleggings (Edms) Bpk v. Saambou Holdings Ltd* 1992 4 SA 387 (W); *Kirsten v. Bankorp Ltd* 1993 4 SA 649 (C).

66 P.J. Schwikkard, *Presumption of Innocence* (1999), p. 23.

67 *Ibid*.

68 *Law of Delict* (2015), p. 108.

69 Emphasis as per the original text.

70 Neethling and Potgieter (2015), p. 110.

71 *Schadensersatzanspruch eines Fußballspielers* 1975 NJW 109. See also the Canadian case of *R. v. Ciccarelli* 54 CCC 3d 121.

72 *Maartens v. Pope* 1992 4 SA 883 (N) 888B.

73 Neethling and Potgieter (2015), p. 109-110.

74 *Ibid*.

75 *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA) 516I-517A.

76 1978 2 SA 614 (A).

77 623H.

78 622H-624A.