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**LIABILITY OF REFEREES**

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**AN ANALYSIS OF TORT LIABILITY FOR  
WRONG REFEREE DECISIONS**

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***ABSTRACT***

In an increasing professional sports world, the referees in key tournaments and games have huge responsibility. Their decisions can impact not only on the game but on all the commercial interests involved in that game. This raises the issue of the liability of referees according to tort law.

The main problems of liability of referees are the circumstances they work in. They have often only a split-second to make important decisions in the course of a game. The responsibility of a referee is so high that they can determine if a team wins or loses. These decisions can impact on the outcome of a game and consequently affect the financial situation of the clubs, sponsors and sportspeople. If a team is eliminated from a tournament they lose a huge amount of money.

There are two legal aspects to consider. One is intention, where a referee might get involved in deliberate match-fixing, and another is negligence. Are match officials liable for their malpractice? Often a referee is not liable for lost chances because there is no causality that the team lost the game only because of a wrong referee decisions. For want of evidence the referee is in most cases not liable. However, is this right?

The main thesis of this paper is that there is a liability of referees who act with intention. Referees who influence results negligently should be covered by immunity.

However, sports governing body as guardians of the rules of the game should have some liability. They have a usual duty to ensure that a referee is able to manage the game and have it under control. Sports governing bodies may have vicarious liability for referee decisions as they use referees to fulfil their obligations of organising and running tournaments. The business approach of modern professional sport has added to the duties of sports governing bodies. Hence sports governing bodies have an added responsibility to ensure that all resources to support the referee and the rules – such as technical or assistant support – are utilized. These special duties need to be followed and can make sports governing bodies liable.

***STATEMENT ON WORD LENGTH***

The text of this seminar paper (excluding footnotes, coversheet, contents, bibliography) will comprise approximately 31,711 words.



<b>I</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II</b>	<b>STATUS OF REFEREES .....</b>	<b>6</b>
1	Changing Role of Referees – Football .....	7
2	Duties and responsibilities of referees.....	9
3	Authority of referee decisions / How binding are referee decisions? .....	11
(i)	Recourse in Common Law for referees’ decisions .....	12
(ii)	Recourse in Civil Law for referees’ decisions .....	13
(iii)	Summary .....	14
4	The relation of referees to sports governing bodies (Contractors / Employees) .....	14
<b>B</b>	<b>International Governing Bodies – Their role in tournaments and role of referees .....</b>	<b>17</b>
1	International Rugby Board .....	17
(a)	Structure of IRB .....	17
(i)	Rugby World Cup .....	17
(ii)	IRB Match Officials Selection Committee .....	18
2	Federation Internationale de Football Association.....	19
(a)	International Football Association Board.....	20
(i)	FIFA Referee Committee .....	21
(b)	Legitimate Connection between parties – Summary.....	23
3	Comparability .....	24
<b>III</b>	<b>LIABILITY ACCORDING TO TORT LAW (PECUNIARY LOSS) .....</b>	<b>25</b>
<b>A</b>	<b>Jurisdiction / Ordinary Courts .....</b>	<b>27</b>
1	Scrutiny of referee decisions .....	27
(a)	Unlegislated area .....	27
(i)	Limitation criminal law .....	31
(ii)	Limitation tort law .....	35
(b)	Ordinary courts and referee decisions .....	38
2	Interim Conclusion .....	42
<b>B</b>	<b>Intentional Conduct (Match-fixing).....</b>	<b>43</b>
1	Robert Hoyzer Case.....	44
2	Legal approach .....	46
(a)	Duty .....	46

(b)	Breach of duty .....	47
(i)	Consent.....	48
(c)	Causation .....	48
(d)	Damages .....	50
(i)	Robert Hoyzer Case.....	50
(ii)	Aggrieved parties .....	51
(iii)	Different positions of damages.....	55
(e)	Result.....	59
3	Interim Conclusion .....	60
<b>C</b>	<b>Negligent conduct .....</b>	<b>61</b>
1	Examples Unintentional Conduct.....	61
(a)	Wembley goal (World Cup Final 1966).....	62
(b)	“God’s hand” (World Cup Quarter-Final 1986).....	62
(c)	Soccer World Cup 2006 .....	63
(d)	Rugby World Cup 2007 .....	64
2	Summary of examples .....	64
3	Tort Law .....	65
(a)	Duty .....	65
(i)	Standard of care.....	68
(b)	Breach of duty .....	70
(i)	Consent.....	73
(c)	Causation .....	74
(d)	Damages .....	77
(e)	Result.....	78
<b>D</b>	<b>Exemption from liability / Limitation of liability .....</b>	<b>78</b>
1	Contractual and / or society limitations of liability .....	79
(a)	FIFA Rule.....	79
(b)	General terms and conditions .....	80
(c)	Summary .....	81
2	The application of the immunity rules for judges and government officials .....	82
(a)	Common law .....	82
(b)	Privacy law .....	84
(c)	Summary .....	85
(d)	Comparability with referees .....	86

(i)	Comparison of match officials and judges .....	86
(ii)	Comparison of match officials and arbitrators .....	87
(iii)	Discussion .....	88
3	Interim Conclusion .....	90
(a)	Immunity .....	90
(b)	Standard of care / Threshold of liability.....	92
(i)	Intentional conduct .....	93
(ii)	Unintentional conduct .....	94
(c)	Result.....	96
<b>E</b>	<b>Vicarious Liability / Respondeat superior .....</b>	<b>96</b>
1	Position of referees – employee or contractor? .....	99
2	Liability of the sports governing body .....	102
(a)	Breach of duty .....	103
3	Interim Conclusion .....	105
<b>IV</b>	<b>Solutions .....</b>	<b>106</b>
<b>A</b>	<b>Method of resolution .....</b>	<b>107</b>
1	Determination of essential limitation for repeal of decisions based on facts... 109	
2	Reconsideration and correction of decisions based on facts during the game . 110	
3	Options for referees .....	110
(a)	Technical options .....	110
(i)	TV records.....	111
(ii)	Goal camera.....	111
(b)	Second referee .....	111
(c)	Better development of referees.....	112
<b>V</b>	<b>CONCLUDING STATEMENT .....</b>	<b>112</b>
	<b>Appendix.....</b>	<b>119</b>
<b>A</b>	<b>Structure of FIFA.....</b>	<b>119</b>
<b>B</b>	<b>Structure of the sport organisations in football.....</b>	<b>121</b>
<b>C</b>	<b>Demonstrated is an example of a sports official immunity act .....</b>	<b>122</b>

## ***I INTRODUCTION***

“The nature of sport and [the] place it has in society has changed.”<sup>1</sup> Formerly sport was a leisure activity different from “normal” activity and “as such only bound by its own rules.”<sup>2</sup> Sport was a hobby. Nowadays sport has changed from amateur sport to big business. Sport is becoming more and more popular and a huge amount of money is involved for many groups of people such as governing bodies, event organisers, promoters, clubs, broadcasters, sponsors, other commercial partners, agents and sportsmen and women.<sup>3</sup> Today many athletes are professionals working in often highly professional commercial operations. Broadcasting of World Cups and Olympic Games and the high audience levels reflect the commercialisation of professional sport.<sup>4</sup> Often good sportspeople are better known in the public than politicians and they can earn huge incomes. For example Dirk Nowitzki, a German basketball player who plays in the National Basketball Association (“NBA”), earns the permitted maximum sum of the NBA. In the season 2006/07, the maximum was US \$ 15.1 million. Every year this amount gets higher, by about 12.5 per cent. In the season 2010/11 he will earn US \$ 21.5 million.<sup>5</sup> These are unimaginable incomes and Dirk Nowitzki is not the highest earning athlete in the world. For the clubs paying out such sums, many times over, this is a huge investment and possible risk. Thus very substantial financial sums can be at stake, both for the athletes and the organisations to which they belong.<sup>6</sup> With the commercialisation of sport and its high public profile

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<sup>1</sup> Adam Lewis and Jonathan Taylor *Sport: Law and Practice* (1<sup>st</sup> ed, Butterworth’s, LexisNexis, London, 2002) v.

<sup>2</sup> Mark Fewell *Sports Law a Practical Guide* (1<sup>st</sup> ed, LBC Information Services, Sydney, 1995) vii.

<sup>3</sup> Lewis and Taylor above n 1, vii.

<sup>4</sup> Fewell above n 2, vii.

<sup>5</sup> Focus: *60 Millionen Dollar bis 2011* at [http://www.focus.de/intern/archiv/nowitzkis-vertrag\\_aid\\_116324.html](http://www.focus.de/intern/archiv/nowitzkis-vertrag_aid_116324.html) (accessed 8 September 2008).

<sup>6</sup> Lewis and Taylor above n 1, v.

there is a greater likelihood of risk, especially economic risk, and therefore a need for legal advice and certainty.

Such commercialisation requires an investment in legal advice. Sport and the law is nowadays a subject of meaningful importance. The problem is that sports law is relatively new and rapidly growing.<sup>7</sup> Sports law develops in reaction to issues as they arise. One such issue is the liability of referees and this is yet to be explored fully.

The liability of referees has been a very real topic over the last few years. The match official has an important position with much responsibility and authority in sports. Their decisions have an impact on the outcome of the game, and thus have an impact on the business of sport as well.

Where large amounts of money are at risk, corruption can occur and risk management is required. Healy sums this up by stating:<sup>8</sup>

The areas of criminal law, negligence and the principles of natural justice are potentially relevant to most sports. Once a sport pays its players or participants or where large amounts of money are involved through sponsorship or grants, the potential application of the law increases.

With increased stakes in professional sport there is an equally increased chance of unethical behaviour to maximise profits.<sup>9</sup> For instance, the referee Robert Hoyzer was involved in a match-fixing scandal in Germany. He was paid to let the underdog in a tournament win, and people who knew about that bet on the underdog, and consequently won large amounts of money.

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<sup>7</sup> Deborah Healy *Sport and the Law* (3<sup>rd</sup> ed, UNSW Press, New South Wales, 2005) ix.

<sup>8</sup> Healy above n 7, xii.

<sup>9</sup> Elizabeth Toomey *Keeping the score - Essays in Law and Sport* (1<sup>st</sup> ed, The Centre for Commercial and Corporate Law Inc, Canterbury, 2005) v.

In tort law it is important to examine the legal status of a referee to determine whether they are liable or not for their malpractice.

The first chapter of this paper, *Status of a Referee*, briefly describes the legal position of a match official, whether they are employees or independent contactors, especially for those who are working in international tournaments like a world cup. This chapter clarifies that the position / status of referees has changed over the last few years, moving from a position as an amateur match official to a professional one. The focus will be on the FIFA Soccer World Cup and the Rugby World Cup, because these are two of the most popular international tournaments.<sup>10</sup> When exploring the legal status, the following questions need to be answered: Are match officials self-employed (contractors) or employees? Who is responsible for allocating the referees at international tournaments? Who is responsible for educating them? Do they have a contract and, if so, with whom? What duties do they have?

The second chapter, *Liability according to tort law*, deals with referee malpractice and whether they are liable for this. To determine whether referees are liable for their malpractice it has to be examined whether the laws of the game are in an unlegislated area or not. If the laws of the games are based in an unlegislated area tort law is not applicable. The sports organisations have the right to establish laws of the game based on the private autonomy of societies. However, the authority of sports organisations is limited by criminal and tort law. Because of the limitation by tort law it is possible to examine whether match officials are liable for their malpractice or not.

At football or rugby games lots of money is at risk, especially the money of the clubs and / or players. A match official can affect these interests and cause damages

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<sup>10</sup> IRB: *IRB Organisation* at <http://www.irb.com/aboutirb/organisation/index.html> (accessed 8 September 2008).

because he or she makes incontestable decisions based on facts.<sup>11</sup> Sports officials have a position similar to that of legal judges: they act as on-field judges.<sup>12</sup> They are supposed to be neutral participants who have no stake in the outcome of the game. They can affect a game in a number of ways and at different times in a game.<sup>13</sup> “In basketball, it can be as simple as one or two calls late in a game, or a few calls early in the game [which] put the star player on the bench. In football it can be a missed call on a pushoff by a receiver.”<sup>14</sup> In rugby it can be the sinbining of an important player. If the match official makes a wrong decision, the team can lose the game and the money because of this. Is a referee liable to pay damages for his error and the consequent lost chance to the club, sportspeople and sponsors?

Different cases are imaginable. On the one hand, the referee could be involved in match-fixing and act with intention. On the other hand the match official could make a negligent wrong decision. The question arises is: Does the match official have to pay damages to the people who are affected by this?

In a case of match-fixing, it is not only the criminal perspective of it; there is the damage to the clubs, merchandising, sponsors, players and fans as well. The match official had the intention to make one team lose. If it happens at a special tournament like a world cup, the team may be eliminated because of this. Often a replay is not possible because the tournament goes on and other matches have already been played. Is the match-official liable for the lost chance to continue in the tournament?

The other case is if the referee makes a negligent wrong decision and because of the incorrect decision the team loses the game and is eliminated from the tournament.

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<sup>11</sup> Peter Heermann “Schiedsrichter – Schiebung – Schadensersatz?” (2005) *Sport International* 4, 4.

<sup>12</sup> Troy Cross “Assaults on sports officials” (1998) 8 *Marq. Sports L. J.* 428,429.

<sup>13</sup> Ante Z. Udovicic “Sports and gambling a good mix? I wouldn’t bet on it.” (1998) 8 *Marq. Sports L. J.* 401, 411.

<sup>14</sup> *Ibid.*

This happens more often because the referee has to interpret the rules and often only has a split-second time to make a decision. For instance, the foul rules in soccer need to be interpreted by the referee. This decision could affect whether a team wins a game or not. These decisions cannot be reversed. Thus a referee has a lot of responsibility. Match officials are in a unique position of trust and power that “imposes an obligation to reduce the risk of mistakes that may deprive a team of victory and associated monetary benefits.”<sup>15</sup>

The disadvantages as a result of bad officiating can be serious and can have a negative influence on umpteen parties.<sup>16</sup> “Bad calls can change the outcome of games and create a domino effect of subsequent monetary and emotional harm.”<sup>17</sup> “Economically, a team’s lost revenue can be substantial when it fails to make the playoffs, or to further advance once they have made it to the post season.”<sup>18</sup> “The value of a team may be reduced as a result of a loss and, according to some, losing can be the equivalent of bankruptcy for a team.”<sup>19</sup> Teams that win more games, especially championship teams, earn far more revenue than teams that do not.<sup>20</sup> There are also fewer indirect effects, such as the release of members of the coaching staff and bitter fans.<sup>21</sup> Coaches and other officials can lose their jobs.<sup>22</sup> Should the referee have to pay for the wage losses of the coach? Who is liable for the financial loss?

The question that has to be clarified is whether referees are liable for their malpractice or not. Furthermore if referees are liable it has to be explored if this is

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<sup>15</sup> Jason Loomis “The emerging law of referee malpractice” (2001) 11 Seton Hall J. Sports L. 73, 94.

<sup>16</sup> Loomis above n 15, 84.

<sup>17</sup> Ibid.

<sup>18</sup> Loomis above n 15, 84-85.

<sup>19</sup> Loomis above n 15, 85.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Udovicic above n 13, 412.



justified. It could be possible that they have immunity similar to the immunity that protects judges and government officials because they are in a comparable position.

The question also arises as to who else could be liable for wrong referee decisions, as someone has to be held liable in the modern professional context of sport. Because sports governing bodies are responsible for educating and allocating match officials this paper examines whether sports governing bodies could have some liability for incorrect referee decisions.

This paper discusses the issues outlined above and explains the questions, whether match officials are liable for their malpractice and, if they are not then whether sports governing bodies could be held liable.

## ***II STATUS OF REFEREES***

This chapter briefly describes the general legal position of referees and then focuses particularly on the legal position of referees in two of the most popular tournaments: the FIFA Soccer World Cup and the Rugby World Cup. Referees' positions / status are based on statutes drafted by sports governing bodies. Because of this, the legal status of referees is immensely affected by the sports governing bodies. Understanding the legal role and responsibility and the legal status to the sports governing body is important to identify whether referees are liable in tort law or not. It is essential to know whether match officials are employees or contractors because the liability is different in these positions. Furthermore the duties of referees need to be examined to clarify whether referees could be held liable or not because breach of a duty is essential in tort law. When exploring the legal status, among other things such as the changing role of match officials over the last years, the following

questions need to be answered: What duties and responsibilities do they have? How much authority do they have? Are the referees self-employed or employees? Do they have a contract and, if so, with whom? Who is responsible for appointing the referees at international tournaments? Who is responsible for educating them?

The example of football referees is used to examine this first issue of the changing role of referees and the duties and responsibilities of referees.

### *1 Changing Role of Referees – Football*

Initially in order to understand current duties and responsibilities it is important to examine how the role of referees has changed. An “arbitrator” is required in competitions regardless of whether they are amateur or professional sports. When two parties are in a competition, someone is needed to enforce the laws of the game, decide controversial situations to guarantee a fair tournament. Historically, the captain of the football team had the role of an arbitrator (match official); he or she had to rectify any conflict on the game-field, but, as the stakes grew, so did the number of complaints.<sup>23</sup> The problem with this is that the team-captain is a player as well, and it is obvious that it is difficult to play and control the game simultaneously. Furthermore, a captain is partial and probably would decide, in case of doubt, in support of his or her team. Needless to say, both parties would like to decide for the benefit of themselves, hence the need for the arbitrator. Nowadays, the rules are more complex and require interpretation and consequently need someone to do that. Another problem was that a player on the pitch cannot see everything, because he or she is not in a good position to see the action. One example illustrates this: when a captain is a striker, he or she may not see what happens in front of the other goal. A

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<sup>23</sup> FIFA *The History of the Laws of the Game* at <http://www.fifa.com/classicfootball/history/law/summary.html> (accessed 8 September 2008).

referee needs to have a good view of the game and the action in order to make the right decision. As a result of these problems a change was essential. The first change was for each team to bring an “umpire” (a non-playing team or club member) and their role was to avoid and resolve disputes. The captain was exculpated from responsibility and could concentrate on playing the game. In spite of this change, there was also a problem of bias: the umpire was a member of the club or team. The decisions of umpires were often subject to lengthy delays. In 1878, the second change was established: the referee (a third independent person) was introduced. The role was to resolve disputes if the umpires could not do so. At the beginning the referee stood on the touchline and was only contacted if the umpires could not agree.<sup>24</sup> That changed a few years later; referees were allowed on the football pitch to control the game. Since 1891 to the present, the umpires became assistant referees (“linesmen”) and the referee became the main authority. Currently all three officials are neutral persons, excluding officials who lead amateur football matches.<sup>25</sup> As the role of a referee developed so did their duties and responsibilities, especially in the professional area where referees get paid for their services.

How many match officials are needed and which duties they have depends on the sport. Different sports could have different titles for these officials. For example these include umpire, linesman or judge.<sup>26</sup> The generic term for those people is sports officials or match officials.

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<sup>24</sup> FIFA *The History of the Laws of the Game* at <http://www.fifa.com/classicfootball/history/law/summary.html> (accessed 8 September 2008).

<sup>25</sup> FIFA *The History of the Laws of the Game* at <http://www.fifa.com/classicfootball/history/law/summary.html> (accessed 8 September 2008).

<sup>26</sup> FIFA *The History of the Laws of the Game* at <http://www.fifa.com/classicfootball/history/law/summary.html> (accessed 8 September 2008).

## 2 *Duties and responsibilities of referees*

A referee is a sports official in charge of a game. Referees are the highest officials at a sports event. Often it is the referee who makes the final decision, has the sole authority; normally assistants have less authority. Match officials have a position like a judge, arbiter and peacemaker and have responsibility for the safe functioning of the contest.<sup>27</sup>

To clarify whether referees are liable for malpractice it is essential to demonstrate the responsibilities and duties they have. Under tort law a duty must be breached in order to have liability. The specific duties of match officials vary with each sport. Two examples illustrate the duties and responsibilities match officials have.

### Law 6.A.4 of the IRB Laws of the Game

(Game of rugby union)

- The referee must apply fairly all Laws of the Game
- The referee has to keep the time and the score
- The referee can consult touch judges in regard to matters

### Law 5 of the FIFA Laws of the Game

(Soccer)

- The referee has to enforce the Laws of the Game
- The referee has to control the match
- The referee acts as timekeeper and has to keep the score
- The referee can consult the assistant referees if he or she has

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<sup>27</sup> Richard J. Hunter "An "Insider's" guide to the legal liability of sports contest officials" (2005) 15 Marq. Sports L. Rev. 369, 369.

relating to their duties (foul play  
or timekeeping)

not seen an action

- The referee can consult the official if he is not sure if a try has been scored or not.
  - The referee must stop the game when a player is injured
  - In the game of rugby union referees not only interrupt the game if there is a breach of the rules, but also he has a role to intervene pre-emptively in the course of the match
- The referee can consult the assistant referees if he or she has not seen an action
  - The referee has to stop the match if a player is seriously injured

As shown above, there are general duties which can be found in every sport. These main duties are to enforce the laws of the game, ensure the safety of players / participants, maintain the order of the game, supervise the course of event and monitor time.

The temporal authority of referees exists from the beginning of the game to the end. The players and coaches have to accept all referee decisions during the game. Often they are not even allowed to complain about referee decisions. Many sports bodies have in their rules, a punishment for complaining by players or coaches. This should ensure the respect and guarantee authority of match officials. Even though the referees' main duties are during the game, however, there are duties outside, before

and after a game. For example the match official has to inspect the pitch (playing field) and control the equipment of players and after, most referees have to write a game-record.

Today the responsibilities and so the position of a referee has become more important, because nowadays sport has changed to a multimillion dollar business. With the commercialisation of sport and its high public profile there is a greater likelihood of risk, especially economic risk, and therefore a need for legal advice.<sup>28</sup> Because of the powerful position match officials have, they require special personal characteristics. They are supposed to be neutral participants who have no stake in the outcome of the game.<sup>29</sup> The conditions of referees, especially at an international tournament, are that it is an independent person, who has to be familiar with the rules of a game, is self-confident, and has special fitness and operating experience.

To get a better picture of the (powerful) position of match officials it is now examined if their decisions during the game are binding for the participants. When referee decisions are binding they have much responsibility for the participants.

### 3 *Authority of referee decisions / How binding are referee decisions?*

Another reason that the position of referees has become more important is that the decisions they make are mostly binding ones and so the decisions influence the game and consequently the sports business. In the rules of many games, it is settled that a referee's decision is binding and cannot be contested. The rule of FIFA is 5 III 2 Laws of the Game which mentions that referees' decisions are final if they are connected with the game (based on facts). The facts of the game are things that have

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<sup>28</sup> Lewis and Taylor above n 1, vii.

<sup>29</sup> Cross above n 12, 429.

occurred in the game, such as goal, offside, foul. A fact decision of referees exists if the circumstances as seen by the referee break the laws of the game.<sup>30</sup> Under FIFA rules, the referee has the sole authority of the game.<sup>31</sup> Because of this regulation, wrong decisions have to be accepted by everyone. The decision is similarly final if the referee makes the right decision based on wrong fact, thus a wrong decision. The question is how acceptable is this?

The importance of ensuring that decisions of referees are binding and final is that games need to be decided at the time, rather than after the event. Tournaments especially need immediate decisions to guarantee an ordered course of the tournament. Furthermore, final decisions are necessary to keep the attractiveness of sport games. It is boring for spectators and players for the game to be interrupted too often, and in the case of court decisions, it takes too long. In most cases a referee decision cannot be revised by courts; the courts will not overturn the decisions of referees.<sup>32</sup>

(i) Recourse in Common Law<sup>33</sup> for referees' decisions

Judicial inspection of referees' decisions is impossible. Courts in the past have held that "decisions of sports officials are 'outside the realm of judicial controversy' and will not be addressed by courts absent a showing of corruption, fraud or bad faith."<sup>34</sup> Courts were even reluctant to decide cases where the mistake is evident or the match official admitted the mistake.<sup>35</sup> As a general rule, therefore, referee

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<sup>30</sup> The decision has to be accepted if the decision of the referee is based on the circumstances that the referee saw, and these circumstances justify his or her decision.

<sup>31</sup> Law 5 of the Laws of the Game.

<sup>32</sup> This problem will be examined later in more detail, see page 30.

<sup>33</sup> If it is not mentioned, common law means the law of New Zealand.

<sup>34</sup> Shlomi Feiner "The Personal Liability of Sports Officials: Don't take the Game into Your Own Hands, Take Them to Court!" (1997) 4 Sports Law J. 213, 228-229.

<sup>35</sup> Feiner above n 34, 224; *Wellington v. Monroe Trotting Park Co.*, 38 A. 543 (1897).

decisions are not checkable. There is only one case where a referee's decision was reversed. This was fraud, because one judge cheated in a Wellington race.<sup>36</sup> The due process of law can be used if the sport governing body / society offends legal statutes. Generally referee decisions in a game are not subject to legal statutes so it is lawful that the court of general jurisdiction does not revise referee decisions.<sup>37</sup>

(ii) Recourse in Civil Law<sup>38</sup> for referees' decisions

In Germany, courts are also reluctant to override referee decisions.<sup>39</sup> Referee decisions are classified as a type of a declaration of intent and as such may be controversial. The German Civil Code (Buergerliches Gesetzbuch) has two causes for rescission of a declaration of intent. These are regulated in section 119 and section 123 of the German Civil Code. The cause for rescission is a mistake in the utterance.<sup>40</sup> Most times wrong decisions made by referees are when referees make the right decision based on wrong facts. That means that they stated what they wanted. This is not a mistake in the utterance. Sports bodies have rules that referee decisions are not controversial. This is in keeping with the law, except where decisions are based on fraud. At this stage a deeper examination is not necessary. The civil law is very similar to the common law in this area. Until now courts are reluctant to scrutinise referee decisions.

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<sup>36</sup> Wellington v. Monroe Trotting Park Co., 38 A. 543 (1897).

<sup>37</sup> This will be explained later more detailed, see page 30.

<sup>38</sup> If nothing is mentioned civil law means German law.

<sup>39</sup> Bernd Kuhn *Der Sportschiedsrichter zwischen buergerlichem Recht und Verbandsrecht Eine Darstellung schiedsrichterlicher Rechtsprobleme nach deutschem und US-amerikanischem Recht* (1<sup>st</sup> ed, Peter Lang, Muenchen, 2000) 92.

<sup>40</sup> Section 119 of the German Civil Code.



### (iii) Summary

Independent of the law system, common law or civil law, referees' decisions are final and courts are not willing to check decisions made by match officials, except the ones resulting from bad faith, fraud or corruption. The reason is that this is ruled by the sports governing body, for example Rule 5 FIFA Laws of the Game. In both law systems, sports bodies generally make rules that do agree with the law of the land. The referees' authority for making final important decisions in a multimillion dollar business gives them huge responsibility.

The most common reason for the binding nature of referee decisions is that courts argue referees have specialist knowledge (they are more experienced) and are closer to the actual situation in games. A court can not decide during a game; the decision is only possible as a result of video material and / or a witness account. Furthermore, referees are able to consider the detailed rules better than judges. As a rule, courts do not revise decisions made by referees. The due process of law can be used if the sport's governing body or societies offend the statutes of the law of the land.

#### 4 *The relation of referees to sports governing bodies (Contractors / Employees)*

Regarding the liability of referees, it is relevant to know whether they get paid for their services, or act voluntarily in amateur sports. Whether a referee gets remuneration for refereeing or not should be irrelevant to their decision-making on the field, as in both cases they have to enforce the laws of the game. Nevertheless, the following questions may arise:

Does a volunteer referee have the same duties as a paid referee?

Can a volunteer referee be held liable for wrong decisions?

The sports governing body or the host club uses match officials to exercise their (sports governing bodies or host clubs) rules. The principal (sports governing body or host club) has the obligation to pay the expenses<sup>41</sup> of referees. The money which voluntary referees get is only a refund of expenses; he or she does not get any remuneration.<sup>42</sup> In this case referees have to execute the order and to comply with instructions of the principal. In the end referees have to account to the principal and this is usually the game record. As such, volunteer referees are acting in agency.

Referees of professional tournaments gain reimbursement but also can receive remuneration. One example should illustrate this. In the German Bundesliga a referee gets NZ \$ 4,000 for refereeing one game.<sup>43</sup> Hence referees who attend international tournaments are not acting in agency. Agency is only possible if there is no remuneration.<sup>44</sup> It seems that the threshold of liability might be lower for those referees who get paid more money than just a refund of expenses. This paper focuses on international tournaments, and consequently on professional match officials who get paid.

As shown above, referees of professional tournaments not only get a refund of expenses, they get paid in return for refereeing. Therefore a “professional” referee is not acting in agency. A condition of agency in civil law is that the operation is free of charge (section 662 German Civil Code). This condition is a basic requirement for agency. The contract between sports governing bodies and match officials is a service

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<sup>41</sup> For example travel expenses or, accommodation expenses.

<sup>42</sup> Kuhn above n 39, 65.

<sup>43</sup> Section 28 DFB-Schiedsrichterordnung.

<sup>44</sup> Sections 662 – 676 h of the German Civil Code.

contract (section 611 German Civil Code).<sup>45</sup> The referee is obligated to govern a game and the sports governing body is therefore obligated to pay the referee.

Referees are not employees. The position as an employee requires that the user of the referee's services has the right to direct and control the work and is able to influence details of the employee's performance.<sup>46</sup> This means that an employee is subject to the employer. Match officials usually have another job and are not obligated to the sports governing bodies. They officiate matches as a side job. Being subject to the employer is a condition for the position as an employee. Another indicator is the amount of control over whether he or she can be fired determining the position of employee. Referees officiate games and if the sports governing body is not satisfied with the performance of them they may not ask the referee again, but they could not fire them.<sup>47</sup> One more argument to abnegate that referees are employees is that the hours of work are not set by the sports governing bodies. Match officials can opt not to officiate the game. An additional reason that match officials are not employees is that they get paid by the game they referee and not by the hour, week, or month.<sup>48</sup> These factors all indicate the contractor status of referees. In general match officials are contractors. This is amongst other things important for the later discussed vicarious liability.

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<sup>45</sup> Bernd Kuhn above n 39, 65.

<sup>46</sup> Merry Moiseichik, Sharon Hunt, and Dawn Macchiarelli, University of Arkansas "Sports Officials: Contractors or Employees?" (1991) 1 J. Legal Aspects Sport 5, 6.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

## ***B International Governing Bodies – Their role in tournaments and role of referees***

For the liability regarding tort law, it is important to examine the legal status of referees and the legal status of the sports governing body to determine whether they are liable. This part of the paper describes briefly the structure of two sports governing bodies International Rugby Board (“IRB”) and Federation Internationale de Football Association (“FIFA”) and connection between these governing bodies and match officials.

### ***1 International Rugby Board***

The International Rugby Board (“IRB”) is the world governing body for the game of rugby union. It was founded in 1886 as the International Rugby Football Board by the unions of Scotland, Wales and Ireland. Today, the IRB has more than 90 members and is situated in Dublin (Ireland). The IRB is the law-making body for the sport of rugby union,<sup>49</sup> and organises international tournaments, particularly the Rugby World Cup.<sup>50</sup>

#### **(a) Structure of IRB**

##### **(i) Rugby World Cup**

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<sup>49</sup> IRB: *IRB Organisation* at <http://www.irb.com/aboutirb/organisation/index.html> (accessed 8 September 2008).

<sup>50</sup> IRB: *IRB Organisation* at <http://www.irb.com/aboutirb/organisation/index.html> (accessed 8 September 2008).

The Rugby World Cup is one of the most popular sporting events, after the Olympics and the FIFA Soccer World Cup.<sup>51</sup> The game of rugby union at tournament level is controlled by match officials: one referee who has the exclusive authority of the game, two touch judges who assist the referee, and a technical match official.<sup>52</sup>

(ii) IRB Match Officials Selection Committee

The IRB has a Match Officials Selection Committee. This Committee selects the referees, touch judges and technical match officials for the Rugby World Cup after seeking nominations from national rugby unions.<sup>53</sup> Thus, the IRB allocates the referees for the Rugby World Cup.

Who is responsible for education / development of referees? Apart from an in-tournament briefing lasting most of two days, each national union is responsible for the education and development of its match officials. The IRB usually meets with its leading match officials once a year for 1-2 days.<sup>54</sup>

As the national unions are important for referees who participate at a world cup, the structure of the New Zealand Rugby Union (“NZRU”) is explored to clarify the structure of such national unions. The NZRU is an incorporated society according to the *Incorporated Societies Act 1908*.<sup>55</sup> It is governed by 27 provincial rugby unions and the Maori rugby board, which are similarly incorporated.<sup>56</sup> The NZRU controls all domestic professional rugby and organises international and Super-14 rugby in

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<sup>51</sup> IRB: *IRB Organisation* at <http://www.irb.com/aboutirb/organisation/index.html> (accessed 8 September 2008).

<sup>52</sup> Law 6 IRB Laws of the Game.

<sup>53</sup> Keith Lawrence, to the author, “Referees in the RWC”, Manager High Performance Refereeing (NZRU), (9 November 2007) E-Mail.

<sup>54</sup> Keith Lawrence, to the author, “Referees in the RWC”, Manager High Performance Refereeing (NZRU), (9 November 2007) E-Mail.

<sup>55</sup> David Rutherford “Employer and Employee in Professional Rugby Union: One team or Two Sides” in Elisabeth Toomey *Keeping the Score: Essays in law and Sport* (2005) 106, 116.

<sup>56</sup> The 27 provincial rugby unions and the Maori rugby board are the voting members of the NZRU.

New Zealand. The NZRU is the national regulatory body for the game of rugby union, which is affiliated to the IRB.<sup>57</sup> In addition, the NZRU nominates the referees to participate at the Rugby World Cup. However, the IRB is responsible for the quality control of match officials attending the Rugby World Cup because they are responsible for organising the tournament. Even though the NZRU is responsible for most things which relate to referees, the IRB has the responsibility for tournaments like the Rugby World Cup and consequently for referees as well. They need match officials to fulfil their responsibility for organising a tournament.

As mentioned earlier, referees are usually contractors. In the case of NZRU referees who attended the 2007 Rugby World Cup it is different; they were full-time employees with employment contracts. Referees who participate at the RWC are employed by Rugby World Cup Limited, a 100 per cent IRB-owned Company.<sup>58</sup> This is true for most but definitely not all of the match officials attending the Rugby World Cup. How match officials are contracted and / or paid varies from national union to national union.<sup>59</sup>

## 2 *Federation Internationale de Football Association*

FIFA (Federation Internationale de Football Association), is the international governing body of association football and organises major football tournaments, such as the FIFA Soccer World Cup.<sup>60</sup> The goal of FIFA is the determination of the

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<sup>57</sup> David Rutherford "Employer and Employee in Professional Rugby Union: One team or Two Sides" in Elisabeth Toomey *Keeping the Score: Essays in law and Sport* (2005) 106, 116.

<sup>58</sup> David Rutherford (29 November 2007) E-Mail to the writer.

<sup>59</sup> Keith Lawrence, to the author, "Referees in the RWC", Manager High Performance Refereeing (NZRU), (9 November 2007) E-Mail.

<sup>60</sup> FIFA: <http://www.fifa.com/worldcup/index.html> (accessed 8 September 2008).

Laws of the Game and the organisation of international tournaments, where nations get together to play.<sup>61</sup>

FIFA is the international governing body of football. The need for such a single body is to oversee the worldwide game and to ensure that the game is played by the same rules everywhere. FIFA was formed in 1904. The sports governing body started only with a few members, the national unions of Switzerland, Denmark, France, Netherlands, Belgium and Sweden. In the course of time FIFA has now 208 national unions, and it is today's main body of the football association. The national unions are subordinate to the FIFA Statutes. The national unions can only be a member of FIFA if they agree to the Laws of the Game and the FIFA Statutes. They are responsible to enforce the rules in the national unions. Most countries of the world follow the statutes of FIFA.

FIFA is a non-trading society of Swiss law. This means that the goal is not to make a profit; the goal of this society is the interaction of cultures. Societies that are not built to make profits are called non-trading societies. The headquarters of the FIFA are in Zürich, Switzerland. Swiss law is therefore applicable.<sup>62</sup>

(a) International Football Association Board

The IFAB (International Football Association Board) is the law-making body for the rules of football. The international rule book of football was adopted by IFAB. The IFAB was founded 1882 in Manchester with the Scottish Football Association, the Football Association of Wales, and the Irish Football Association. They wanted to create a universal set of rules. These associations met to define a common set of rules

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<sup>61</sup> Article 2 FIFA Statutes

<sup>62</sup> Article 1 FIFA Statutes

in order for international matches between the British football associations. The first meeting took place in 1886.<sup>63</sup> IFAB is the body of association football and as such determines, enforces and, approves the Laws of the Game. Annual meetings were set out to study, determine or reject improvements. FIFA declared that they would adhere to the rules of the IFAB. The IFAB meetings include eight representatives, one from each British football association. Since 1913, FIFA has had four representatives. The adjudication of IFAB must be approved by at least six votes (a three quarter majority). No decision is made without FIFA and none without a UK member. Hence FIFA does not have the sole responsibility for the laws of football. IFAB's significance is to determine the rules of the game only. FIFA runs the sport worldwide and as a party accepts IFAB rules. FIFA remains the sports governing body which is responsible for the world cup.

The Appendix A has further background information about FIFA, IFAB and the national unions.

(i) FIFA Referee Committee

As the international governing body of association football, FIFA is responsible for the enforcement of the World Cup, and consequently is responsible for allocating the referees. FIFA has a referee panel. This panel is responsible for the referees and decides which referee gets listed on the specific FIFA referee list. Only those who are listed can participate at the World Cup. The national unions recommend referees who may be put on the FIFA referee list. The FIFA Referee Committee is not bound by this recommendation. Hence, FIFA has sole responsibility for the referees who attend a world cup.

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<sup>63</sup> FIFA *The International FA Board [IFAB]* at <http://www.fifa.com/classicfootball/history/law/ifab.html> (accessed 8 September 2008).



Essential criteria for nominating a candidate are:<sup>64</sup>

- The candidate must be at least 25 years old
- The candidate must have not reached the age of 45
- The candidate must have officiated matches in the highest division in their country for at least two years
- The candidate must pass the FIFA physical fitness test and medical examination
- The candidate must be on FIFA's referee list

Article 7 of the Regulations governing the registration of international referees, assistant referees, futsal referees and beach soccer referees on FIFA's lists states that the FIFA Referees Committee decides which nominations of the member associations will be accepted for the list of international referees. The decisions of the FIFA Referees Committee are final and not subject to appeal.<sup>65</sup>

The panel / referee committee is also responsible for education and development of referees. They arrange a special selection procedure to nominate the best referees. Thirty-two teams play at the World Cup. Sixty-four games take place at one World Cup, and each match is controlled by a referee who is the sole authority of the game. He or she is assisted by two linesmen (assistant referees). Hence there are 64 referee services and 128 referee assistant services required.

The example of the selection procedure of referees attending the Women's World Cup 2007 in China illustrates the work of the panel committee. In the

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<sup>64</sup> Article 4 Regulations governing the registration of international referees, assistant referees, futsal referees and beach soccer referees on FIFA's list.

<sup>65</sup> Article 13 Regulations governing the registration of international referees, assistant referees, futsal referees and beach soccer referees on FIFA's list.

beginning 100 referees were nominated to attend the selection procedure,<sup>66</sup> later there were 42 referees left and in the end 12 referees and 23 assistant referees were selected. In addition there were two reserve trios attendant in China. The selection procedure included three practical training courses held during January and May 2007 and a final period of preparation and training.<sup>67</sup> This training programme is designed to optimise the performances of the referees at the FIFA Women's World Cup. In addition, they have participated in match conditions which were supervised, and also been involved in analysing of videos and teaching of techniques, and undergone a fitness check. The referees had to do practical tests on the Laws of the Game, an English language test, and physical and medical examinations.<sup>68</sup> It is essential for the officials to speak English fluently, because it is important that the officials have one language to communicate. The importance of communication is illustrated by, the Soccer World Cup Final 1966 between Germany and England. This match was refereed by the Swiss referee Gottfried Dienst and his assistant referee Tofik Bakhramov from the USSR. They had no language to communicate and had to make a very important decision on whether or not a goal had been scored.

(b) Legitimate Connection between parties – Summary

The legitimate connection between the parties is complex. Which parties have a legal relationship (player, club, referee, FIFA, IFAB, national unions)?

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<sup>66</sup> FIFA: *A World Cup Dream* at <http://www.fifa.com/womenworldcup/news/newsid=123505.html> (accessed 8 September 2008).

<sup>67</sup> FIFA: *Referees: Final list approved* at <http://www.fifa.com/womenworldcup/organisation/media/newsid=538316.html> (accessed 8 September 2008).

<sup>68</sup> FIFA: *Referees: Final list approved* at <http://www.fifa.com/womenworldcup/organisation/media/newsid=538316.html> (accessed 8 September 2008).

The legal relationship is important to determine potential claims between these parties. This excludes the law of torts, where a legal relationship is not a precondition. The character of the legal relationship is important to determine the scope of rights and obligations and as a result the scope of liability.

FIFA is an umbrella organisation. In this organisation are national unions who like to attend a world cup and use the other facilities of FIFA. In this umbrella organisation the national unions are combined.

IFAB is not integrated into FIFA but FIFA is integrated into IFAB. FIFA submits to the Laws of the Game made by IFAB.

Referees are members of national unions, for example of the German Football association (Deutscher Fussballbund). The German Football association and the national unions are members of FIFA.

Furthermore there is a referee list at FIFA. As shown above referees are contractors and usually have a service contract with FIFA.

### 3 *Comparability*

Are there general rules which a world cup follows? Can the tournaments be compared? The rugby and soccer world cups are similar in that there is one sports governing body that is responsible for the tournaments: the IRB and FIFA respectively. These governing bodies are also responsible for the referees who attend a world cup. Furthermore, the main duties for referees are similar: they are the sole authority of a game; they have to ensure the safety of players, have to enforce the laws of the game, and can punish players. Most referees are contractors but in the

Rugby World Cup match officials are sometimes employees. However, the similarities enable some comparisons and analysis to be made and conclusions to be drawn.

Thus is established that match officials have duties and responsibilities and they make binding decisions. These basics of tort law are established. The next step is to discuss liability under tort law.

### ***III LIABILITY ACCORDING TO TORT LAW (PECUNIARY LOSS)***

The old mantra of officiating is that it should blend in with the game and not be noticed.<sup>69</sup> Unfortunately, it happens too often that referees decide the game instead of the teams. Referees have often only a split-second to make a decision in the heat of battle and because of this it is possible that the decision he or she made is wrong. Referees can affect a game in a number of ways and at different times in a game. “In basketball, it can be as simple as one or two calls late in a game, or a few calls early in the game [which] put the star player on the bench. In football it can be a missed call on a pushoff by a receiver.”<sup>70</sup> In rugby, for example, it can be the sinbining of an important player. “Bad calls can change the outcome of games and create a domino effect of subsequent monetary and emotional harm.”<sup>71</sup> Nowadays sport is a multimillion dollar business. At football games lots of money is at risk, especially the money of the clubs and / or players. “For example in England, the financial reward for winning the annual end-season promotion play-off fixture has been estimated at £ 35 million. This amount includes TV revenue, gate revenue, advertising, sponsorship and

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<sup>69</sup> Michael Mayer “Stepping In to Step Out Of Liability: The Proper Standard Of Liability For Referees In Foreseeable Judgement-Call Situations” (2005) 3 DePaul J. Sports L. & Contemp. Probs. 54, 56.

<sup>70</sup> Udovicic above n 13, 401.

<sup>71</sup> Loomis above n 15, 84.

merchandising.”<sup>72</sup> The athletes often sign lucrative endorsement deals. For example, NBA Star Michael Jordan earned 90 per cent of his \$ 40 million dollar income from his endorsements with Nike, Gatorade, McDonalds and Wilson.<sup>73</sup> If the referee makes a wrong decision, the team or players can lose the game and the money because of this.

First it has to be examined whether tort law is applicable before exploring the liability of referees according to tort law. If the sport is based in an unlegislated area referees cannot be held liable based on tort law. Unlegislated area means no laws set by the state. When tort law is applicable it has to be explored whether referees are liable to pay damages for his or her error and the consequent lost chance to the club, sportspeople and sponsors.

Tort law and the law of negligence are the source of most liability arising from the actions of sports officials.<sup>74</sup> The main parts of liability are two possible case groups. One possibility is that sports officials act intentionally, for example that they fix match results (match-fixing). The other possibility is that sport officials act negligently and as a consequence influence the outcome of the game in a negligent manner. These two possibilities of officiating errors of referees will be examined in this chapter. These two possibilities are also two categories of tort law: Intentional Torts and Negligence Torts.

However, whether or not tort law is applicable in the area of sports needs to be examined.

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<sup>72</sup> Peter Dawson, Stephen Dobson, John Goddard, John Wilson *Are football referees really biased and inconsistent?* (Economics Discussion Papers, University of Otago, 2005).

<sup>73</sup> Coneys John J Jr. and Jonathan R. “Taxing the stars: US taxation of non-US entertainers and athletes” (1996) 7 Iss. 3, International Tax Review 5, 19.

<sup>74</sup> Feiner above n 34, 215.

## ***A Jurisdiction / Ordinary Courts***

### ***1 Scrutiny of referee decisions***

Is sports law an unlegislated area? “There was once a time when sport and the law were seen as practically never crossing paths. Sport was a pastime, a game, an area of escape separate from ‘normal’ activities, and as such only bound by its own rules.”<sup>75</sup>

As discussed above this has changed greatly during the last years, as now professional sport is often a highly professional commercial operation with much money at stake, so the involvement of the law is inevitable. For many people, their business is sport; they earn their money as employee or entrepreneur in this area. As a consequence their (basic) rights could be affected. The main questions which have to be examined are: Is sport an unlegislated area with its own rules? Can ordinary courts check decisions made by match officials?

#### **(a) Unlegislated area**

Referees can only be held liable for damages if the law of the land (tort law) is applicable in this area. Tort law is not applicable if sport is an unlegislated area with its own rules.

An unlegislated area is defined as an area without legislation. The main reason for no regulations and legislation is that the state sees no need for regulations in this area.<sup>76</sup> The theory of the unlegislated area states that there are areas in relations between human beings that are unlegislated. The typical cited unlegislated areas are

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<sup>75</sup> Fewell above n 2, vii.

<sup>76</sup> Bernhard Pfister “Der rechtsfreie Raum des Sports” (1999) *Festgabe der Zivilrechtslehre*, 457, 464; Kuhn above n 39, 36.

for example, love and religion.<sup>77</sup> Sport is often cited in this context, too. However, the changing status of sport has challenged this idea. The question needs to explore whether general law still applies, for example the laws against assault. This question will be answered later.

The structure of sports organisations is important to examine if sport is an unlegislated area. Most sports are regulated in a hierarchic and monopolistic way and have governing bodies which are the umbrella organisations for sports. For example, FIFA is the main body of football. The direct subordinates of FIFA are the national sport governing bodies such as Deutscher Fussballbund (DFB) and New Zealand Football Association (NZFA). Below them are the sports governing bodies of the land followed by the clubs at the bottom of the hierarchy.<sup>78</sup> The sport governing bodies, such as FIFA or IRB, are responsible for the sports. These sports governing bodies are societies and, as a society, have private autonomy. Private autonomy means the societies have the authority to draft their own rules and regulations, and that the parties decide what legal consequences should result from breaching the laws of the game. Sports governing bodies are able to enact their own rules, which become general rules, binding for everyone<sup>79</sup>, the national unions, clubs and sportspeople.<sup>80</sup> Most legal systems have the right of private autonomy and give societies the authority to act out their own rules and to enforce these rules. This right for societies is based on the freedom of association, which is regulated in Section 17 of the New Zealand Bill of Rights Act 1990. In Germany the freedom of association is ruled in Article 9 of

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<sup>77</sup> Pfister above n 76, 464.

<sup>78</sup> See Appendix B.

<sup>79</sup> "Everyone" means every member of the society. Regulations made by societies are only binding for the members of these societies. The societies do not have the authority to enact rules which are binding for the whole public.

<sup>80</sup> Pyramid effect. Pyramid effect regarding to sports governing bodies means that the sports governing bodies as umbrella organisations enact rules that are binding for all subordinate organisations such as national unions, regional unions and so on.

the Basic Constitutional Law. In Germany, it is assured in Article 9 of the Basic Constitutional Law that societies have a private autonomy to create their own rules. The freedom of association means that everyone can build an association, and that the associations have the freedom to enact their rules within the society.<sup>81</sup> The freedom of association is a fundamental right in most legal systems.

The key question is, should rules of sports governing bodies remain in an unlegislated area, under the right of freedom of association, or should there be some set limitation by the laws of the land.

The Laws of the Game in football are made by IFAB and FIFA. The society enacts rules with instructions for referees as to how to interpret these rules. The Laws of the Game are more complex than in former times. Draft Comments are provided to interpret areas of doubt. FIFA for example established the FIFA Statutes, and these contained the Regulations Governing the Application of the Statutes and the Standing Orders of the Congress. The FIFA Statutes contain a whole code of procedure, table of content definitions, membership, rules about the president, confederations, organisation (Congress, Executive Committee, President, Emergency Committee, Standing Committee), Disciplinary measures, Judicial bodies, Arbitration, Submissions to decisions of FIFA, General secretariat, Finance, Rights in competitions and events, Competitions, and Final provisions. As you can see, the FIFA has ruled upon everything. It is like its own legal system within the sports governing body. It has its own legislated area. So the questions are: To what extent is the authority of the sports governing bodies able to supervise their rules? Do they have to consider the laws of the countries or are they the sole authority for the regulations within their society?

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<sup>81</sup> Article 9 of the German Basic Constitutional Law.



Sport governing bodies have two sets of rules to consider. One is the laws of the game; the other is the rules of the sports society itself. The laws of the game mean the rules which apply during a game (narrow rules) and that referees have to enforce. The other rules (broader rules), are those ones, that make the society work. This includes administration rules and rules about the organisation of competitions, and the remedies for decisions made by referees and the rules about jurisdiction of special organs (Executive Committee). This paper concentrates on liability of referees so that only the laws of the game are relevant in this context of liability.

The laws of the game apply during a game on the pitch. These rules are there to guarantee a fair course of the game, to rule on sporting actions like a penalty for a foul in the penalty box or a red card for a foul. Normally, the match official is in charge of enforcing these rules. The sports governing bodies are responsible for these rules; they enact them and match officials enforce them. The rules set out by sports governing bodies give the sport the special attractiveness and character. The state gives the sports governing bodies the freedom to enact laws of the game. The state does not want to influence or affect these rules and the participants of a sporting event do not want the rules to have legal consequences because they want to have immediate game results and not wait until a court decides about a goal.<sup>82</sup> Furthermore, the state does not have any criteria for interpreting the laws of the game. They are not specialised in the area of sport. The court / state would not know if a ball that is out has as a consequence a throw-in or a free-kick. The attractiveness of a competition would be lost if courts had to check and decide about referee decisions. The participants of a competition do not want referee decisions checked by courts.<sup>83</sup> They want to have a game result in the playing time and this is only possible if the

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<sup>82</sup> Kuhn above n 39, 48.

<sup>83</sup> Kuhn above n 39, 50.

decisions during the game (goal, try) are final ones. These regulations are based in an unlegislated area.<sup>84</sup>

(i) Limitation criminal law

However, the authority of sports governing bodies is not unlimited. Even though sports governing bodies are legitimated from the state to set their own rules as a society and accomplish those rules, it is not an absolutely unlegislated area. It is not possible to have an absolute unlegislated area in areas where people act / work / live together. Human beings have special basic rights which should protect them. The exclusion from the ordinary courts,<sup>85</sup> in the area of decisions made on the field, is intended. Nevertheless there is a limitation. If a person is affected in an unacceptable manner (for example suffers an injury) there should be the possibility for plaintiffs to sue. The law has an effect on the by-laws made by societies. The freedom to establish rules is limited by criminal law.<sup>86</sup> Where is the line drawn for the limitation of private autonomy? On the one hand, sport rules should not inhibit participants in sports or change the character of sports, but on the other hand there is a need for protection of participants from violation.<sup>87</sup>

One example is the 2006 Stanley Cup Finals in the National Hockey League (NHL). During the game a fight between two players -Yzerman and Domi- occurred. The head referee tried to break up the fight but because of its fierceness backed off.<sup>88</sup> In the fight Domi hit a “haymaker” into Yzerman’s temple and he fell down to the ice and as a result of the brawl (and in particular the “haymaker”) Yzerman was bed-

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<sup>84</sup> Kuhn above n 39, 49.

<sup>85</sup> That means that ordinary courts do not check decisions made by match officials during the game.

<sup>86</sup> Pfister above n 76, 464.

<sup>87</sup> Alan P. Judge „Basketball Anyone? Recklessness and Sports Injury Cases: Dotzler v. Tuttle” (1990-1991) 24 Creighton L. Rev. 529, 542.

<sup>88</sup> Mayer above n 69, 55.

ridden for the rest of his life. He suffered incurable brain injuries.<sup>89</sup> It is not obvious that the referee is liable for these injuries because it happened in a body-contact sport.<sup>90</sup> Physical contact is not prohibited by some sports and injuries do result.<sup>91</sup> Nevertheless, the players do not consent to every level of injuries, just the normal injuries of the game. The athletes do not consent to excess behaviour by other players. This means that sportspeople do not consent to intentional misconduct. The standard of recklessness seems as the most logical standard in the context of sports injury cases.<sup>92</sup> The referees cannot guarantee that a game will be free from injury, nor can they guarantee the safety of each participant.<sup>93</sup>

Is criminal law applicable? The league's self-regulation is the appropriate treatment for day-to-day sports violence. However, there still remains a scope of application for criminal law, in cases where the violence overrules the actual sports and goes far beyond what is consented to. In these cases the criminal law is used as a statement of society that this violent behaviour is, under no circumstances, acceptable and needs to be condemned.<sup>94</sup>

One recent example illustrates this dilemma of what should apply in cases of poor player behaviour in a game – sports governing body rules or criminal law? This example demonstrates the limitation of the area unlegislated by criminal law. In a NHL Game, Todd Bertuzzi punched his opposing player, Steve Moore, in the head. Moore fell on the ice with Bertuzzi on top of him, causing his neck to break in three places, severe facial injuries and a concussion. Moore has never been able to play

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<sup>89</sup> Ibid.

<sup>90</sup> It does not mean that there is no liability on referees at all.

<sup>91</sup> Mayer above n 69, 56; Hunter above n 27, 372.

<sup>92</sup> Judge above n 87, 546.

<sup>93</sup> Hunter above n 27, 372.

<sup>94</sup> Jan-Frederik Hellmann "The application of criminal law to violence in professional sports" (LLM Research Paper, Victoria University of Wellington 2007).

again. The NHL suspended Bertuzzi for 13 games, costing him over \$ 500,000 in salary.<sup>95</sup> In addition to that, Bertuzzi was charged with assault causing bodily harm. He accepted a plea bargain and pled guilty in exchange for a conditional charge. “As a result of the plea, Bertuzzi would have to serve one year on probation and complete eighty hours of community service but would have no criminal record.”<sup>96</sup> This is only one incident of player-to player violence. The question that arises out of these well known examples of misbehaviour in sports is whether their actions should expose them to criminal liability, or should they be dealt with by the internal sports governing bodies.<sup>97</sup> This issue of, who deals with the misbehaviour of athletes, has been argued for the last few decades with yet no consistent legal solution<sup>98</sup> within jurisdiction<sup>99</sup> and legal doctrine.<sup>100</sup> On the one hand it is argued that criminal law should have no influence within the sport, on the other hand it is argued that everyone is treated equally before the law and thus athletes should have no privileges with regard to their unlawful actions.<sup>101</sup> As stated above, most violent actions fulfil the requirements of criminal assault or battery. However, why do police not prosecute every body-check and straddle? Most of the actions can appeal to the defence of consent. But there are still cases which are far beyond what is consented to. Considering that everyone is

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<sup>95</sup> About.com: Hockey *The longest NHL Suspensions* at [http://procehockey.about.com/cs/history/a/nhl\\_suspensions.htm](http://procehockey.about.com/cs/history/a/nhl_suspensions.htm) (accessed 8 September 2008).

<sup>96</sup> Clete Samson “No Time like the Present: Why Recent Events Should Spur Congress to Enact a Sports Violence Act” (2005) 37 *Ariz. St. L.J.* 949, 949.

<sup>97</sup> Ben Livings “Legitimate Sport or Criminal Assault? What are the roles of the rules and the rule-makers in determining Criminal Liability for Violence on the sport field” (2006) 70 *J. Crim. L.* 496, 496.

<sup>98</sup> Wyatt M. Hicks “Preventing and Punishing player-to-player violence in professional sports: the court system versus league self-regulation” (2001) 11 *J. Legal Aspects Sport* 209, 213.

<sup>99</sup> Simon Gardiner “Should more matches end in court?” (2005) 155.7183 *NLJ* 998, 998.

<sup>100</sup> Paul J. Farrugia „The consent defense: sports violence, Sadomachosim, and the criminal law“(1996-1999) 8 *Auck U LR* 472, 472.

<sup>101</sup> Livings above n 97, 496.

equal before the law, athletes are then fully exposed to the criminal law.<sup>102</sup> Ultimately, there are limitations of consent in sports and criminal law is applicable.

It is generally accepted that most violent actions on sporting fields comply with the requirements of criminal assault and battery.<sup>103</sup> That violence takes place during competition, in itself, makes no difference. As said in *R v Bradshaw*, “no rules or practice of any game whatever can make lawful that which is unlawful by the law of the land.”<sup>104</sup> This means that all violent behaviour of sportsmen is a “quasi assault.”<sup>105</sup> However, it is difficult to define what constitutes criminal violence in the sporting context. The major challenge that courts face when prosecuting these acts is to decide to what degree consent operates as a defence. Nevertheless, there are limitations in the unlegislated area of sports. One limitation is the criminal law; the law does not stop at the sidelines. Basic principle of criminal law cannot be ignored in the sporting contest.

Finally the rules of sports governing bodies are legally classified as different. There are the laws of the game which are in an unlegislated area and only binding for members of associations / sports governing bodies. The courts have to accept rules and decisions made in the unlegislated area without an option to check them. But there are limitations. The limitation of this unlegislated area is criminal law.

In order to avoid any interference of the criminal law (or of Human Rights Act) all sports governing bodies have set up internal disciplinary proceedings. In order to enforce punishments the sports governing bodies have to have jurisdiction over the accused referee / participants. This link is either established through a direct

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<sup>102</sup> Jan-Frederik Hellmann “The application of criminal law to violence in professional sports” (LLM Research Paper, Victoria University of Wellington 2007).

<sup>103</sup> *R v Barnes* [2005] 2 All ER 113, para 6 (CA) Lord Woolf CJ.

<sup>104</sup> *R v Bradshaw* [1878] 14 Cox CC, 83, 84 Lord Justice Bramwell.

<sup>105</sup> Livings above n 97, 496.

contractual relationship between the athlete and the governing body or through a pyramid structure. In a pyramid structure sports governing bodies require their members (clubs) to make it a condition in their contract with the players / referees that they submit to the jurisdiction of the governing body. The rules, set up by the governing body, are detailed in their description of punishable misbehaviour. The high efficiency of the governing bodies' self-control is an advantage. The punishment is often enforced only a few days after the misbehaviour occurred. This is due to the fact that the procedural requirements are rather simple. Furthermore, the league's authorities / sports governing bodies have the required specialized knowledge.

(ii) Limitation tort law

There is plenty of literature about the limitation of sports law by criminal law but nothing about the limitation by tort law. Is there limitation by tort law? Whether the authority of sports governing bodies is also limited by tort law, needs examining. As discussed above, sport is not in an absolutely unlegislated area. It is limited by criminal law.

The difference between criminal law and tort law is that people cannot decide in criminal law to sue someone. The state decides if they want to accuse someone. If there is a public interest, the prosecutor decides to accuse or not. In general, the victim cannot influence the initiation of the legal procedure. In terms of private law (tort law) this is different. The plaintiff has the option to sue or not. If he or she does not sue there is no lawsuit pending in court. As a consequence it is incumbent on the plaintiff to sue for damages. If he or she does not sue there is no possibility to sue for damages. Even if it is in the area of responsibility of the plaintiff to sue for damages or not, tort law is another limitation of the unlegislated area, because the plaintiff can decide to

sue or not to sue. “Legal actions concerning foul play and mistimed tackles that have led to injury have invariably been in the context of civil law actions by those seeking compensation.”<sup>106</sup> Most organised sports have their own disciplinary trial (procedure) and also the “availability of civil remedies.”<sup>107</sup> As shown above it does not matter whether there is the possibility for plaintiffs to use the own disciplinary trial of sports organisations or ordinary courts, it is just essential that there is the option to sue. Another difference between criminal law and civil law is the burden of proof.<sup>108</sup> In criminal law to convict someone it is essential that there is no reasonable doubt.<sup>109</sup> It is easier to succeed in a civil action than in a criminal one, because the standard of proof is on the balance of probabilities.

One example for the application of tort law is the case of the negligent referee in *Smoldon v. Whitworth*.<sup>110</sup> The facts of the case are: There were at least twenty collapsed scrums in an under-19 (Colts) rugby match. The IRB created special rules for a colts game to reduce the risk of injuries for the young players, “in particular by requiring that scrummages should be required to form according to a defined sequence of crouch-touch-pause-engage.”<sup>111</sup> The defendant referee’s society underlines the importance of the crouch-touch-pause-engage and that there occur danger in not doing so.<sup>112</sup> The plaintiff was seriously injured in the final scrum. The defendant referee had failed to apply and enforce the laws of the game in a proper manner because he accepted that so many collapsed scrums happened in the game. He did not apply the ‘safety rules’ for a colts game. The injury suffered by the plaintiff was foreseeable because there were at least twenty collapsed scrums in the game.

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<sup>106</sup> Gardiner above n 99, 998.

<sup>107</sup> Ibid.

<sup>108</sup> Lewis N. Klar *Tort Law* (3<sup>rd</sup> ed, Thomson Carswell, Canada, 2003) 504.

<sup>109</sup> Ibid.

<sup>110</sup> *Smoldon v Whitworth* [1997] ELR 115 (Curtis J); on appeal [1997] ELR 249, CA.

<sup>111</sup> Lewis and Taylor above n 1, 1056.

<sup>112</sup> *Smoldon v Whitworth* [1997] ELR 115 (Curtis J); Lewis and Taylor above n 1, 1056.

Even the referee himself admitted that in evidence of 25 collapsed scrummages the laws of the game were not being applied and enforced, and that he lost the control of the game.<sup>113</sup> The conclusion was that the match official had lost control of the game and should have called the game to a halt. The referee was held liable. The importance of this case is that referees are not immune from the application of the principles of negligence. The principles of negligence are of universal application.<sup>114</sup>

This case demonstrates the liability of a referee after an athlete was injured. The referee had to pay compensation for the injuries. However, this paper discusses the liability for monetary harm that can occur because of wrong referee decisions. Tort law protects different objects of legal protection. It is not only bodily integrity, it is also financial wellbeing.<sup>115</sup> The conclusion is that referees are not immune from the application of the principles of negligence. Because of this it is possible to sue for compensation if the qualifications of negligence are fulfilled. Tort law is another limitation of the unlegislated area.

Because the parties (plaintiffs) can decide whether they want to sue for compensation or not there is the possibility to contract out of tort law. They can decide if they still want to have the option to sue or if they want exclude the option to sue. Sports governing bodies are in a monopoly position and often use waiver or exclusion clauses. Another consideration is that athletes often have no choice but to sign a contractual waiver or exclusion clause. If they do not sign, they cannot participate because sports governing bodies refuse to negotiate, the offer is a take-it-

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<sup>113</sup> The referee did not accept that there had been so many scrums in the game, but his evidence was rejected by the judge.

<sup>114</sup> Lewis and Taylor above n 1, 1056.

<sup>115</sup> Stephen Todd *The Law of Torts in New Zealand* (4<sup>th</sup> ed, Brookers, Wellington, 2005) 8-9.



or-leave-it. "If they do sign, they lose their rights to claim in legitimate situations."<sup>116</sup> This is the reason why these waiver clauses should be scrutinised by courts closely, the clauses are often ineffective.<sup>117</sup> Under the doctrine of unconscionability the court may strike down the ineffective contract clause, or on occasions the whole contract. The circumstances of unconscionability are in general that one contracting party is small and the other one large or that one party has a monopoly position in the special subject of the contract,<sup>118</sup> or the larger party refuses to negotiate about the clause so that the offer is a take-it-or-leave-it one.<sup>119</sup> Although parties can decide whether they want to sue for compensation or not, courts have the authority to strike down such ineffective clauses, there is also a limitation by tort law.

(b) Ordinary courts<sup>120</sup> and referee decisions

This section clarifies whether it is possible for ordinary courts to check decisions made by referees or sports jurisdictions. This is a main part of sports law. Is there a possibility for ordinary courts to control decisions made by sports governing bodies and referees? Decisions in this area mean decisions which are related to the laws of the game, such as referee decisions during the game.<sup>121</sup> Nowadays much money is at stake and as a consequence clubs and sportspeople who lose a game want recourse to ordinary courts. Sporting success brings monetary claims and there is a

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<sup>116</sup> Natasha Schot "Negligent liability in sport" (2005) Faculty of Law, Bond University, Sports Law eJournal, 1, 12; Douglas Leslie "Sports Liability Waivers And Transactional Unconscionability" (2004) 14 Seton Hall J. Sports & Ent. L. 341, 344.

<sup>117</sup> Schot above n 116, 12.

<sup>118</sup> Regarding to the topic of the paper it would be the monopoly position of the sports governing bodies in the special sports.

<sup>119</sup> Leslie above n 116, 344.

<sup>120</sup> Ordinary courts mean courts of the judicial system. Ordinary courts deal with criminal and most civil cases.

<sup>121</sup> Bernhard Pfister „Sportregeln vor staatlichen Gerichten“ (1998) SpuRt, 221, 221.

case that these interests need to be protected under law. Participants of sports often consider referees and their wrong decisions responsible for a lost game.

In the rules of many games, it is settled that a referee's decision is binding and cannot be contested. For example FIFA ruled in 5 III 2 Laws of the Game that referees' decisions are final if they are connected with the game. Decisions that are connected with the game mean decisions based on facts during the game, for example goal, offside, foul. A fact decision of referees exists if the circumstances as seen by the referee break the rules of the game. Under FIFA rules, the referee has the sole authority of the game. Because of this rule, wrong decisions have to be accepted by everyone. The decision is similarly final if the referee makes the right decision based on wrong facts. The question is how acceptable is this? The importance of ensuring that decisions of referees are binding is that games need to be decided at the time, rather than after the event. Tournaments especially need immediate decisions to guarantee an ordered course of the tournament. Furthermore, final decisions are necessary to keep the attractiveness of sport games. It is boring for spectators if referees interrupt the game too often, and in the case of court decisions, it takes too long to get the game results. Sport would lose the special character if the game is not decided immediately after the playing time. In most cases a referee decision cannot be revised by courts; the courts will not overturn the decisions of referees.<sup>122</sup> "Case Law demonstrates a judicial reluctance to interfere with the outcome of sports contests unless there is a showing of bad faith, fraud or corruption."<sup>123</sup> Independent of the law system, privacy law or common law, referees' decisions are final and they are not

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<sup>122</sup> The court overturned the decision made by the match officials in the Wellington Race (match-fixing).

<sup>123</sup> Daryll M. Halcomb Lewis, Frank S. Forbes "A Proposal For A Uniform Statute Regulating The Liability Of Sports Officials For Errors Committed In Sports Contests" (1990) 39 DePaul L. Rev 673, 705.

judicially revisable, except the ones resulting from fraud, bad faith or corruption. The most common reason for the absence of court-decisions is that they argue referees have specialist knowledge (they are more experienced) and are closer to the actual situation in games. A court can not decide during a game; the decision is only possible as a result of video material and / or a witness account. Furthermore referees are able to consider the detailed rules better than judges. As a rule, courts do not revise decisions made by referees. The due process of law can be used if the sport's governing body / society offend the statutes the law or offends the basic principles of due process. This argument could be countered by stating that it often happens that judges have to decide questions which belong to other than legal areas. For example this occurs over medical questions. The difference is that the rules in medicine are part of the contract or legal relationship between these parties (doctor and patient). The rules of sports governing bodies include that the referee decisions or in general decisions made on the pitch, are final ones. In the end it can be said that the Laws of the Game can not be controlled by ordinary courts; they have to accept binding referee decisions. Another problem for checking referee decisions by ordinary courts is that an ordinary court maybe has to check evidence for the whole tournament about a referee decision or a failed referee decision and the interpretation of the law and eventually has to correct the outcome of the game and the tournament. The exemption of ordinary courts is related to the decisions based on the laws of the game. The decision of referees is based on facts and as such is not checkable by ordinary courts.<sup>124</sup>

However, should there be a way to gain access to ordinary courts regarding wrong referee decisions? As shown above, referee decisions are final and not

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<sup>124</sup> Pfister above n 121, 224.

checkable by ordinary courts. The main reason is to keep the special character and attractiveness of sports. Nevertheless remains the question if participants / aggrieved parties should have the option to sue for damages. More than ever parties need the option to sue for damages because match officials (as the sole authority on the playing field) make final decisions that are not contestable and wrong decisions could result in monetary harm for the participants.

In general, courts access is necessary if a plaintiff needs protection. As shown above, many people have their business in sport and consequently they need protection. The sportsperson only has a claim for lost bonus money if monetary interests of the claimant are affected or legal statuses are affected.<sup>125</sup> The possibility to attend in the next round of a tournament affects the monetary positions of sportspeople and is, as such, a legal position which is enforceable. Attending the next round is comparable to an economic position. Sport is big business and not just a leisure activity and, as in the commercial area, there should be recourse to ordinary courts.

Because the sports governing bodies are unique societies there has to be an option to ordinary courts. Sport is neither an unlegislated area, nor can the constitutionally guaranteed sport autonomy claim the right to solve all its problems by itself. Therefore, individual aspects of sports activities or those of its environment can not only become the subject of association tribunal proceedings, but also lead to legal disputes in ordinary courts. Some basics have to be determined, such as an athlete needs to have the option of a hearing in accordance with the laws.<sup>126</sup> There must be an option for athletes to go to courts or another public authority with the power to make

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<sup>125</sup> Ibid.

<sup>126</sup> Section 27 of the New Zealand Bill of Rights Act 1990; Article 19 (4) German basic Constitutional Law.

decisions. The New Zealand Bill of Rights Act 1990 has ruled in section 27 that everyone has the right to get heard by a tribunal or a public authority with the power to make a decision. In Germany the right of hearing is in accordance with the law (right to get heard by an authority), derived from the rule of law Article 19 (4) of the Basic Constitutional Law. This is a main basic right, because every human being has the right to be protected by the state. There has to be a way to take action (sue) but it is not essential that the ordinary court is the judicial organ. For example, FIFA has ruled<sup>127</sup> that there is access to arbitration courts and to a court of the last instance. The arbitral jurisdiction is adequate to ensure basic rights of participants, because the main point is that there is a possibility of recourse available. The participants need to have an opportunity to sue for damages or something equivalent. Even with an arbitration court the right of justice is preserved.

Protection of sportspersons and subordination of sports associations in the increasingly commercial world of sport make it more necessary than ever for participants to have recourse to judicial review. "Legislative reform is not required but a wide view should be taken by the courts in relation to the scope of judicial review. It calls for an approach which recognises that public power can reside in bodies other than government organisations and concludes that any regulatory power with a sufficient public element should in principle be reviewable."<sup>128</sup>

## 2 *Interim Conclusion*

The laws of the games are based in an unlegislated area and thus not revisable by ordinary courts. Participants have to accept even wrong referee decisions and

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<sup>127</sup> Article 60 FIFA Statutes.

<sup>128</sup> Brian R D Burke *Sports Associations and the Administration of Sport: Does Judicial Review Have a Place?* (LLM Research Paper, Victoria University of Wellington, 1996).

might get monetary harm because of this. Checking referee decisions by ordinary courts would destroy the special character and attractiveness of sports but more than ever there is a need for sportspeople to have an option to claim for occurred damages.

Sports governing bodies govern themselves; the private autonomy gives them the authority to enact rules and / or by-laws. However, this authority is limited by criminal and tort law. The limitations of sports law might violate a right of an athlete. Nevertheless, the right to justice is an important basic right that ensures that there has to be the possibility to go to court or another public authority with the power to make decisions. Because of this, sports governing bodies have to ensure that athletes have the possibility to access court. If the sports governing body does not give access to court there has to be the opportunity to go to an ordinary court. This does not mean that courts are able to overrule decisions made by match officials, as these decisions are final. This means that there has to be the possibility to sue for compensation where it is necessary. In addition the ordinary courts have the authority to review the natural rights of sportspeople.

### ***B Intentional Conduct (Match-fixing)***

Two different cases are possible in referees' malpractice. The game could be lost because of a negligent incorrect referee decision; the referee could be involved in match-fixing and has acted intentionally to determine the outcome of a game. The question arises - does the referee have to pay damages to the people who are affected by either of these?

This part of the chapter examines the cases where referees act intentionally. The intentional conduct of referees includes match-fixing, fraud, or corruption. The referee "becomes a benign accomplice to the team that benefits from the error. This is true

whether the error is the product of fraud, corruption, bad faith, or just an honest mistake.”<sup>129</sup> For clarification of the problem, a summary of a German case follows.

### 1 Robert Hoyzer Case

One year before Germany hosted the Soccer World Cup (2006), there was a match-fixing scandal in the German Bundesliga.<sup>130</sup> Robert Hoyzer, a German football referee admitted that he had tampered with several games of the German Cup tie, the German Regional League and the Second Bundesliga.<sup>131</sup> He tampered with the results of the game to coincide with his bets and the bets of his colleagues.<sup>132</sup> The colleagues were Croatian people who had a betting syndicate. Robert Hoyzer got money from them to tamper with the games. They bet on the underdog and special goal combinations and raked in huge sums on “rigged” matches.<sup>133</sup> One match was the first-round German Cup tie between regional league club SC Paderborn and Bundesliga club Hamburger SV. Robert Hoyzer was suspected of betting on the game. The SC Paderborn was the underdog; they played two leagues under the Hamburger

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<sup>129</sup> Lewis and Forbes above n 123, 695.

<sup>130</sup> FAZ: *Schiedsrichterskandal, Foul am Fussballgott* at <http://www.faz.net/s/RubAEA2EF5995314224B44A0426A77BD700/Doc~ED598C82CBA734C6AB549067609A43951~ATpl~Ecommon~Spezial.html> (accessed 14 November 2007); Sueddeutsche Zeitung: *Manipulationen im Profifussball, DFB-Spitze hat Warnungen ignoriert* at <http://www.sueddeutsche.de/,tt1m2/sport/bundesliga/artikel/19/46972/> (accessed 8 September 2008); ARD: *Die Chronologie im Fall Hoyzer* at [http://sport.ard.de/sp/fussball/news200502/01/chronologie\\_hoyzer.jhtml](http://sport.ard.de/sp/fussball/news200502/01/chronologie_hoyzer.jhtml) (accessed 8 September 2008).

<sup>131</sup> Urteil LG Berlin; FAZ: *Schiedsrichterskandal, Foul am Fussballgott* at <http://www.faz.net/s/RubAEA2EF5995314224B44A0426A77BD700/Doc~ED598C82CBA734C6AB549067609A43951~ATpl~Ecommon~Spezial.html> (accessed 8 September 2008); Sueddeutsche Zeitung: *Manipulationen im Profifussball, DFB-Spitze hat Warnungen ignoriert* at <http://www.sueddeutsche.de/,tt1m2/sport/bundesliga/artikel/19/46972/> (accessed 8 September 2008); ARD: *Die Chronologie im Fall Hoyzer* at [http://sport.ard.de/sp/fussball/news200502/01/chronologie\\_hoyzer.jhtml](http://sport.ard.de/sp/fussball/news200502/01/chronologie_hoyzer.jhtml) (accessed 8 September 2008).

<sup>132</sup> ARD: *Die Chronologie im Fall Hoyzer* at [http://sport.ard.de/sp/fussball/news200502/01/chronologie\\_hoyzer.jhtml](http://sport.ard.de/sp/fussball/news200502/01/chronologie_hoyzer.jhtml) (accessed 8 September 2008).

<sup>133</sup> Urteil LG Berlin; FAZ: *Schiedsrichterskandal, Foul am Fussballgott* at <http://www.faz.net/s/RubAEA2EF5995314224B44A0426A77BD700/Doc~ED598C82CBA734C6AB549067609A43951~ATpl~Ecommon~Spezial.html> (accessed 8 September 2008); Sueddeutsche Zeitung: *Manipulationen im Profifussball, DFB-Spitze hat Warnungen ignoriert* at <http://www.sueddeutsche.de/,tt1m2/sport/bundesliga/artikel/19/46972/> (accessed 8 September 2008); ARD: *Die Chronologie im Fall Hoyzer* at [http://sport.ard.de/sp/fussball/news200502/01/chronologie\\_hoyzer.jhtml](http://sport.ard.de/sp/fussball/news200502/01/chronologie_hoyzer.jhtml) (accessed 8 September 2008).

SV. The Hamburger SV took a 2-0 lead before Hoyzer obviously influenced the outcome of the game. The match official Hoyzer sent off Hamburger striker Emil Mpenza in the first half and also adjudicated Paderborn with two questionable penalties. In the end Paderborn, the underdog, won 4-2. Further referees and players were also alleged to be involved in the match-fixing scandal.

In the case of Robert Hoyzer, it is not only the criminal perspective of match-fixing; there is the damage to the clubs, merchandisers, sponsors, players and fans as well. The referee had the intention to make one team lose. If it happens at a special tournament like a world cup or in the case of Robert Hoyzer in the German Cup tie,<sup>134</sup> the team may be eliminated because of this. Often a replay is not possible because the tournament goes on and other matches have already been played. Is the referee liable for the lost chance to continue in the tournament? And if so, what amount of damages has the referee to pay?

This scandal happened not at an international tournament but in a comparable knockout tournament. This situation is also possible in a world cup situation, and one FIFA referee has already been suspected of involving in match-fixing. In 2005 there was a match-fixing scandal in Brazil.<sup>135</sup> This case is not quite so prominent but is an interesting one because a member of FIFA's referee staff was involved. Two football referees, Edilson Pereira de Carvalho (FIFA member) and Paulo Jose Danelon, had obtained money to influence the result of the football games of the Brazilian

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<sup>134</sup> It is a special football tournament in the German Bundesliga.

<sup>135</sup> Sports Illustrated: '*I was corrupted*' Brazilian ref banned for life in match-fixing scandal at <http://sportsillustrated.cnn.com/2005/soccer/10/17/bc.sport.soccer.brazil.matchfixing/index.html> (accessed 8 September 2008); VEJA: [http://veja.abril.uol.com.br/280905/p\\_072.html](http://veja.abril.uol.com.br/280905/p_072.html) (accessed 8 September 2008).



competition “Campeonato Brasileiro”.<sup>136</sup> This is very significant because the FIFA selects only “the best” referees of the world and they are used at the FIFA World Cup.

## 2 *Legal approach*

In the case of referee’s liability, it needs to be discussed whether there are the conditions of a tort claim achieved. These conditions are:<sup>137</sup>

- Duty
- Breach of duty
- Causation
- Damages

The conditions of a tort claim are very similar in common law and civil law. Because of this there is no separate examination. The following section pinpoint out the specific problems which occur when looking at referees’ liability according to intentional conduct.

### (a) *Duty*

One condition in tort law in a negligence action is that the defendant (referee) must have owed a duty to the plaintiff (participants) to take care.<sup>138</sup> The sports governing body is responsible for the organisation and enforcement of tournaments. During a competition it is most important to ensure the enforcement of the laws of the

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<sup>136</sup> Sports Illustrated: ‘*I was corrupted*’ Brazilian ref banned for life in match-fixing scandal at <http://sportsillustrated.cnn.com/2005/soccer/10/17/bc.sport.soccer.brazil.matchfixing/index.html> (accessed 8 September 2008); VEJA: [http://veja.abril.uol.com.br/280905/p\\_072.html](http://veja.abril.uol.com.br/280905/p_072.html) (accessed 8 September 2008).

<sup>137</sup> The conditions are similar in civil law and common law so that there is no differentiation. Only the problems of the conditions regarding to referees’ liability are demonstrated.

<sup>138</sup> C Witting (2005) 25 OJLS 533; Todd above n 110, 116; N J Mc Bride (2004) 24 OJLS 417.

game and guarantee a fair tournament.<sup>139</sup> This duty is given to the referee by the sports governing body for the duration of the game. Enforcing the laws of the game is a very general term. For liability it is essential that this is more specified. What are the special laws of the game?

The main duty of referees is to enforce the laws of the game. As shown above, it is one duty of the IRB Laws of the game (6. A. 4 Laws of the Game) that a referee must fairly apply all Laws of the game. Even though it is not mentioned in the FIFA Laws of the Game, it goes without saying that referees should not influence the outcome of the game; he or she has to ensure fair play and a fair game. The teams should decide the game and not the referee. As a consequence it is not permitted to fix game results.

(b) Breach of duty

The second condition for liability in a negligence action is that the defendant act carelessly, or in other words acted in a way that breached the duty of care.<sup>140</sup> Breach of a duty is generally defined as failure to perform a duty or “failure to exercise that care which a reasonable [prudent person] would exercise under similar circumstances.”<sup>141</sup> If the risk of damages is higher the standard of care is higher. Thus a referee who fixes the results of a match before it even started, influences the outcome of the game. A prudent match official would not influence the outcome of a game, because his duty is quite the contrary. Hence, the referee who fixes match-

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<sup>139</sup> Law 5 of the FIFA Laws of the Game; Law 6.A.4 of the IRB Laws of the Game.

<sup>140</sup> W.V.H. Rogers *Winfield & Jolowicz On Tort* (70<sup>th</sup> ed, Thomson Sweet & Maxwell, London, 2006) 242; Todd above n 115, 117.

<sup>141</sup> Loomis above n 15, 94; Klar above n 108, 304.

results breaches these duties. He or she makes one team lose even though match officials have to be neutral and not influence the outcome of the game.

(i) Consent

A waiver of a claim could be consent. If a party consents to a special acting or risk it could be possible that the party has no claim against the offender. When a party accepts a special risk then the party knows which consequences could result. The party has an idea of the possible risk and has no claim for damages. It can be said that nobody would consent to match-fixing and so the possibility to exclude a claim because of consent is not applicable in this case.

(c) Causation

The damage which the plaintiff suffered must be caused by the breach of the duty of the defendant.<sup>142</sup> “In addition to determine the existence of an injury, a duty, and a breach of the standard of care, it must be shown that the officiating error was the logical and proximate cause of the plaintiff’s loss.”<sup>143</sup> A defendant is not liable for remote consequences; he or she is only liable for direct consequences of their wrongdoing that were foreseeable.<sup>144</sup> The official’s conduct has in case of match-fixing a causal connection to the resulted damages. However, it is very difficult for a plaintiff to prove the harm was in fact caused by the official’s error. The plaintiff must show that “but for” the error, the loss would not have occurred. The “but-for” rule examines “whether, but for the defendant’s conduct the damage to the plaintiff would

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<sup>142</sup> Tony Weir *An Introduction to Tort Law* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2006) 71; Todd above n 115, 117; G. Edward White *Tort Law In America An Intellectual History* (2<sup>nd</sup> ed, Oxford University Press, Oxford, 2003) 314.

<sup>143</sup> Lewis and Forbes above n 123, 697; Todd above n 115, 117.

<sup>144</sup> Todd above n 115, 12.

have occurred.”<sup>145</sup> This means that the conduct of the offender is the reason for the suffered damages. However, in the case of match-fixing it is easier to give evidence that officiating mistakes results in a lost game. In the example discussed above it was in all probability because of the referee’s decision that HSV lost. The referee adjudicated two questionable penalties for the SC Paderborn and sent off a striker of Hamburger SV in the first half of the game. In the end it could be determined that Robert Hoyzer influenced the game actively, because he admitted that he gave two wrong penalties and that there was no reason to send the striker off. Nevertheless, it is difficult to prove evidence that “only” referee decisions made one team lose.

Another important element of causation is the foreseeability. The element of foreseeability is essential to define the scope of a defendant’s duty and is a limitation for the defendant’s liability.<sup>146</sup> “If a risk of injury is foreseeable, then an actor must take precautions to minimize the likelihood of the injury.”<sup>147</sup> The match official should be protected therefore from a too wide liability. The foreseeability justifies the liability because the match official knows about the risk and can take actions to avoid damages. If the harm is not foreseeable an actor has no chance to protect the claimant of it and is, as a consequence, not liable. The injured party must demonstrate that the damage caused was foreseeable or should have been reasonably foreseeable.<sup>148</sup> The foreseeability focuses on the issue that the “wrong” referee’s decision will damage the course of the game. It is foreseeable for the sports official that elimination from a team results in an economic harm (financial loss) because at competitions much money is at stake for a range of people.

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<sup>145</sup> Simon Deakin, Agnus Johnston, Basil Markesinis *Markesinis And Deakin’s Tort Law* (6<sup>th</sup> ed, Oxford University Press, Oxford, 2007) 249; Kuhn above n 39, 214; Klar above n 108, 389.

<sup>146</sup> “This element of foreseeability defines the scope of a defendant’s duty.” Lewis and Forbes above n 123, 691.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

(d) Damages

(i) Robert Hoyzer Case

At the match-fixing scandal in the German Bundesliga, Hamburger SV lost the game, and was eliminated from the German Cup tie. As a consequence the Hamburger SV suffered damages, but it is difficult to clarify what special damages / monetary loss Hamburger SV suffered because it is impossible to determine if they would have won the German Cup tie and got the trophy-money. Of course, there are damages but the damages are not readily at hand. How should an amount of damages be calculated?

The DFB (sports governing body of football in Germany) sued Robert Hoyzer – the referee- for 1.8 Million Euro (NZ \$ 3.6 Million) damages. The DFB suffered a pecuniary loss to the amount of 1.8 Million Euro. The amount is made up of:

- Referee Remuneration. Robert Hoyzer gained money from the DFB for his services to referee the game. The DFB alleged that they are not obligated to pay him for refereeing a game he fixed. This is a breach of the service contract Robert Hoyzer had with the DFB.
- The costs of proceedings. This means the costs for the lawsuit to get the damages from Robert Hoyzer.
- The costs for a special meeting (Bundestag) of the DFB which was held after the DFB found out that Robert Hoyzer fixed matches. The meeting was held to discuss what they should do.
- The main part of the amount of damages is a duty obligation to pay Hamburger SV. The DFB agreed to pay Hamburger SV 1.5 million Euro

(NZ \$ 3 Million) damages for the lost game. The main part of this amount is the loss ticket gains from the next game and lost revenue. The DFB did this, because it is the sports governing body and responsible for the tournament German Cup tie.

The court has not decided the case yet but has mentioned already that the damages, except the costs for the Bundestag meeting, will probably be justified. Finally DFB and Robert Hoyzer made an amicable arrangement so that the court has not to decide the case. The agreement includes that Robert Hoyzer has to pay the DFB NZ \$ 1, 5 Million. Furthermore, he is not allowed to achieve any economic advantage of this case.

The problem is that these positions of damages are not readily available. Nobody can definitely say that Hamburger SV would have won the game without the wrong calls of Robert Hoyzer. However, it can be determined that there was a very high chance for Hamburger SV to win the game. They were two goals in front and played in a higher league than the SC Paderborn. In addition, Robert Hoyzer admitted that he made wrong calls against Hamburger SV. Nevertheless it is difficult to determine the exact amount of damages. This problem is examined later in connection with occurred damages in general.<sup>149</sup>

## (ii) Aggrieved parties

To determine occurred damages in general and not only for the Robert Hoyzer case, it is essential to look first at which parties could be aggrieved by wrong referee decisions. To get an idea which parties can be affected by wrong referee decisions a short overview about aggrieved parties follows.

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<sup>149</sup> See page 55-56.

Who is an aggrieved party?

- *Players:* The players may lose trophy money, as often teams have an agreement that there will be an amount of bonuses money paid until the elimination round. The German national football team gets NZ \$ 100,000 for achieving the quarterfinals in the Euro Cup, NZ \$ 200,000 for achieving the semi-finals, NZ \$ 300,000 for achieving the finals and NZ \$ 500,000 for winning the Euro Cup.<sup>150</sup> Should the referee have to pay for lost bonus money?
- *Coaches:* Coaches and other officials may lose their jobs.<sup>151</sup> For instance, the coach of the Seattle Seahawks of the NFL Dennis Erickson was fired because the team lost the game against the New York Jets. They lost the game because of a referee decision.<sup>152</sup> The Seattle Seahawks were the underdog in the game against the New York Jets. Nevertheless, the Seahawks played like the favourite team. The score was 31-26 for the Seahawks and only twenty seconds left. The Jets needed a touchdown to win the game and were on the five-yard line. The referee Earnie Frants gave touchdown although instant replay showed that it was none and the Jets won the game. Should the referee have to pay for lost wages?
- *Clubs:* The clubs lose money if they are kicked out of a tournament. The financial loss resulting from a team's elimination from post-season play is substantial. Thus, if an official's conduct was the cause of such elimination, the harm would be economic.<sup>153</sup>

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<sup>150</sup> Sportgericht.

<sup>151</sup> Udovicic above n 13, 412.

<sup>152</sup> Loomis above n 15, 82.

<sup>153</sup> Feiner above n 34, 228.

- *Merchandising firms:* In *Bain v. Gillispie*<sup>154</sup>, a merchandiser complained that a college basketball referee's mistake denied him certain benefits. He sold Iowa University apparel and novelty items, and counter-claimed against an NCAA basketball referee for a call made at the end of an Iowa-Purdue basketball game that resulted in a loss for Iowa. This loss eliminated Iowa's chance to compete in the NCAA Championship. The storeowner alleged that the bad call caused lost business by his subsequent inability to produce and sell Iowa products for the NCAA Championship.<sup>155</sup> Should the referee have to pay for the damages the storeowner suffered?
- *Fans:* In the case of match-fixing fans / spectators do not see what they have paid for. They paid for a fair game with open result; in a game which is match-fixed they can not see the sport competition between these teams. Should the referee have to pay the gate money back?
- *Betting agency:* A betting agency thinks they sign a contract with the clients for a game where the result is not clear before the beginning of the game. Instead the game-result is already fixed. The problem is that the winning money is determined on the winning chance of teams or special combinations. The amount of benefit depends on chance, so that you pay for a special chance and this chance is nonexistent in such cases. The amount of benefit is higher if the underdog wins, and the reason for that is that the chance for the underdog to win is not as high as for the favourite team. Because the match result is fixed there is no fair contract for the betting

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<sup>154</sup> 357 N.W. 2d 47 (Iowa Ct. App. 1984)

<sup>155</sup> Loomis above n 15, 91.



agency. Should the referee have to pay for damages the betting agency suffered?

- *Sponsor*: The sponsors invest money in the clubs / players in order to advertise their products. The advertisement is not as good when a team is kicked out of a competition too early. The relation between investment money and the advertising effect is then displaced. Should the referee have to pay for the suffered damages?
- *Sports governing body*: The body loses invested money if the team is eliminated at an early stage of a tournament. Should the referee have to pay for the monetary harm suffered by the sports governing body?

As shown above many parties could be affected by referees' malpractice. To determine a narrow scope of liability, it is essential that it is foreseeable for referees to know in advance for whom they are liable. One example illustrates the problem. In *Bain v. Gillispie*<sup>156</sup>, the merchandiser case demonstrated above, the merchandiser wanted damages for a lost game of Iowa. The storeowner alleged that the bad call caused lost business by his subsequent inability to produce and sell Iowa products for the NCAA Championship.<sup>157</sup> The suit was overruled by the court.<sup>158</sup> The court argued that it is not justified to pay damages to the storeowner. The main reason is that the duties of referees do not include the protection of merchandisers. There is no direct contact between referees and merchandisers. The contract of referees and sports governing bodies does not include the protection of merchandisers. The contract of referees is a contract for benefit of a third party, but only for those parties who are

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<sup>156</sup> *Bain v. Gillispie* 357 N.W. 2d 47 (Iowa Ct. App. 1984).

<sup>157</sup> Loomis above n 15, 91.

<sup>158</sup> *Bain v. Gillispie* 357 NW. 2d 47 (Iowa App. 1984).

directly affected by referee decisions, such as players, coaches and clubs.<sup>159</sup> The liability would be too wide when every affected party would have a claim. It would not just be merchandisers; there could be monetary harm for the merchandiser firms, the firms who deliver products to the merchandiser firms and firms who deliver products for them and so on. The chain of causation is long. As shown above are there many aggrieved parties. When referees would be held liable for all these parties the liability would be too wide and counter-productive for the work of referees. Nobody would like to work with such a risk of liability.

In the end only parties who are directly affected by wrong referee decisions such as players, coaches, clubs and sports governing bodies, are in a position to claim for damages.

What damages can result from referee malpractice?

(iii) Different positions of damages

The injured party has to be in the same economic position he or she would have been in had the referee performed in the right way.

There are different positions imaginable:

- Players can lose their value (a player who attends in further rounds of a tournament is more interesting for other clubs and commercial firms, and as a consequence his or her current market value increases).
- Clubs may lose value (a club that wins a tournament, or at least attends a further round of a tournament, is more respectable and their market value

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<sup>159</sup> Kuhn above n 39, 105.

increases, for example, merchandisers and sponsors are willing to pay more money to successful clubs).

- Players may lose their trophy money (often players gain an amount of money to attend the next round of a tournament, see example of German national football team<sup>160</sup>).
- Players and clubs can lose sponsors' money (often they pay extra money for winning a tournament because "winners" are good product sellers).
- Players and clubs may lose their merchandising contracts (they often have the condition that they can get out of a contract when a special goal, like winning a tournament, is not reached).
- Coaches may lose their job and consequently their income.
- A team which is eliminated at an early stage of a tournament could lose gate revenue and invested money.

The difficulty of these positions of damages is that it is always a loss of a chance. The problem to make up for damage caused by a loss chance is that the goal of compensation in tort law is that the plaintiff should be placed in the same position as if the wrong had not been suffered.<sup>161</sup> It is not clear if the plaintiff would have got the chance without the conduct of the defendant so that the result could be over-compensation. On the other hand, it could be under-compensation if the plaintiff would not get compensation. Because of this there has to be found a balance of this factors. It would not be justified to refuse damages for the plaintiff only because it is

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<sup>160</sup> See page 52.

<sup>161</sup> Todd above n 115, 961.

not clear if the plaintiff would get the chance without the defendant's conduct."<sup>162</sup>

"The question is whether the chance that was lost was 'real' or 'substantial', as opposed to the loss of a mere speculative possibility."<sup>163</sup> In cases of hypothetical financial damages plaintiffs have to prove that they lost a substantial chance of avoiding that outcome.<sup>164</sup> The loss of a chance itself can plausibly be characterised as an item of property, like a lottery ticket.<sup>165</sup> A solution for this problem could be a discount of compensation for remaining uncertainties.<sup>166</sup> "If the lost chance itself is recognised as amounting to damage the plaintiff is only required to establish on the balance of probabilities that the defendant caused the loss of that chance."<sup>167</sup>

"However, a substantial discount was made in respect of the uncertainties and imponderables involved in calculating these losses."<sup>168</sup> Essential is "whether the hypothetical chain of events is fully determined by the events which have occurred."

"The plaintiff must prove [on] the balance of probabilities that but for the defendant's negligence he or she would [not] have suffered the loss."<sup>169</sup> "So a 90 percent chance of avoiding an adverse event may result either in complete recovery, on the theory that the chance of not avoiding the loss was sufficiently speculative to be ignored, to alternatively a discount of 10 percent for contingencies."<sup>170</sup>

All positions are based on monetary harm. "Sports officials are aware that the higher the stakes, award or prize of an athletic contest, the more costly an officiating

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<sup>162</sup> Todd above n 115, 825.

<sup>163</sup> *Davies v Taylor* [1974] AC 207 (HL); *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602 (CA); *T Church* 91996) 55 CLJ 187; Todd above n 115, 825.

<sup>164</sup> Todd above n 115, 828.

<sup>165</sup> *Ibid.*

<sup>166</sup> Todd above n 115, 826.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Attorney-Genereal v Geothermal Produce New Zealand Ltd* [1987] 2 NZLR 348 (CA); Todd above n 115, 826.

<sup>169</sup> Todd above n 115, 829.

<sup>170</sup> Todd above n 115, 825.

error is to the contest participants or their principals.”<sup>171</sup> Determining the damages which are caused by the lost game is essential in order to make a claim. The problem is that it is difficult to pinpoint the exact amount of occurred damages. The lost trophy money for players and the lost income for coaches could be calculated easily because they determined the sum in their contracts. But what is with lost value of players or clubs, lost merchandising contracts, or lost sponsors’ money? There are no regulations about the amount of pecuniary loss if a team loses a game. In addition the monetary harm varies from player to player or from team to team. Some players earn much more than others and for some teams much more money is at stake than for other teams. It is not justified to pay the aggrieved parties no damages because it is difficult to determine the exact amount of pecuniary loss. However, a change solution is essential. There is no reason not to draw up a regulation list for possible monetary harm. Some people would argue that it is not possible to calculate the amount of pecuniary loss for a lost game. This view is declined because there are special factors which can be considered to calculate the amount. There are other areas in life where tables determine the amount of damages or money people can get. For example there are tables for people with disabilities. Depending on the condition of disability they get a special amount of money. Another example is for people who cannot work anymore; there are tables that determine the annuity they get. An additional example is compensation for pain and suffering. It is not easy to pinpoint out the exact amount of damages but nevertheless there are tables to determine the amount. Why should it not be introduced in the area of sports law? As shown above, sport has changed from amateur to a big business, which makes it essential to adjust regulations in this area.

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<sup>171</sup> Lewis and Forbes above n 123, 690.

Because of this the essential factors of calculating pecuniary loss have to be examined.

Factors are:

- average number of sold tickets
- trophy money
- remuneration of players
- wage of coaches
- value of club.

These factors should be considered to calculate the amount of monetary harm. It is essential to introduce a table to make it possible to calculate the amount of damages.

#### (e) Result

Referees are liable when they act with intention and they do so when they fix matches. They have to pay damages because they fixed the matches intentionally and they have to accept consequently that they are liable to pay damages to the aggrieved parties.

The question which arises is, whether referees have to pay all damages. There is an inequity between the remuneration of referees and the risk of liability. The damages could be very high as you can see in the case of Robert Hoyzer (NZ \$ 3.6 Million). The risk is counterproductive to the work of referees. If referees are liable and have to pay such high damages nobody would like to do the work, but referees are necessary for sports competitions. However, referees who act unlawfully and

intentionally are not worthy of protection. They know what they are doing and make intentionally wrong field-decisions, usually for their own benefit. Because they always act intentionally it is absolutely justified to hold them liable. As a result it can be said that referees should be held liable for monetary harm.

The problem that results is that referees are often not able to pay these huge sums of damages. This would be to the disadvantage of the plaintiff because he or she would probably not get the compensation of the suffered damages. The question which arises is whether it would be sensible to hold someone else, such as the sports governing body, additionally liable? On the one hand, it could be argued that the chain of causation is breached by the intentional acting of referees, so that the sports governing should not be held liable. On the other hand is it not justified that the plaintiff is the one who suffers. Sports governing bodies are able to pay the amount of damages and they are responsible for educating referees. Because of this it is justified if sports governing bodies are additionally to referees liable such in the case of Robert Hoyzer. The DFB (sport's governing body) paid compensation to the club that lost the game because of the match-fixing of the referee. If the sports governing body pays the damages, they would have a claim against the referee. It would be easiest if sport's governing bodies would have insurance for conduct like this.

### 3 *Interim Conclusion*

In general it is not possible to draw a rule for referees' liability because the law systems are too different and there are too many factors which influence the results / liability. Nevertheless, there is no doubt that match officials should be held liable in the case of match-fixing. Though the New Zealand and German law systems are different, the main assumptions in tort law are similar.

Referees cannot be held liable for every pecuniary loss that happens to someone. There has to be a limitation. The liability would be too wide if match officials also have to pay damages for merchandisers<sup>172</sup> or someone else who is not directly affected by this. It is only justified to hold referees liable for damages which are foreseeable. Then referees can pre-estimate what amount of damages they possibly have to pay.

To demonstrate to referees the amount of damages that could occur in case of match-fixing, it is useful to make regulations for the calculation of pecuniary loss. Furthermore, match officials should be forewarned of the consequences of liability and the amount of a possible damage. There should be a penalty clause in referee contracts so they know from the beginning what happens when they fix match-results. However, the plaintiff needs protection, and thus the sports governing body is, after or next to the referee, liable for match-fixing.

## ***C    Negligent conduct***

### *1    Examples Unintentional Conduct*

“Where an officiating error unintentionally affects the outcome of a sports contest and thereby causes a party’s economic injury, liability may be predicated upon traditional theories of negligence.”<sup>173</sup>

In this case, with an unintentionally officiating error, it is more difficult to determine whether a match official should be held liable or not, because there is no intention involved. Every human being can make wrong decisions, especially in a

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<sup>172</sup> See example on page 53.

<sup>173</sup> Lewis and Forbes above n 123, 688.



sporting event where referees have often only a split-second to decide. The question arises: Could they be held liable for the game result which might be affected by their wrong decisions during the course of the game. The question which has to be answered is: is there a possibility for aggrieved parties to claim for damages?

The following examples are used to demonstrate the legality for claiming for damages.

(a) Wembley goal (World Cup Final 1966)

One example is the soccer World Cup final between England and Germany in 1966. The referee, Gottfried Dienst, was uncertain if a goal had been scored and consulted the linesman who said that it had. England won the game on this decision. Recent film replays show it was not a goal.<sup>174</sup>

(b) “God’s hand” (World Cup Quarter-Final 1986)

In the quarter-final of the soccer World Cup 1986 between Argentina and England, Argentina won. The score was 2:1 for Argentina. The goal was scored by Maradona using his hand. He cut through the penalty area to get a pass for a teammate. The English goalkeeper came out of his goal to punch the ball and because of his height the goalkeeper was the favourite in this duel. However, Maradona got in touch with the ball first, with the outside of his left fist and because of this the ball went into the goal. The referee has not seen the breach of the laws of the game and allowed the goal. This was an illegal goal. The handball is according to the football rules illegal, but was not penalized.<sup>175</sup> A hand goal does not count as a goal and the

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<sup>174</sup> Youtube: *Wembley goal* at [http://www.youtube.com/watch?v=m3FvB\\_lwz6A](http://www.youtube.com/watch?v=m3FvB_lwz6A) (accessed 8 September 2008).

<sup>175</sup> Law 12 of FIFA Laws of the Game.

punishment is a free kick for the other team. The chance to make a goal from a penalty kick is very high so the English team had a better chance to win that day. The referee (Tunisian Ali Bin Nasser) did not see the breach of the rule and allowed the goal. The referee was inexperienced; he gave the goal and ignored the protests of Terry Fenwick and Glenn Hoddle (two English players) who chased him back to the centre-circle, angrily indicating a handball.

(c) Soccer World Cup 2006

At the FIFA Soccer World Cup 2006 the referee of the game Italy vs. Australia “decided” the game. It was the game of the last sixteen, the first knockout stage of the World Cup. After the regular playing time of 90 minutes the result was drawn, 0 to 0. In the fifth minute of additional time, there was a disputed referee decision. A penalty kick was awarded to Fabio Grosso. Francesco Totti performed the penalty kick and

Italy won the game.<sup>176</sup> The decision was inherently questionable. The question is the referee allowed to give such a controversial penalty? The answer is no, it would influence the game actively. With only ten players on the field and only a few minutes playing time left Italy was not in a strong position to win the game. It is argued that the officials and not the teams decided the result of the game. The winning team got the trophy, trophy money, better sponsor contracts, and the right to merchandise products. There was financial loss for the loser. Who is liable for financial loss?

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<sup>176</sup> BBC: *Italy 1 – 0 Australia* at [http://newsimg.bbc.co.uk/sport1/hi/football/world\\_cup\\_2006/4991534.stm](http://newsimg.bbc.co.uk/sport1/hi/football/world_cup_2006/4991534.stm) (accessed 8 September 2008).

(d) Rugby World Cup 2007

“Did he cost us the game?”<sup>177</sup> This was the heading of the Dominion Post two days after the quarter final game France against All Blacks of the Rugby World Cup 2007. In this case, the referee was Wayne Barnes, who failed to punish the forward pass of the French team which was the pass for the winning try. Furthermore there was a controversial sin-binning of Luke McAlister (All Black first five eighth) early in the second half.<sup>178</sup> This was the worst result of the All Blacks in a World Cup (until then they were the only team which played in every World Cup the semi-final). The effect of the early elimination of the All Blacks has had many effects. For example, it affects players and sponsors. The effects could be, for example, that the team does not get trophy money (NZ \$ 100,000); the sponsors do not pay bonus money, or get the coverage expected; the merchandizing of shops are affected by this; and broadcasting revenue can be lost.<sup>179</sup>

2 *Summary of examples*

These examples show that referees' decisions had an impact on the game and were probably the reason for the lost game. Because of this it is examined regarding to tort law if referees are liable for their wrong decisions during the course of the game. The question which has to be answered is: is there a possibility for aggrieved parties to claim for damages?

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<sup>177</sup> Dave Burgees “Did he cost us the game?” (9 October 2007) *The Dominion* Wellington 1.

<sup>178</sup> Ibid.

<sup>179</sup> Loomis above n 15, 87, Dave Burgees “Did he cost us the game?” (9 October 2007) *The Dominion* Wellington 1.

“Sports officials can be found liable for negligence when their conduct departs from the required standard of care and results in harm to participants.”<sup>180</sup> “Applying traditional negligence principals, a plaintiff must show that a sports official has a general or specific duty of care to the plaintiff, that the official breached that duty, and that the breach proximately caused injury to the plaintiff.”<sup>181</sup>

The necessary elements for tort actions against match officials are:<sup>182</sup>

- There must be an existent duty
- The match official must breach the duty
- The damages must be a consequence of the breached duty (Causation)
- The plaintiff must sustain loss
- The plaintiff must prove evidence of these factors

(a) Duty

“The threshold condition for liability in any negligence action is that the defendant must have owed a legal duty to the plaintiff to take care.”<sup>183</sup> “In order to impose such liability upon an official, a plaintiff must establish that the referee owes a duty of care to officiate in such a manner so as to avoid causing monetary harm to the plaintiff.”<sup>184</sup> Several factors are to be considered in determining whether a duty exists or not. These factors include:

- The foreseeability of harm to the plaintiff;

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<sup>180</sup> *Feiner* above n 34, 214

<sup>181</sup> *Lewis and Forbes* above n 123, 688.

<sup>182</sup> *Feiner* above n 34, 214.

<sup>183</sup> *N J McBride* (2004) 24 OJLS 417; *C Witting* (2005) 25 OJLS 533; *Todd* above n 115, 116.

<sup>184</sup> *Lewis and Forbes* above n 123, 689-690.

- The degree of certainty that the plaintiff suffered injury;
- The closeness of connection between the defendant's conduct and injury suffered;
- Extent of burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and
- Availability, cost, and prevalence of insurance for the risk involved.<sup>185</sup>

The sports governing body has the obligation to ensure the correct enforcement of the tournament and as such the enforcement of single games also. The main duty of the sports governing body is to enforce the laws of the game. Most sports governing bodies confer this obligation upon their match officials; often referees have the sole authority during the game. Consequently the main duty of referees is to enforce the laws of the game. The laws of the game should ensure the fair course of the match.

“The [participants] competitors trust that the performance of the referee will not affect the outcome of the game.”<sup>186</sup> Over and over again referees make negligent wrong decisions during the game. Often referees' malpractice, such as giving a wrong penalty, a wrong offside call, a wrong red card or a wrong sinbining of a player, may impact on the result of a game. A referee should carry out his or her role to a high standard and therefore reduce the risk of errors which may deprive a team of a victory or monetary gain. However, it is not possible to completely avoid wrong decisions as long as only a human being has the sole authority. Lewis and Forbes state:<sup>187</sup>

Such an obligation should vary with the importance of the contest and the stakes involved. Where there is a great deal at stake, the participants will expect the official to

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<sup>185</sup> Ibid.

<sup>186</sup> Lewis and Forbes above n 123, 695.

<sup>187</sup> Ibid.

exercise more caution to avoid errors. Where available, and when the rules of the particular sport authorize or require its use, an official may breach his duty when he fails to use video technology to review a potentially incorrect decision.

One example is a rule in rugby that match officials should contact the technical official in special situations.<sup>188</sup> The match officials should be held liable when they fail to use technology and these results in a monetary harm.<sup>189</sup>

In general the main duties of referees are:

- to enforce the laws of the game correctly
- sport official's duty to render correct decisions
- to maintain the order of the game
- to ensure the safety of players (except game-inherent injuries)

Should match officials be held liable if they breach these duties? In criminal law it is accepted that referees are liable in the same way as players. Players who make an irregular goal like Maradona in the case discussed above, are not liable for damages that the opposite team suffers.<sup>190</sup> Neither players nor clubs nor teams have a judicial fiduciary duty for opposite teams or players. Fiduciary duty means that the financial wellbeing is protected by this rule. The opposite team cannot trust that the other team will keep the rules. For this reason the referee is on the pitch and should punish any breach of the laws of the game. Do match officials have a judicial fiduciary duty for the participants? A punishment with a penalty after a foul should only give an advantage for the team as a result from a breach of laws of the game and to restore the

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<sup>188</sup> Rugby Rules

<sup>189</sup> Lewis and Forbes above n 123, 697.

<sup>190</sup> Bernhard Pfister *Festschrift fuer Gitter* "Schutzzweck von Sportregeln –Insbesondere zum Schadensersatzanspruch bei Vermoegensschaeden aufgrund von Verletzungen der Sportregeln-" (1<sup>st</sup> ed, Wiesbaden, 1995) 736.

balance of the game. Do the laws of the game protect financial interest? This is an essential assumption for a claim for monetary damages.<sup>191</sup> The laws of the game are only regulations to ensure a fair course of a competition and are not introduced to protect financial interests of participants. However, the character of sports has changed and the question arises: Should the laws of the game protect financial interests too? “[Does] a plaintiff-participant or principals possess interests which are entitled to legal protection from the defendant-referees’ conduct?”<sup>192</sup> “Where a sports official commits an obvious and gross officiating error which leads to a demonstrable monetary loss, has that official breached any duty to that participant or principal?”<sup>193</sup> As shown above, many people have their business in sport and need protection. Because of this the financial interest is indirectly implicated in the laws of the game. Nowadays, the role of sports has changed, and there is much money at stake. Because decisions made by match officials are in essence final, it is important to protect participants and the right to sue for damages. If a review of referee decisions is not possible, there has to be at least the possibility that a correction can be made by claiming damages.

Finally it can be said that match officials have duties regarding the participants of a competition.

(i) Standard of care

The special position of the referee imposes an obligation to reduce the risk of mistakes that may deprive a team of victory and any associated monetary benefits.

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<sup>191</sup> Kuhn above n 39, 122.

<sup>192</sup> Lewis and Forbes above n 123, 690.

<sup>193</sup> Ibid.

What should the standard of care be for co-participants [referees] involved in a sporting event? The different standards of care are negligence, gross negligence and recklessness. “Some courts and commentators believe that the correct standard to be applied to sports injury cases is the negligent standard.”<sup>194</sup> They base their opinion on the theory that the negligence standard is flexible enough to encompass the situations that occur in sports. These scholars do not take into account the competitive nature of sports and that wrong referee decisions are inherent with sports because match officials often have only a split-second to decide in the heat of a competition.<sup>195</sup> The correct standard, as adopted by a majority of the jurisdictions faced with this issue, is the reckless disregard for the safety of others or intentional misconduct standard. This standard takes into account the fact that wrong referee decisions occur in sports, and the mere existence of monetary harm does not mean that there is tort liability. “The standard also protects participants in sporting events from reckless or intentional misconduct by establishing tort liability for those actions.”<sup>196</sup> “If liability is to be imposed on referees in non-physical injury officiating error cases, then a standard of care higher than the ordinary, reasonable and prudent referee should be imposed.”<sup>197</sup> The criterion of standard of care is in general an ordinary, reasonable and prudent person. The question which is asked is: What would a prudent person do in such a situation? A prudent person is the model of all legal behaviour. This person does everything in moderation, follows the community ethic, and always exercises due care.<sup>198</sup> The circumstances when a referee makes decisions should be respected. Though participants have discussions about referee decisions, long after the game has

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<sup>194</sup> Frank J. DeAngelis “Torts –Standard of Care- Duty of Care Applicable to Participants in Informal Recreational Sports Is to Avoid the Infliction of Injury Caused by Reckless or Intentional Conduct” (1995) *Seton Hall J. Sport L.* 509, 526.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

<sup>197</sup> Lewis and Forbes above n 123, 695.

<sup>198</sup> Todd above n 115, 313.



ended, the context for a referee is mostly a split-second one in the heat of a game.<sup>199</sup> These factors should be regarded for the standard of care. One argument is that referees should only be subjected to liability when their errors are a result of gross negligence or recklessness; otherwise the liability risk is too high. The relation of remuneration and liability risk has to be adequate and it would not be if referees are even liable for negligent wrong referee decisions, otherwise no one would like to work as a match official. "Recklessness is conduct that creates a higher degree of risk than that created by simple negligence."<sup>200</sup> The grossly negligent standard is the right one for liability regarding negligent decisions, because the standard is flexible enough for the special circumstances which apply to referee decisions. The risk of liability is not too high nor too low. It can be expected from referees that they do not make decisions based on gross negligence.

#### (b) Breach of duty

Match officials must breach a duty to be held liable. When is a duty breached? A breach of a duty is generally defined as failure to perform a duty or "failure to exercise that care which a reasonable [prudent person] would exercise under similar circumstances."<sup>201</sup> As shown above, the right standard of care for referees is gross negligence, which means that they are not allowed to do anything grossly negligent. Consequently a duty is breached when referees fail to exercise that care which a prudent person would exercise under similar circumstances.

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<sup>199</sup> This could be avoided by using video-referees or video evidence but these possibilities are not used at the moment so that it cannot be regarded.

<sup>200</sup> Ray Yasser "In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants be required to be Reasonable?" (1995) 5 Seton Hall J. Sport L. 253, 257.

<sup>201</sup> Loomis above n 15, 94.

For clarification, the breach of duties by match officials regarding the above discussed case groups is demonstrated.

- Wembley goal: The referee gave a goal which was not a goal. The laws of the game say that it is only a goal scored if the ball crosses the goal line.<sup>202</sup> The ball did not cross the line. The question which arises is, was this gross negligence? The answer is no, because it was very difficult to see whether a goal was scored or not. The context in 1960 was different than today. There was no replay available to check if a goal was scored or not. But even today the replay is not used to control if a goal is scored or not. Years later there will still be discussions whether a goal was scored or not. Even video records could not show clearly if it was a goal or not. Based on that it cannot be expected from referees to make a right decision under these difficult circumstances.
- God's hand: The referee gave a goal which was not a regular goal which adheres to the laws of the game. The referee gave a goal although Maradona used his hand to score it. This decision was gross negligence because players complained and it could be seen clearly by other players that Maradona used his hand to make the goal. If the referee is not sure he has to ask the assistant referees. The breached duty is that the referee did not consult the linesman and ask for his opinion; he just gave the goal. The circumstances in this case foreboded that it was an irregular goal. Finally Maradona itself admitted that he used his hand.
- Soccer World Cup 2006: The referee gave a questionable penalty in the overtime. Is this correct? This was definitely a grossly negligent wrong

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<sup>202</sup> Law 10 of the FIFA Laws of the Game.

decision because the decision had an impact on the game. In the overtime a questionable penalty is usually the decision of the game. It is not justified to make such a questionable decision in overtime. The chance to score a goal from a penalty is quite high so that it can be said that the referee decided the game instead of the teams. He actively influenced the course of the game, even if it was not intentionally. Other referees point out that especially in overtime it is important to be vigilant about penalties. They should give them only if it is very clear that there is a penalty decision. Of course it is never justified to give a questionable penalty, but one in overtime can be called 'critical incident' because the decision has a direct impact on the game. The impact on the game with a questionable penalty is different in regular playing time and overtime. The referee did not follow the basic practice of referees. Because of this the decision was a grossly negligent one. A prudent person would not give a questionable penalty in the overtime. Just a clear penalty can be given at this stage of a match.

- Rugby World Cup 2007: There were three mistaken calls of Wayne Barnes. The referee did not punish a forward pass and gave a questionable sinbining. The referee manager from IRB, Paddy O'Brien, admitted that Wayne Barnes "had missed a forward pass that led to France's match winning try."<sup>203</sup> For touch judges it is often impossible to be in a position to make this call, but the referee should be. Barnes was nowhere to be seen. Furthermore Barnes gave a total of 11 penalties. A good penalty count is somewhere between 18 and 24. Wayne Barnes "was missing infringements or he put away his whistle and chose not to rule on infringements he did

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<sup>203</sup> tv nz.co.nz at *IRB defends referee Wayne Barnes* <http://www.tvnz.co.nz/view/page/417227/1395656> (accessed 8 September 2008).

see.”<sup>204</sup> Furthermore the referee gave a controversial sin-binning to Luke McAlister. All of these mistaken calls could have affected the outcome of the game.<sup>205</sup> These are known as ‘critical incidents’ which means they are wrong decisions that directly can influence the game.

The discussed cases above show that it is not easy to draw the line between negligence and gross negligence. It is hard to determine when a duty is breached or not. Nevertheless this is no reason to negate a duty of referees. Referees have duties of care. Even if it is difficult, it is possible to examine when a duty is breached<sup>206</sup> and when not and after decisions about a couple of cases it would be easier to draw the line and there would be legal certainty.

#### (i) Consent

A waiver of a claim could be consent. If a party consents to a special acting or risk it could be possible that the party has no claim against the offender. When a party accepts a special risk then the party knows which consequences could result. The party has an idea of the possible risk and has no claim for damages. Participants in sports games are generally aware that referees are human and that mistakes can happen. But how far is this consent? Do players and clubs consent that referees makes sometimes wrong decisions? “The [participants] competitors trust that the performance of the referee will not affect the outcome of the game.”<sup>207</sup> They do not consent to grossly negligent wrong decisions, they have faith that referees will act like

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<sup>204</sup> *IRB faces credibility crisis over referee's performance* <http://sportsafterdark.net/2007/10/19/irb-faces-credibility-over-referees-performance> (accessed 8 September 2008).

<sup>205</sup> *IRB faces credibility crisis over referee's performance* <http://sportsafterdark.net/2007/10/19/irb-faces-credibility-over-referees-performance> (accessed 8 September 2008).

<sup>206</sup> As shown above while examine the cases it is possible to examine whether a duty is breached or not.

<sup>207</sup> Lewis and Forbes above n 123, 695.

a prudent person would do; consequently they do not consent to gross negligent wrong decisions.

(c) Causation

“In addition determining the existence of an injury, a duty, and a breach of the standard of care, it must be shown that the officiating error was the logical and proximate cause of the plaintiff’s loss.”<sup>208</sup> The official’s conduct must have a causal connection to the damages. The plaintiff must show that “but for” the error, the loss would not have occurred. The “but-for” rule examines “whether, but for the defendant’s conduct the damage to the plaintiff would have occurred.”<sup>209</sup> This means that the conduct of the offender is the reason for the suffered damages. It is complicated to give evidence that the conduct of a referee is the reason for a lost game. There is always the possibility that the team would have lost the game without the wrong referee decision. A team’s or a player’s inadequate performance may well have “caused” a loss rather than the officiating mistake.<sup>210</sup> There are more factors imaginable which can influence the outcome of a game, for example the performance of players, the team coaches, the system that is played, if it is a home game or not and so on. Then again it is possible that a wrong referee decision has an effect on the player behaviour, for example a sinbin of a player, and this is the reason for the lost game. The question remains: How can the team prove this? It is not possible to prove with absolutely certainty that wrong referee decisions are the only reason for a lost game. It is difficult to provide evidence of causation between a wrong referee decision and the lost game. It is not possible to give secure evidence. It would rarely be

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<sup>208</sup> Lewis and Forbes above n 123, 697.

<sup>209</sup> Kuhn above n 39, 213.

<sup>210</sup> Feiner above n 34, 228.

possible to prove that the referee's conduct is the only reason for a lost game because there are so many other factors crucial too. The plaintiff must show that "but for" the error, the loss would not have occurred. A team's inadequate performance may well have "caused" a loss rather than the officiating mistake.<sup>211</sup> Nevertheless, it is difficult to prove evidence that "only" referee decisions made one team lose.

Because of this it has to be discussed if the causation factor has to be a certainty or not. The special circumstances of sports competitions and the impact of wrong referee decisions has to be considered. Wrong referee decisions such as giving a wrong red card or a wrong sinbin of an important player can influence the performance of the team. The problem is that this is a factor which is intangible. Because of this there has to be a specific table of factor or case law where the line is drawn as to the degree of probability of required evidence for the causation factor. The degree of probability of required evidence cannot be 100 percent because in sport it is not possible to give 100 percent evidence if a wrong referee decision caused the lost game. However, some mistaken calls could have affected the outcome of the game. In refereeing calls these are known as 'critical incidents'. There has to be determination between minor mistakes which do not influence the game and those "critical incidents". The latter one could have affected the outcome of the game. In terms of sport this should be enough for the required evidence for causation.

Furthermore, the damage or monetary harm has to be foreseeable and avoidable. "This element of foreseeability defines the scope of a defendant's duty."<sup>212</sup> "If a risk of injury is foreseeable, then an actor must take precautions to minimize the likelihood of the injury."<sup>213</sup> The injured party must demonstrate that the damage

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<sup>211</sup> Ibid.

<sup>212</sup> Lewis and Forbes above n 123, 691.

<sup>213</sup> Ibid.

caused was foreseeable or should have been reasonably foreseeable.<sup>214</sup> It is foreseeable for the sports official that elimination from a team results in an economic harm (financial loss).<sup>215</sup>

The injured party / person must also be foreseeable to avoid unlimited liability. Otherwise, the liability would be too wide. Everyone such as merchandisers, producer for merchandising products and so on would have a claim for compensation. The damages of store owner in the case *Bain v. Gillispie*<sup>216</sup> were unforeseeable. A merchandiser complained that a college basketball referee's mistake denied him certain benefits. He sold Iowa University apparel and novelty items and counter-claimed against an NCAA basketball referee for a call made at the end of an Iowa-Purdue basketball game that resulted in a loss for Iowa. This loss eliminated Iowa's chance to compete in the NCAA Championship. The claim was declined. The trial court stated that referees are in a business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. The liability would be too wide. If there is a liability to a merchandiser like Gillispie, then there would be a liability to thousands of Iowa fans and so on. However, the court left the question open whether a sports official could be liable to the participating teams, schools or sports governing bodies for his or her errors which cause monetary loss.<sup>217</sup> The referee should be held liable for his or her malpractice if he or she acts with gross negligence. As shown above it is not justified to hold match officials liable for minor mistakes (negligence) because it is human practice to make minor mistakes in the heat of competition. However, it can be expected from referees attending international tournaments that they make no major mistakes (act with gross negligence).

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<sup>214</sup> Ibid.

<sup>215</sup> Lewis and Forbes above n 123, 690.

<sup>216</sup> 357 N.W. 2d 47 (Iowa Ct. App. 1984)

<sup>217</sup> Lewis and Forbes above n 124, 689.

#### (d) Damages

As shown above, many parties could be affected by referees' malpractice.<sup>218</sup> To determine the scope of liability, so that it is not too wide, it is essential that it is foreseeable for referees to know what their liabilities are. This should include types of liability and damages.

As discussed above there are many different types of damages imaginable such as lost value by players or clubs, lost trophy money and so on.<sup>219</sup> All damages that might occur are financial loss. "Sports officials are aware that the higher the stakes, award or prize of an athletic contest, the more costly an officiating error is to the contest participants or their principals."<sup>220</sup> As shown above it is still difficult to pinpoint the exact amount of damages, and regulations are essential. There is no reason not to draw up a regulation list for possible monetary harm. It is not easy to pinpoint the exact amount of damages but nevertheless there could be tables to determine the amount. Why should it not be introduced in the area of sports law? As shown above, sport has changed from amateur to a big business, which makes it essential to adjust regulations in this area.

The regulations should include the following factors:

- lost money from merchandising contracts
- lost gate money for the next round of the tournament
- lost trophy-money
- lost wages.

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<sup>218</sup> See page 34-35.

<sup>219</sup> See page 36-37.

<sup>220</sup> Lewis and Forbes above n 123, 690.



(e) Result

Referees are liable when they act with gross negligence. The gross negligence standard is flexible enough to regard the special circumstances of a competition. It is not justified to hold referees only liable for intentional conduct. The standard of gross negligence ensures that referees do their best to provide a good performance. On the other hand the threshold of liability is not so low that referees are liable for minor mistakes. It can be expected from professional match officials that they do not make mistakes based on gross negligence. "Case Law demonstrates a judicial reluctance to interfere with the outcome of sports contests unless there is a showing of bad faith, fraud or corruption. The same resistance has been met in holding sports officials personally liable for monetary injuries resulting from officiating mistakes."<sup>221</sup> Nevertheless, the nature of sport has changed; it is a big business now with much money at stake. The time has come in professional sporting era, for tort law to be used to justify referee liability. Currently the risk of liability is in a grey area because it is not possible to determine exactly for every situation whether referees act with gross negligence and are consequently liable or not. However, the question now arises if there should be an exemption from liability for match officials, as in the case of judges or government officials.

***D Exemption from liability / Limitation of liability***

A limitation of liability might result from rules of sports societies, contractual agreements or the application of immunity as it applies to judges and government officials.

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<sup>221</sup> Lewis and Forbes above n 123, 705.

## *1 Contractual and / or society limitations of liability*

There are society rules and individual contractual agreements in Germany and USA that exempt match officials from liability at least for the negligent actions of referees. When a limitation of liability or an exemption from liability is ruled in the society rules / by-laws it is only binding for members of the society, because these rules are only by-laws or regulations and such rules are not binding for everyone. Only laws of the land are binding for everyone.

The problem of these rules which limit liability is that the rules are not negotiated between the parties. The rules are regulated by the society and the party / member has to accept the rule. If parties do not want to accept the rules they cannot be a member of the society. No doubt, referees would accept these rules, because for them it is an advantage not to be liable. But clubs and teams have to accept these rules as well and they might have a disadvantage from such a regulation. They have no chance to sue referees because of wrong decisions. If the rule itself is improperly made or deemed to be exclusively restrictive the courts would people let sue. The courts have the authority to review rules in general (if the rules are in accordance with the law of the land), they are only limited in the revision of referee decisions.

### *(a) FIFA Rule*

FIFA Rule V-IBD 13 states: Referees and assistant referees are not liable for wrong decisions concerning the game which result in bodily harm or financial loss for spectators or participants.<sup>222</sup> The problem of this regulation is that it exempts liability for all damages, even for a referee who acts intentionally. It is not justified that

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<sup>222</sup> Kuhn above n 39, 257. FIFA exempts officials from liability, Rule V-IBD: "... officials are not held liable for any match-related decisions which lead to injuries of participants or spectators, property damage or other losses."

referees cannot be sued by parties when they act intentionally. As shown above, the wider regulations of societies have to be in accordance with the law of the land. However, the laws of the game are in an unlegislated area. Is FIFA Rule V-IBD 13 in accordance with the law of the land?

(b) General terms and conditions

In Germany, such clauses have to be in accordance with general terms and conditions (*Allgemeine Geschäftsbedingungen*). General terms and conditions are conditions of a contract which are formulated for a multiplicity of contracts which one party has regulated; the other party has to accept them.<sup>223</sup> They are ruled in Sections 305 - 310 of the German Civil Code. There are limitations for terms and conditions. The limitations are ruled in section 308 and 309 of the German Civil Code. The terms and conditions are ineffective when there is an exemption from liability for bodily harm and gross negligence. This section prohibits exemption from and limitation of liability, such as exemption of liability for a special amount of damages, or the limitation for special damages.<sup>224</sup>

The general purpose (underlying principle) of this rule is to protect people. There has to be a possibility to sue for damages. It is unlawful to exempt match officials from liability for bodily harm or gross recklessness because the limitation of rules within the sports governing body are criminal law and tort law.<sup>225</sup> It is not possible to contract out of these areas of law. Every human being is treated similarly with regard to criminal and tort law (basic moral aspects).<sup>226</sup> This purpose is a basic

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<sup>223</sup> *Allgemeine Geschäftsbedingungen* (terms and conditions) ruled in: Section 305 (1) of the German Civil Code.

<sup>224</sup> Otto Palandt *Kommentar zum Bürgerlichen Gesetzbuch* Section 309.

<sup>225</sup> See page 31-38.

<sup>226</sup> Livings above n 97, 496.

one which has to be considered in every country, especially because FIFA is an international organisation, otherwise match officials have the opportunity to cause bodily harm to others without getting punished for this. This is unacceptable, particularly because sports governing bodies are in a monopoly position. This means if someone would like to do sports he or she has to accept the rules that match officials might cause bodily injuries to them and they do not have an option to sue for damages. As shown above, this is a breach of basic human rights. The exemption of liability for gross negligence / recklessness or intention is unacceptable. It might be possible to exclude a negligent attitude but not an intentional one. The legal consequence of one ineffective rule, however, does not affect the rest of the contract.

#### (c) Summary

It is not acceptable to exempt referees from liability for bodily harm and acting in a gross negligent manner. The parties of a sports governing body are usually human beings and individuals require greater protection than a society such as a sports governing body, especially where the sports governing bodies are in a monopoly position. People need more protection as their only option to play their sport is through the monopoly of the sports organisation. They have to accept the rules of the sports organisations otherwise they cannot be a member or play. The basic right of freedom of association includes that it has to be possible for everyone to join a club / society.<sup>227</sup> This must be possible without abstaining of basic rights. In sports organisations such as FIFA the parties have to accept the exemption from liability if they want to join the club and as a consequence consent to the exemption of liability. As a result they are accepting the possibility of bodily harm, monetary harm and

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<sup>227</sup> Article 9 of the German basic Constitutional Law, New Zealand Bill of Rights

without an option to sue for damages. This is inequitable. It is not possible to contract out of tort and criminal law. Every person has to be treated similarly according to criminal law and tort law.<sup>228</sup> With regard to the purpose of the general terms and conditions it is not justified to exempt referees from liability. The reason therefore is that the plaintiff / sportspeople must have the possibility to sue for damages.

## 2 *The application of the immunity rules for judges and government officials*

Sports officials have a position similar to the position of legal judges; they act as on-field judges.<sup>229</sup> This view of match officials suggests the position of match officials is comparable to those of legal judges. Many law systems have rules about a special limitation of liability or even immunity from liability for legal judges and / or government officials. The question is whether there is a comparable position for match officials to justify a limitation of liability for referees. First, for clarification the different legal theories and the reasons for introducing these theories are demonstrated regarding common law and civil law.

### (a) Common law

There are two relevant common law theories to consider. The first one is absolute immunity and the second one is qualified immunity.<sup>230</sup> The history of these theories is based on the liability of government officials. The reason for liability privilege of government officials is that their actions or their willingness to act should not be restricted because of a possible liability. They should even assist in making decisions.

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<sup>228</sup> See page 22; Livings above n 97, 496.

<sup>229</sup> Cross above n 12, 429.

<sup>230</sup> Kuhn above n 39, 257.

Judges have absolute immunity. The absolute immunity is for their position in a decision-making role; it is not applicable to administrative actions of judges. On this theory judges are not legally responsible for damages which occur to others.<sup>231</sup> This should ensure the independence of their decision-making. They are not even liable for malicious acting. Judges can avoid socially objectionable consequences such as suits against them, and absolute immunity allows judges to make controversial decisions that may go against public opinion.<sup>232</sup> This should ensure that judges make independent decisions in their neutral position regarding the law of the land. They are protected from the influence of the public and they do not have to be anxious about lawsuits and resulting liability because of a decision. The main connecting factor is not the person but the position and function of the judges' role.

The doctrine of qualified immunity is used for the executive work of judges. On this theory judges are only liable if they act intentionally against constitutional law. This immunity should also assist the decision-making of judges. This should ensure that judges are neutral and their decisions are neutral and are not influenced by public opinion. Judges have to make neutral decisions in accordance with the law of the land and this could diverge from public opinion.<sup>233</sup>

Arbitrators are also protected by a liability privilege. This is based on the comparability of the position of an arbitrator and a judge. An arbitrator is a quasi judge. The immunity is restricted to arbitral acts.<sup>234</sup> The state wants to assist the out-of-court settlement of disputes. The decision-maker (arbitrator) is bound by the regulations of the arbitration. Because of this the position of a decision-maker is comparable to those of judges. This is the reason for a quasi judicial liability

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<sup>231</sup> Ibid.

<sup>232</sup> Kuhn above n 39, 257.

<sup>233</sup> Ibid.

<sup>234</sup> Arbitral acts: these are tasks which are usually worked by an arbitration.

privilege. The members of arbitration work independently and should not be influenced by the public. Another argument for the liability privilege is that the decision-maker often earns only a low remuneration.<sup>235</sup> This is an argument in deciding the question whether someone should be held liable or not because otherwise no one would like to officiate matches anymore. Often is it only a side job and if the decision-maker had too wide a liability, nobody would like to work as one.

Without the immunity nobody, or at least scarcely anybody, would like to work as a judge or arbitrator. The risk of making a wrong decision and being liable therefore would be too high. To support the independence of judges, to encourage their work and decision-making, the immunity was created.

#### (b) Privacy law

The privacy law has comparable regulations for limited liability of judges and government officials. Article 34 of the Basic Constitutional Law of the Federal Republic of Germany (Grundgesetz) in conjunction with Section 839 of the German Civil Code (Bürgerliches Gesetzbuch), ruled that civil servants are not liable for mistakes that happened in the scope of their working area. Referees might be in a position comparable to judges or government officials.

Section 839 (1) of the German Civil Code states: “Malpractice in office” A public official who attends to one’s duty not in a proper manner (intentionally or negligently) has to pay damages to the third person which result from this breach of duty. Section 839 (2) of the German Civil Code states that if a judge affected the rights of someone in a sentence, he or she is only responsible for damages when the

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<sup>235</sup> Kuhn above n 39, 229.

breach of duty resulted from a criminal act.<sup>236</sup> Section 839 of the German Civil Code is applicable with Article 34 of the Basic Constitutional Law of the Federal Republic of Germany. This Article stated that the country or the corporate body for which the official is working is responsible and liable for damages. Article 34 Basic Constitutional Law of the Federal Republic of Germany states that the country or corporate is liable for wrong decisions of their public officials but the liability is reserved if the public official acts intentionally or with recklessness.

The basic principle of this regulation is that the country is liable instead of the public official for his or her actions. This is justified because the risk of liability would be too high for judges and government officials. Furthermore, judges and government officials are public officials and in these positions have special obligations (basic rules of the civil service system). The main reason is the same as in common law; to ensure that public officials make independent and neutral decisions. This rule should encourage effective decision-making. A condition for the liability of the state is that the breach of duty happens during an exercise of an office.

#### (c) Summary

Both law systems have persons who have privileged liability. The cause for privileged liability is that the persons have unique positions with much responsibility and should not be deterred from (difficult) decision-making. On the one hand, the privileged liability should assist people to do their work, and on the other hand it should ensure that the people make decisions without influence, including decisions which are not in accordance with the general opinion of the public.

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<sup>236</sup> Section 839 of the German Civil Code.



(d) Comparability with referees

The question which remains is, whether referees are in a similar position to judges or government officials and as a result can be compared to them so that match officials also have the privilege of absolute or qualified immunity.

(i) Comparison of match officials and judges

The position of match officials requires that he or she is independent and neutral. Judges also have to be neutral and independent. These conditions are similar for judges and match officials. Referees have to ensure a correct course of the game and judges have to guarantee a correct course of the proceeding. This should protect the rights of the parties / participants. The match officials should abide by the laws of the game and judges should abide by the laws of the land. Furthermore, there is a public interest in judges being able to do their jobs without fear or favour. There is a similar public interest in referees doing their job. The public take more and more stock in sport.

Nevertheless, the position of referees differs to the position of judges in several areas. Referees are not bound by former decisions they made in other games.<sup>237</sup> However, judges are bound by former decisions and cases. The consequence is that decisions made by judges have an impact on other following cases and decisions. Referee decisions have only meaning for the game they referee on. Another difference is that referee decisions are final. The decisions during the course of the game are based on facts.<sup>238</sup> There is no court of appeal or another institution to control or overrule referee decisions. In contrast, decisions made by judges are contestable by

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<sup>237</sup> Kuhn above n 39, 232.

<sup>238</sup> “Based on facts” means that match officials make their decisions based on situations during the course of the game as they see them.

the court of appeal.<sup>239</sup> Another difference, at least in Germany, is the principles of civil service. Judges and government officials in Germany have special obligations. This is based on Article 33 (5) of the German Basic Constitutional Law. Article 33 (5) states: “The law governing the public service shall be regulated with due regard to the traditional principles of the professional civil service.”<sup>240</sup> One example is the political fiduciary duty or the obligation to avert a damage of the principle. The referee is not bound by such obligations. These are fundamental divergences between the position of judges and the position of match officials. Because of this the positions of referees and judges are not comparable. These main differences in the positions do not justify that referees should have absolute immunity like judges.

#### (ii) Comparison of match officials and arbitrators

The first similarity between referees and arbitrators is that both groups have to be neutral while doing their job. The second comparison is that referees and arbitrators act based on agreement of parties and not based on the law of the land like judges.<sup>241</sup> Another parallel is that decisions of referees and arbitrators are only open to limited scrutiny.<sup>242</sup> There is no court of appeal or a similar institution for decisions made by match officials. As shown above, decisions during the course of the game are final.<sup>243</sup> Decisions made by arbitrators are not checkable because the arbitrator acts based on the agreement of the parties and they consent to accept the decision.<sup>244</sup>

The key difference is that the arbitrator acts because of agreement by both parties, whereas the match official acts based on a contract with one party or another

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<sup>239</sup> Kuhn above n 39, 233.

<sup>240</sup> Article 33 (5) of the German Constitutional Law.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> See page 14.

<sup>244</sup> Kuhn above n 39, 233.

third party such as a sports governing body.<sup>245</sup> Another difference is that those arbitrators have to act in accordance with the process rights, but match officials have no process rights to consider.<sup>246</sup> A further divergence is that an arbitrator acts to settle out of court. They exist to disburden ordinary courts. Because of this they act in a manner like judges (they do often the same work) and as a consequence have immunity as well. Since judges have absolute immunity arbitrators have qualified immunity. The reason therefore is those arbitrators are not “employed” by the state or government. Nevertheless, both judges and arbitrator have immunity. However, match officials do not act to settle differences out of court. They act in an area which is not appointed for ordinary courts.<sup>247</sup> They have to enforce the laws of the game. The qualified immunity is only for people who act in a comparable position to judges and / or governmental officials. Because of these divergences, match officials do not have a comparable position to judges / arbitrators and consequently no qualified immunity.

### (iii) Discussion

As shown above, the position of match officials is not comparable with those of judges and arbitrators. However, there is still the question of whether the similarity of the position of referees justifies immunity. The nature of sport has changed during the years and so also the position of referees. Because of this, the value of having referee immunity needs examining.

The main reasons for the liability of referees are the following:

The obligation of referees is to enforce the laws of the games in a proper manner. People who are working in other jobs have their responsibilities and

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<sup>245</sup> Ibid.

<sup>246</sup> Kuhn above n 39, 234.

<sup>247</sup> Ibid.

obligations as well. They will be held liable for mistakes they do which cause damages to others. Referees owe a duty of care in the game under their charge,<sup>248</sup> especially nowadays in professional sports contests, where much money is at stake. They know about their responsibility and accept it. Furthermore, in most tournaments it is not possible to rerun a game; results are final. This means that referees might cause irreparable damages to participants, for example if a team is eliminated from a tournament. Another reason is that liability of referees guarantees a better performance from referees. In the end someone has to be held liable for occurred damages.

The main reasons to make referees not liable:

Referees have only a split-second to decide difficult situations. To ensure an attractive game for fans and spectators there cannot be a long discussion about decisions. Especially in fast games such as basketball and handball, it is even more difficult to always make the right decisions. Another reason against liability of referees is that match officials are human beings and they cannot guarantee freedom from error. Wrong decisions are inherent with sports. This has to be accepted as long as human beings have the sole authority on a pitch. The laws of a game often need interpretation by referees. The liability would restrict the discretion of referees. This would not be in the interests of the participants and spectators. It is difficult to draw the line between discretion and liability of referees. In addition the liability of match officials would flood the courts with litigation, even if there would be a higher threshold. Every time participants were not satisfied with a game result, they would sue the referee. The remuneration of referees would not be in balance with the threshold of the liability. There might be a huge amount of damages if a team is

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<sup>248</sup> Lewis and Taylor above n 1,1057.

eliminated from a world cup because of a wrong referee decision. Referees would not be able to pay these damages. Another argument against liability is that a softening threshold would have a deterring effect on the numbers of volunteers willing to officiate matches. The amount of people willing to officiate athletic contests might be greatly diminished if their mere negligence could result in personal liability.<sup>249</sup> The volunteers probably would no longer agree to do their job. Who would be putting themselves at a greater legal and financial risk without receiving any monetary benefit?<sup>250</sup> As a result the amateur sport could lose most of their volunteer referees. Many amateur leagues cannot pay the referees so they will lose them.<sup>251</sup> The most obvious disadvantage is that many volunteer referees would no longer want to be a referee. "It is better to have referees not be liable for negligent acts than to have no officials present at all."<sup>252</sup>

The problem is that standpoints which are not important for the decision may influence the decision made by a referee. The referee should be a neutral person on the pitch who makes decisions based on the facts of the game and not because of non-game-related circumstances such as anxiety for liability.

### 3 *Interim Conclusion*

#### (a) Immunity

##### *Result:*

The application of the liability privilege, like that of the arbitrator, is not suggested by the jurisdiction or the literature. Comparability seems possible, because

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<sup>249</sup> Mayer above n 69, 99.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

there are many similarities in these positions. During an ordinary lawsuit or an arbitral lawsuit, it should be ensured that the judges (decision-maker) are independent and supported in their decision-making (process). The independence of the parties is not only in a lawsuit or an arbitral proceeding necessary, it is essential everywhere where people are acting to settle a difference and have the sole authority. But is it justified to protect match officials in a decision-making role from limited liability?

The advantages of liability outweigh the disadvantages; it is still not justifiable to hold referees liable for wrong decisions. Even if someone should be held liable, referees are not the right group. Nobody would like to officiate matches anymore, because the risk of liability would be too high. Referees cannot guarantee to be error free. Sport can only exist if there are people who referee the matches. Although the position of match officials and judges are not comparable, there appears to be a strong argument that referees should have some kind of immunity. This immunity needs to be adjusted to different time and situations.

In California there is already a regulation for limited liability of boxing referees (umpires).<sup>253</sup> California Tort Claims Act of 1963 (CTCA 1963) section 197 CTCA stated that public employees are liable like every other employee.<sup>254</sup> One exception of this general rule is stated in section 198 CTCA 1963. There are no damages for actions or failures which are at the discretion of the exercising person. Damages are only possible when the actions or failures are based on corruption or the intent to cause damages.<sup>255</sup> Boxing referees in California are treated as a public employer, and because of this section 198 CTA 1963 is applicable. As a consequence, boxing referees have a liability privilege. This is because all referee decisions or most referee

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<sup>253</sup> Kuhn above n 39, 230.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

decisions are based on discretion. According to this, the liability of referees is limited to intentional damage and bribing of referees. If a boxing referee only makes a discretionary mistake he or she is not liable, because the regulation excludes liability for decisions based on discretion. This regulation is only applicable for referees acting in the boxing sport.

Because of the changing position of referees, the sole authority they have, and the high level of responsibility and their neutral decision-making, they have to be treated similar to arbitrators. It is justified that they have qualified immunity. The question which has to be examined is where the line has to be drawn; what standard of care will exempt them from liability?

(b) Standard of care / Threshold of liability

“Sports officials can be found liable for negligence when their conduct departs from the required standard of care and results in harm to participants.”<sup>256</sup> “If an official falls below the accepted standard of care required for officials, a court will assign liability for injuries that are proximately caused by the conduct.”<sup>257</sup> The different standards of care are intention, recklessness, gross negligence and negligence. The liability of match officials should be limited to situations where they grossly depart from the necessary standard of officiating, and not to situations which can be deemed minor aberrations.<sup>258</sup> What standard of care should exempt match officials from liability?

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<sup>256</sup> Feiner above n 34, 214.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

(i) Intentional conduct

“The sports official’s liability will vary with his or her conduct. Clearly, where a sports official intentionally influences the outcome of a game, whether the referee’s act is done in cooperation with or by direction of a third party [Hoyzer case], or is performed autonomously, criminal as well as civil liability should be imposed.”<sup>259</sup> This could mean referees who breach their officiating contract by intentionally influencing the result of a match should be personally liable for damages.<sup>260</sup>

Referees should definitely be held personally liable for their actions and resulting damages if they act intentionally as in cases of bad faith, fraud or corruption. As shown above, it is justified to hold referees liable if they fix matches. Referees do not need protection in the case of match-fixing. Match officials who act intentionally know that their acting is malpractice, that they breach their duties, so it is justified that they have to pay damages to the concerned parties such as the participants of the sporting contest. The main argument against liability of sports officials is that the relation of remuneration and risk of liability is disproportionate. The payment of referees is not very high in relation to the damages that may occur. This argument does not work for match officials who act intentionally. They know the effect of their conduct and intentionally breach the rules and their duties and know that they will harm the participants and that they could occur monetary harm. The consequences are foreseeable for match officials. Because of this referees have to be held liable for the action in an intentional conduct.

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<sup>259</sup> Lewis and Forbes above n 123, 706.

<sup>260</sup> Ibid.



(ii) Unintentional conduct

Unintentional conduct is more common. What should the standard of care be for co-participants [referees] involved in a sporting event? Is it justified to exempt match officials from liability for acting in an unintentional manner?

The unique position of match officials has to be considered. Because of this the threshold of liability cannot be too high. Some people (courts and commentators) believe that the right standard is the negligent one.<sup>261</sup> “They base their opinion on the theory that the negligence standard is flexible enough to encompass the situations that occur in sports. These scholars do not take into account the competitive nature of sports nor that injuries occur in the heat of competition and should not be second guessed later by a judge or jury.”<sup>262</sup> While immunity is not the answer, the mere negligence standard does not sufficiently answer the question. The correct standard, as adopted by a majority of the jurisdictions faced with this issue, is the reckless disregard for the safety of others or intentional misconduct standard. “Recklessness is conduct that creates a higher degree of risk than that created by simple negligence.”<sup>263</sup> This standard takes into account the fact that injuries occur in contact sports, and the mere existence of an injury does not mean that there is tort liability. “The standard also protects participants in sporting events from reckless or intentional misconduct by establishing tort liability for those actions.”<sup>264</sup>

“An [sports] official should be subjected to liability only for those unintentional mistakes that are recklessly committed. An example of this type of reckless conduct would be where an official is not aware of an applicable rule or where an official

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<sup>261</sup> DeAngelis above n 194, 525.

<sup>262</sup> DeAngelis above n 194, 526.

<sup>263</sup> Yasser above n 200, 257.

<sup>264</sup> DeAngelis above n 194, 526.

misapplies a rule. Of course, in each case, injury must be proved.”<sup>265</sup> “Sports officials should be held liable for their actions if they act recklessly or with gross negligence. Limited liability legislation can stem the growing number of lawsuits filed against sports officials. While such lawsuits will still likely be filed by injured players, in states which have adopted this type of legislation, the higher burden of proof required in order for a player to prevail should cause that number to decrease. Insurance coverage should not be depended upon for protection of officials from the threat of litigation. Limited liability legislation, if properly drafted, will give sports officials the protection they need from the threat of litigation and frivolous lawsuits.”<sup>266</sup>

The special position of the referee imposes an obligation to reduce the risk of mistakes that may deprive a team of victory and any associated monetary benefits. This obligation should vary with the importance and stakes involved with each contest. An official should exercise more caution in games of substantial importance.<sup>267</sup>

The criterion for acting in a reckless or grossly negligent manner is an ordinary, reasonable and prudent person. The question asked is: How would a prudent person react / decide? This threshold of liability is justified, because on the one hand it guarantees that referees officiate in a proper manner, on the other hand the threshold is not too low so that the risk of liability is not too high. The risk of liability (risk of harm caused by wrong decisions) is therefore foreseeable for referees.

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<sup>265</sup> Lewis and Forbes above n 123, 695.

<sup>266</sup> Steven Ellinger “Limited Liability For Sports Officials” (1999) *The National Association Of Sports Officials* 1, 18.

<sup>267</sup> Feiner above n 34, 229.

(c) Result

To have liability only in cases where an injury takes place creates a legal uncertainty. However, legal uncertainty should be avoided. Professional leagues should establish a clear policy to clearly define thresholds as to whether referees are liable or not and what damages are payable.

As shown above, match officials should have immunity from liability for every wrong decision made. The limitation of liability should be for acting recklessly and with gross negligence. Referees are in a unique position; they have much responsibility, and the relation between remuneration and the risk of liability would be too high if there was liability for every wrong decision.

The position of referees creates an inherent possibility of damages. The referee has only a split-second to make important decisions. Sometimes this decision is wrong and this is the consequence when a human being makes decisions.<sup>268</sup> Because referees have often only split-seconds to make decisions it is not justified to hold them liable for wrong decisions made negligently.

On the other hand referees have to be held personally liable if they act intentionally.

Who else could be liable if referees have immunity for negligent actions?

***E Vicarious Liability / Respondeat superior***

The topic of the paper is liability of referees and to complete the picture of liability for referees' malpractice it is necessary to briefly consider the vicarious

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<sup>268</sup> Kuhn above n 39, 257.

liability of sports organisations because vicarious liability is another aspect of tort liability in professional sports.

As Todd states:<sup>269</sup>

Vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency – respondeat superior – the responsibility of the superior for the acts of their subordinate, or, in a broader sense, the responsibility of any third party that had the ‘right, ability or duty to control’ the activities of a violator.

The legal doctrine is to hold an employer liable for the torts committed by an employee.<sup>270</sup> This is a tool used by the jurisdiction to “fairly allocate the risk of on-the-job torts between employees and employers.”<sup>271</sup> In summary, vicarious liability is secondary liability. It means that the principal is held liable instead of the tortfeasor. Vicarious liability in tort law means that one person is held liable for the injury / harm caused by another person (vicarious agent).<sup>272</sup> Often it exists in the area of principals and agents, employees and employers, or employers and independent superiors.<sup>273</sup> The reason is that there is a legally relevant relationship between those parties. The superior uses the services of the subordinate to fulfil an obligation for someone else. In general a person can be held liable if there is the right, ability or duty to control the activities of the subordinate (vicarious agent).<sup>274</sup> The superior is responsible for the actions of the subordinate. “A person who fails to fulfil a duty to take care is responsible for that failure even if acting as an employee<sup>275</sup>, an agent<sup>276</sup>, or an

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<sup>269</sup> Todd above n 115, 888; Rogers above n 140, 879-880.

<sup>270</sup> Steven I. Rubin „The Vicarious Liability Of Professional Sports Teams For On-The-Field Assaults Committed By Their Players“ (1999) 1 Va J. Sports & L. 266, 268.

<sup>271</sup> Rubin above n 270, 288.

<sup>272</sup> Weir above n 142, 104; Palandt above n 224, section 831.

<sup>273</sup> Kuhn above n 39, 234.

<sup>274</sup> Todd above n 115, 888.

<sup>275</sup> Yullie v B & B Fisheries (Leigh) Ltd [1958] 2 Lloyd's Rep 596.

<sup>276</sup> S v Attorney-General [2003] 3 NZLR 450 (CA).

independent contractor.”<sup>277</sup> The employer will usually be liable when an employee is negligent in the course of carrying out his or her duties. In some circumstances the employer will be liable for the negligence of an independent contractor.

There is a test to distinguish an independent contractor from an employee.<sup>278</sup> The definition of employee or agent is that someone is employed to render services and his or her acting is controlled or could be controlled by another person, most times by the employer or principal. In relation to an employer and employee it is possible to sue an employer for damages of the employee if the damages occurred or are caused in the course of employment. “Employers are vicariously liable, under the respondeat superior doctrine, for negligent acts or omissions by the employees in course of employment.”<sup>279</sup> The employer or principal is liable when the tortfeasor acts in his or her position as employee or agent, and the damage occurred within the scope of his or her employment.<sup>280</sup> The English jurisdiction held the employer liable even when the employee acts intentionally, and the damage happens in the scope of his or her employment.<sup>281</sup> A temporal and spacious connection between action of the tortfeasor and the service for the employer is essential.<sup>282</sup> It has to be a common action of the employee, so that it is foreseeable for the employer.<sup>283</sup>

The question arises also whether the relation between sports governing bodies and referees is comparable to the relation between an employer and an employee and

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<sup>277</sup> *Grieve v Brown* [1926] SC 787.

<sup>278</sup> *Horne v The King* [1947] NZLR 538.

<sup>279</sup> Nolo law Employer Liability for an Employee’s Bad Act at <http://www.nolo.com/article.cfm/ObjectID/315FE0E9-D6B6-479B-A8005EED919D3D5F/catID/5DF453C7-2180-4035-AD75304A83BC6543/111/259/183/ART/> (accessed 8 September 2008).

<sup>280</sup> Weir above n 142, 109; Rogers above n 140, 892-894; Deakin, Johnston and Markesinis above n 145, 666; Kuhn above n 39, 235.

<sup>281</sup> Kuhn above n 39, 235; Deakin, Johnston and Markesinis above n 145, 678; Rogers above n 140, 892.

<sup>282</sup> Rogers above n 140, 884; Kuhn above n 39, 235; Deakin, Johnston and Markesinis above n 145, 665.

<sup>283</sup> Deakin, Johnston and Markesinis above n 145, 677-678; Kuhn above n 39, 235.

as a consequence referees are vicarious agents of sports organisations, and the sports organisations therefore liable for malpractice of referees.

Can the mistakes of referees be attributed to the sports governing body? To answer this, it is necessary to determine if referees are vicarious agents of their sports governing bodies.

### *1 Position of referees – employee or contractor?*

The nature of the relationship between the tortfeasor and the person who should be vicariously liable is essential because vicarious liability derives from particular relationships.<sup>284</sup> The most important one is the relationship of employer and employee. It is important, to determine whether referees are employees or independent contractors, to answer the question whether the sport's governing body is vicariously liable for referees' malpractice. "Where an independent contractor commits a tort in the course of his or her employment, the principal [sports governing body] will not usually incur liability."<sup>285</sup> There is a test<sup>286</sup> to distinguish between employees and independent contractors. The criteria are if the person engaged herself or himself to perform services and to do those services on her or his own account.<sup>287</sup> The person is an independent contractor if the question could be answered with yes; if the answer is no, the performing person is an employee. Other indicators to distinguish between independent contractors and employees are: who has the financial risk during the work, if the performer uses their own equipment, if the performer is controlled or free, and if the performer is free in choosing the hours of work.

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<sup>284</sup> Weir above n 142, 108; Todd above n 115, 889-891.

<sup>285</sup> Todd above n 115, 891.

<sup>286</sup> The test is also known as "economic reality" test.

<sup>287</sup> Todd above n 115, 892.

In general, referees are not employed by sports governing bodies, they are usually independent contractors. The job of a referee is often only a part-time job and as a consequence, referees are not dependent on the sports governing body. An independent contractor is one who is generally not bound to obey orders of the employer, so is free to act as he or she thinks fit within the terms of the contract.<sup>288</sup> Referees are bound by the advice of the sports governing bodies but they are “free” in their decision-making on the pitch. Referees have the sole authority to supervise the game. Their game-related decisions are not alterable, the decisions are final. The sports organisations only have control of referees before and after the game. They cannot influence referees during the game (supervision of referees), referees have the sole authority on the court. Because of this referees are not employees, they are independent contractors. However, referees work for the sports governing bodies to fulfil obligations of the sports governing bodies to their participants.<sup>289</sup>

Referees have a special position. They act to fulfil an obligation for the sport organisation to enforce the laws of the game and ensure a fair and safe course of the game. They are independent in their decision-making on the pitch. The decisions made by referees are, only to a limited extent, reviewable. This might be problematic regarding their position as a vicarious agent.<sup>290</sup> A vicarious agent is the person that is used by the principal to fulfil obligations and is subjected to the sports governing body. A vicarious agent is bound by the instructions of the principal (sports governing body). Nevertheless, the independent position does not exclude the referee as vicarious agent.

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<sup>288</sup> The Laws of New Zealand, Negligence: Part II Recognised Duties of Care: (12) Liability for negligence of others.

<sup>289</sup> Kuhn above n 39, 115; Todd above n 115, 892.

<sup>290</sup> Kuhn above n 39, 115; Todd above n 115, 892.

Sports governing bodies use referees to fulfil obligations regarding their participants. They have the possibility to develop and control referees who officiate in international tournaments. As shown above, both FIFA and IRB have referee panels which are responsible for developing and selecting referees for international tournaments. Because of this they have the possibility to influence match officials. They can have an indirect effect on match officials. Because they are responsible for organising the tournament, and ensuring a fair and safe course of the tournament and for the games and selection procedure of referees, they have enough control and the right, ability or duty to control the activities of the match official.<sup>291</sup> It does not matter that referees have the sole authority on the pitch and make final decisions, because the sports organisations could change the rules to have more influence on referees or the decision-making process during a game. Furthermore they can influence the match officials before and after games. When sports governing bodies decide that referees should have the sole authority during the game and that sports governing bodies cannot overrule decisions made by referees, they have to accept the consequences. However, it can be said that sports governing bodies have the possibility to have greater control of referees than they do at the moment.

Referees are in a similar position to employees and can be seen as vicarious agents. The main argument is that referees act for sports organisations to fulfil responsibilities in regard to the participants. Sports governing bodies have enough influence on referees to justify referees as vicarious agents; they are responsible for the development of match officials and choose the referees who officiate at the international tournaments. The sports organisation carries the responsibility of supervision of a game and has an inherent duty and obligation to the players and to

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<sup>291</sup> Todd above n 115, 888.



the referee. Because the referee works as an agent or contractor for the sports governing body, the malpractice of referees could to be attributed to the sports governing bodies regarding to vicarious liability. The required relationship for vicarious liability is existent.

## 2 *Liability of the sports governing body*

Now it is clarified that referees are in general independent contractors, but that they have a comparable position to employees, because of the subordination to sports governing bodies, the question arises whether the sports governing body is liable for the malpractice of referees?

The sports governing body makes the rules of the game (non-judicial) and referees apply these rules. Referees are “employed” by the sports governing body, so the organisation is responsible for referees. The basis for a claim in terms of vicarious liability is that there is a connection between referees and sports governing bodies. As shown above the position of match officials is a special one but comparable to those of employees. Referees could be said to act as vicarious agents of the sports governing bodies. The jurisdiction today is that an employer is generally held vicariously liable for all employees’ acts, whether negligent or intentional, that take place in the course of employment.<sup>292</sup> To determine whether the employee acts in course of the employment there is a “scope of employment” test.<sup>293</sup> That means that there has to be a connection between the employment and the unauthorised action.

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<sup>292</sup> Rubin above n 270, 278.

<sup>293</sup> Todd above n 115, 897; Rubin above n 270, 278.

Referees act to fulfil the duties of sports governing bodies so that the duties referees fulfil are also duties of sports governing bodies. Because of this it also has to be looked at the duties of match officials.

Duties of referees:

- a sports official's duty is to render correct decisions
- enforce the laws of the game
- maintain the order of the game
- ensure the safety of players (except game-inherent injuries)

These are duties of match officials that are transferred from sports governing bodies to them. As a consequence, sports governing bodies are responsible for ensuring that referees are in good shape and are well developed to ensure that they enforce the laws of the game in the best way. "The [participants] competitors trust that the performance of the referee will not affect the outcome of the game."<sup>294</sup> "Where there is a great deal at stake, the participants will expect the official to exercise more caution to avoid errors."<sup>295</sup>

#### (a) Breach of duty

A breach of a duty is generally defined as a failure to perform a duty or "failure to exercise that care which a reasonable [prudent person] would exercise under similar circumstances."<sup>296</sup>

As demonstrated above, it is hard to define when a duty is breached by match officials. Nevertheless, not all wrong decisions made by referees are necessarily

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<sup>294</sup> Lewis and Forbes above n 123, 695.

<sup>295</sup> Ibid.

<sup>296</sup> Loomis above n 15, 94.

breaching a duty. A wrong sinbining decision, a wrongly given goal or a wrongly given penalty are decisions which influence the game result more than other decisions.

As shown above, the sports governing bodies are liable for the wrong decisions made by referees if the wrong decisions happened in the course of employment (“scope of employment” test). The question that needs to be answered is if the malpractice happens in the course of employment.

- Wembley goal: The referee gave a goal which was not a goal. The match official consulted the linesmen to figure out whether a goal was scored or not. As shown above, it was difficult, even with video material, to make sure if it was a goal or not. As referee, it can happen that there occurs a wrong goal decision from time to time. It is not extraordinary so that this malpractice happens in the course of the “employment” and consequently the sports governing body (FIFA) is liable for the mistake.
- God’s hand: The referee gave a goal which was not a regular goal which adheres to the laws of the game. The referee gave a goal although Maradona used his hand to score it. The referee did not consult the linesmen to ask for his opinion, he just gave the goal. It was not clear to see if Maradona used his hand to score. This is a mistake that can happen when referees officiate a match; even under the circumstances that he did not consult the linesmen. Consequently the wrong decision by the referee happened in course of the employment. The sports governing body (FIFA) is liable for this mistake.
- Soccer World Cup 2006: The referee gave a questionable penalty in overtime. Other referees point out that especially in overtime it is important

to be vigilant about penalties. They should give them only if it is very clear that there is a penalty decision. The referee did not follow the basic practice of referees. Even if the referee did not follow the basic practice of referees, this wrong decision occurred in the course of employment. Because “employers” (sports governing bodies) are even liable if the “employee” (referee) acts intentionally, it is not a reason to exempt the sports governing body (FIFA) from liability in this case.

- Rugby World Cup 2007: The referee did not punish a forward pass and gave a questionable sinbining. The match official did not punish a forward pass which leads to the match winning try for the French team. The referee was nowhere to be seen, and following Thornburn’s statement touch judges are not allowed to interfere in forward passes. Furthermore, Wayne Barnes gave a questionable sinbining, and there was a lack of penalties in this match. These were all mistaken decisions which could have affected the outcome of the game. All these wrong decisions happened in course of employment. Consequently, the sports governing body (IRB) is liable for the wrong decisions.

As discussed above in the chapter about liability of referees caused by their wrong decisions, these are mistakes which could impact the outcome of the game. Consequently, aggrieved parties such as teams or players have a claim against the sports governing bodies.

### *3 Interim Conclusion*

The sports governing body has some liability for some incorrect referee decisions.

The relationship between sports governing bodies and match officials can be compared to the one of employee and employer, even if referees in general are independent contractors. Because of the comparable situation, the doctrine of respondeat superior (vicarious liability) is applicable. That means that sports governing bodies are liable unless referees act not in course of employment.

Immunity of referees is not a reason for exclusion. Vicarious liability is still possible when the person who acts in malpractice is covered by immunity.<sup>297</sup> “Participants and their principals should not be allowed to stand without a remedy simply because governing sports bodies do not want to incur additional expense.”<sup>298</sup> Hence sports governing bodies cannot use the implied immunity of referees to avoid liability.

Finally a change of law is essential. The business of sport is now big business and consequently the law has to be adapted to meet the needs of all sectors of that big business enterprise. Because it is possible that monetary harm can occur, someone has to be held liable for mistakes that can be avoidable.

#### ***IV SOLUTIONS***

The following section illustrates solutions for sports governing bodies to avoid wrong referee decisions. Sports governing bodies have to follow special duties to ensure a good and fair game. The participants have a right to expect that sports governing bodies will do what they can, to ensure that the laws of the game are

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<sup>297</sup> In Germany the government is held liable for malpractice of judges or government officials although they have absolute or qualified immunity. Palandt *Kommentar zum Buergerlichen Gesetzbuch* section 839. Section 839 of the German Civil Code in connection with Article 34 of the German Basic Constitutional Law.

<sup>298</sup> Lewis and Forbes above n 123, 697.

enforced correctly. They are liable for decisions made by referees that are based on gross negligence and were avoidable by sports governing bodies. This is especially evident in situations, for example, where sports governing bodies could have used video evidence or other officials. "With the advent of video technology, however, this position is in need of re-examination. It is now possible to review the events of a sports contest as clearly as the attending official. Video technology allows the reviewer to slow down the action to obtain a more clinical analysis of what transpired. This technology can be used not only as an evidentiary tool designed to determine the facts of the controversial play, but also to overturn the decision of the on-field official. Therefore, video technology should be utilized to avoid officiating errors which can lead to significant monetary loss."<sup>299</sup>

The following solutions or possibilities to support the decision-making of referees need to be explored. The possibilities of supporting decisions made by referees are important because the solutions imply indirectly a duty of sports governing bodies to do their best to ensure a fair game and consequently a fair game result.

#### ***A Method of resolution***

The rules act as the basis for controlling a game, and the added use of technical modification improves the ability of officials to ensure those rules. Both help referees to make the right decision and technical modifications allow the limitation of possible wrong decisions.

The changes or modifications have to be made by FIFA and IRB as they are the umbrella organisations of the sport of soccer and rugby. The subordinate national

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<sup>299</sup> Lewis and Forbes above n 123, 705-706.

unions have to follow these rules, as uniform rule interpretation is essential. However, the rules or modifications should not impact the usual conception of the game. There has to be a balance found between the economic interest of the participants and maintaining the order of the game.

The game-related decisions have to be accurately realized. There has to be at least a minimum standard in the decision-making process. Examples will illustrate this idea. If the FIFA changed the laws of the game and did not use linesmen anymore there would be discussions and most people would say that this decision is not in accordance with today's standards. Another example is if the International Association of Athletics Federation (IAAF) in track and field decided to use a manual stopwatch again. There would likely be mutual consent that this would not meet with technical standards of today.<sup>300</sup>

The modifications and changes have to be in accordance with the state of the scientific and technical knowledge and furthermore the cost for introducing technology needs to be proportional. There again, the special character of the sport has to be borne in mind. The flow of the game should not be interrupted too often and the breaks should not be too long. Sports such as ice hockey and rugby show that it is possible to introduce a goal camera or a technical match official without changing the special character of the game.

The questions for introducing modifications are:

- Does the technique help referees to make the right decisions?
- Is the state of the scientific and technical knowledge safe enough to use it?

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<sup>300</sup> Kathrin Lauterbach "Der Videobeweis" (2001) Seminar Universitaet Bayreuth.

- Are the costs for introducing the technique proportional for clubs and / or sports governing bodies?
- When applied, do the modifications keep the specific character of the sport and are the breaks not too long?

If all questions could be answered with yes there is an obligation for sports governing bodies to set up technical modifications. This might be a solution which maintains the concept as regards the claim of a fair game and the specific characteristics of the sport.

Video support such as a technical match official would, not influence the game directly. It would be in the background and available to be used so the flow of the game would not change. Furthermore it has to be regarded that even FIFA referees are of the opinion that support by video evidence or a technical match official is necessary.<sup>301</sup> In addition, participants such as clubs and players, require some protection. Change is essential. There are no reasons not to introduce modifications such as video referees. There are other options available to avoid wrong referee decisions. An immediate control and correction of game-related decisions during the game is possible. Concrete basic conditions have to be introduced and examined.

The limitation would be if judges overruled decisions immediately after the game.<sup>302</sup>

# *1 Determination of essential limitation for repeal of decisions based on facts*

One criterion for immediate corrections could be if it is a serious wrong decision. Serious wrong decisions are, for example, a wrong goal, try, or penalty

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<sup>301</sup> Ibid.

<sup>302</sup> Pfister above n 76, 473.



decisions because they influence the score directly.<sup>303</sup> If a change is possible it should be a direct control of these decisions. However, throw-ins, offside or foul decisions should not be controlled in this way. These would lead to too many interruptions of the game. The referee should not interrupt the game too often otherwise the attractiveness of the game would be lost. As shown above, the impact of the wrong decision is the key element that determines repeal. Wrong throw-in decisions do not affect the game as much as a wrong penalty decisions. If a goal is not given it changes the result of a game. A correction of these wrong decisions is justified. Criteria such as current game score and time left also need to be considered. A wrong goal decision with the score 4 – 0 in the 70th minute would not decide the game. However, the wrong given goal with a score of 3 - 2 in overtime would influence the game, even if the final result is 4 – 2 or 5 – 2.

## 2 *Reconsideration and correction of decisions based on facts during the game*

Nowadays because of the technical opportunities, it is possible to check game-related referee decisions immediately during the course of the game. Only special decisions made by referees should be checkable, such as goal or penalty decisions, because correction of other decisions would change the specific character of the sport.

## 3 *Options for referees*

### (a) Technical options

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<sup>303</sup> Kathrin Lauterbach “Der Videobeweis” (2001) Seminar Universitaet Bayreuth.

(i) TV records

In the United States it is possible for referees in the NHL to use video evidence to control and check their decisions. There is a monitor where the referee has the option to watch the essential scene. All records of all used video cameras in the stadium are available for this.<sup>304</sup> The use of such a system would be imaginable also to use for competitions such as a world cup. Another option is to use a technical match official who is watching the game on the screen and the referee on the pitch has the option to consult him or her for questionable decisions. They could be in contact by radio. The second alternative would have the advantage that someone else could see the game and might see more than the referee.<sup>305</sup>

(ii) Goal camera

The goal camera is already used in ice-hockey. The “goal umpire” answers only whether the ball has been over the goal line or not. The cost-benefit analysis is fine; the installation of a goal camera is not too expensive and the results can help to guarantee a fair tournament. The course of the game is not interrupted for too long because a quick decision can be made by the “goal umpire.” Opponents of this solution will say that a goal camera is only needed in 1 out of 1000 cases, but still then it avoids wrong decisions and helps referees to make right decisions.

(b) Second referee

In many other sports, such as basketball, handball and ice hockey, it is common to have two referees on the field. In basketball there are three referees on the field.

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<sup>304</sup> Ibid.

<sup>305</sup> Feiner above n 34, 230.

The game field in rugby and soccer is larger, so it would make sense to let two or three referees officiate matches. A second referee would have the advantage that they can share the responsibility and have a better view on the field. Two heads are better than one. The referees would have special areas on the field that they are responsible for, so they could concentrate on a smaller area and would see more actions of the players. Furthermore it is an advantage that they would have different views on situations.

(c) Better development of referees

Sports governing bodies should ensure a well development for match officials. They should introduce training camps, and control referees performing in national tournaments. They should only choose well experienced match officials who can handle the considerable strain.

## ***V CONCLUDING STATEMENT***

Sport is becoming more and more popular and a huge amount of money is involved for many groups of people such as governing bodies, event organisers, promoters, clubs, broadcasters, sponsors, other commercial partners, agents and sportsmen and women.<sup>306</sup> Today many athletes are professionals working in often highly professional commercial operations. With the commercialisation of sport and its high public profile, there is a greater likelihood of risk, especially economic risk, and therefore a need for legal advice and certainty. Nowadays sport is a big business and consequently the law needs to adapt in this area. "Sports tort law is a small but

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<sup>306</sup> Lewis and Taylor above n 1, vii.

developing and challenging field which is changing through legislative and judicial definition.”<sup>307</sup>

Referee decisions might influence the outcome of the game, intentionally or negligently. Most match officials have the sole authority on the pitch and accordingly referees have much responsibility. The important position of referees is underlined by the final decisions they make. Independent of the law system, common or civil law, referee decisions are final and not checkable by courts. The specific character of sports makes it essential that immediate decisions are made. The laws of the game are in an unlegislated area and thus in general not revisable by ordinary courts. There is a broad court reluctance to interfere with the outcome of sports events. They argue that referees have specialist knowledge and are closer to the actual situation in games. The judiciary only overturn decisions if they are based on bad faith, fraud or corruption. However, the authority of sports governing bodies based on the private autonomy is limited by criminal and tort law. Every person has to be treated similarly according to criminal and tort law. Because of this the question whether match officials are liable according to tort law needs to be answered. “Personal liability should also attach where it can be shown that an official intentionally acted or refrained from acting, with the purpose of harming a team, or player, or with the purpose of affecting the contest’s outcome. If the official’s plan is carried out, and contest’s outcome is altered, then the official should be personal[ly] liable.”<sup>308</sup> “If a participant is successful in changing the outcome of a sports contest as a result of an officiating error, the official may not be liable.”<sup>309</sup>

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<sup>307</sup> Jay A. Urban “Sports Torts In Wisconsin” (1998) 8 Marq. Sports L. J. 365, 386.

<sup>308</sup> Lewis and Forbes above n 123, 708.

<sup>309</sup> Lewis and Forbes above n 123, 706.

“This same line of reasoning has been followed in not holding sports officials personally liable for monetary damages resulting from officiating mistakes. Both of these positions are based on the belief that a sports official’s immediate reactions and decisions warrant more credence than the remote observations of a court.”<sup>310</sup>

The liability of match officials varies with his or her conduct. “Clearly, where a sports official intentionally influences the outcome of a game, whether the referee’s act is done in cooperation with or by direction of a third party [Hoyzer case], or is performed autonomously, criminal as well as civil liability should be imposed.”<sup>311</sup> Match officials who intentionally influence the outcome of a game are personally liable for the damages which directly flow from the breach of the duty and his officiating contract.<sup>312</sup> There is no doubt that match officials should be held liable in the case of match-fixing. There is no reason to hold someone else liable for the conduct of referees who intentionally influence match results. They act intentionally to change game results and have to accept the consequences of their conduct. For the team that lose the game or is eliminated from the tournament there is monetary harm. The match official is responsible therefore and has to pay these damages. Sports governing bodies can only be held liable where they have an idea that the match official is involved in match fixing so that it is possible for them to avoid that.

Furthermore, sports officials are liable for their actions if they perform recklessly or with gross negligence. Referees are liable when they act with gross negligence. This gross negligence standard is flexible enough to regard the special circumstances of a competition. The standard ensures that referees do their best to provide a good performance, and the standard is not too low that referees are liable for

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<sup>310</sup> Ellinger above n 266, 18.

<sup>311</sup> Lewis and Forbes above n 123, 706.

<sup>312</sup> Ibid.

minor mistakes. However, the liability for match officials who influence the outcome of a game should not be without limit. “Specifically, an official should be subjected to liability only for those unintentional mistakes that are recklessly committed. An example of this type of reckless conduct would be where an official is not aware of an applicable rule or where an official misapplies a rule. Of course, in each case, injury must be proved.”<sup>313</sup> The limitation of liability would avoid the growing number of lawsuits against match officials. The high burden of proof would help the number to decrease. “Limited liability legislation, if properly drafted, will give sports officials the protection they need from the threat of litigation and frivolous lawsuits.”<sup>314</sup> Currently the risk of liability is in a grey area because it is not possible to determine exactly for every situation whether referees act with gross negligence or recklessness and so it is difficult to determine whether they are liable or not. There has to be a limitation. Match officials cannot be held liable for every pecuniary loss that happens to someone. The limits to liability for injured parties can be clearly prescribed and this would be foreseeable. “The imposition of liability on sports officials for obvious and gross officiating mistakes should be mandated. Liability on sports officials for mere and inconsequential errors in judgement, however, is not being proposed. Such potential liability would cause officials to hesitate and would seriously impede their ability to function properly. Furthermore, this liability might discourage many individuals from becoming sports officials.”<sup>315</sup> Instead, personal liability should attach where obvious and gross errors in rules administration lead to a demonstrable monetary injury. For example, an official would commit a gross error where a clear penalty is provided for by the rules, but the official administers an improper penalty. This error would also be obvious if evidence showed that a reasonable and prudent

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<sup>313</sup> Lewis and Forbes above n 123, 707.

<sup>314</sup> Ellinger above n 266, 18.

<sup>315</sup> Lewis and Forbes above n 123, 708.

referee under the same circumstances could not differ as to what properly should have been done.”<sup>316</sup>

The threshold of liability for referees has to be high, otherwise nobody would like officiating matches anymore. Referees have a special position and make their decisions often in a split-second. These circumstances have to be regarded. Both law systems, the common law and the privacy law, have persons who have privileged liability. Referees act as on field judges and have a comparable position to those of judges; there are many similarities in these positions. They are both decision-maker who are supposed to be independent and neutral. Because of this, a sports official immunity act has to be introduced. Professional leagues should establish a clear policy with clearly defined thresholds as to whether referees are liable or not and what damages are paid, because the position of referees creates an inherent possibility of damages.

An immunity act should – according to Lewis and Forbes – include a definition of sports officials and regulate under which circumstances referees should be held liable for their malpractice. This means in detail that match officials should not be held liable for minor mistakes that happen when they render their officiating services. They are not covered by the immunity act for gross negligence or intentional conduct.<sup>317</sup>

Sports officials are liable for mistakes caused from their intentional conduct. They are also liable for conduct which results in an obvious and gross error. However, the liability should be limited. “Sports officials typically perform in a pressurized and intense environment notwithstanding the possibility of liability for errors they make in

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<sup>316</sup> Ibid.

<sup>317</sup> See Appendix C.

their games. Their ability to exercise independent judgement should not be unduly infringed by threat of suit.” To decrease lawsuits legislation made by sports governing bodies should guarantee sports officials qualified immunity. This means that they are not liable for minor mistakes they make. “Where immunity is granted because of failure to meet the jurisdictional requirement, organized athletic conferences and leagues should handle officiating errors, incompetence or negligence, as well as general disputes arising from sports contests.”<sup>318</sup>

Because sports governing bodies are responsible for the laws of the game, organising tournaments and the allocation and development of match officials, they have special obligations. The main duty of sports governing bodies is to ensure a fair course of a tournament. The outcome of this duty is that they have to adapt the laws of the game to a special standard. If they do not do that they could be held liable for wrong referee decision. Nevertheless, they are not liable for every wrong referee decisions. Match officials are personally liable if they act intentionally. In addition to the liability of referees, sports governing bodies are liable to pay compensation. The reason is that match officials are often not able to pay this huge amount of damages and sports governing bodies are able to do so. It would not be justified if the plaintiff did not get compensation for the suffered damages.

Sports governing bodies have to fulfil special duties to ensure a good game. They should be held liable for decisions made by referees that are based on gross negligence and were avoidable by sports governing bodies; for example, for wrong referee decisions that could be avoided by using video evidence or something similar. That guaranteed that sports governing bodies are doing everything to ensure a fair course of a game. The sports governing bodies have the obligation to adapt the rules

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<sup>318</sup> Lewis and Forbes above n 123, 708.



to a new technology standard from time to time. The nature of sport has changed, much money is at stake and many people have their business in sport. This is the reason why sports governing bodies have to adapt the laws of the game to fulfil their obligation.

Notwithstanding, there should be a limitation for liability of sports governing bodies or match officials, they cannot be held liable for every pecuniary loss that happens to someone; the liability would be too wide. One limitation is the foreseeability of the aggrieved party. As shown above in the case of *Bain v. Gillipsie* it is essential that the injured party is protected by the breached duty.

Sports governing bodies should establish regulations for lost games, and the damages or monetary harm from these lost games. It should be possible to calculate the monetary harm, for clubs and for players. Table for calculating damages should be established. It is useful to make regulations for the calculation of pecuniary loss. As demonstrated above, no regulations are available to calculate the monetary harm that can occur because of a lost game.

## *APPENDIX*

### *A Structure of FIFA*

FIFA has three bodies: the congress, the executive committee, the general secretary.

- The FIFA Congress is the most critical body of football's international governing body. The congress is the annual meeting of the FIFA members. They discuss about changes of statutes, new members and voting for the FIFA president. The Congress decides about new memberships of national federations. The Congress can pass changes to FIFA's by-laws.
- The executive committee is responsible for making arrangements for the World Cup, the rules of the game, and the disciplinary rules, and it decides which country will host the next world cup. The Committee is responsible for dates, locations, and the format of competitions, and it delegates agents to the IFAB meetings. The Executive Committee ratified the decisions made by the Standing Committees (Art. 34 to 54 of the FIFA Statutes).
- The General Secretary administers FIFA. The General Secretary is assisted by 25 Standing Committees and by the Disciplinary Committee and Appeal Committee, the two judicial bodies of FIFA. Examples of the Standing Committee are: Organising Committee for the FIFA World Cup, Referees Committee, Legal Committee, Appeal Committee, and Dispute Resolution Chamber.

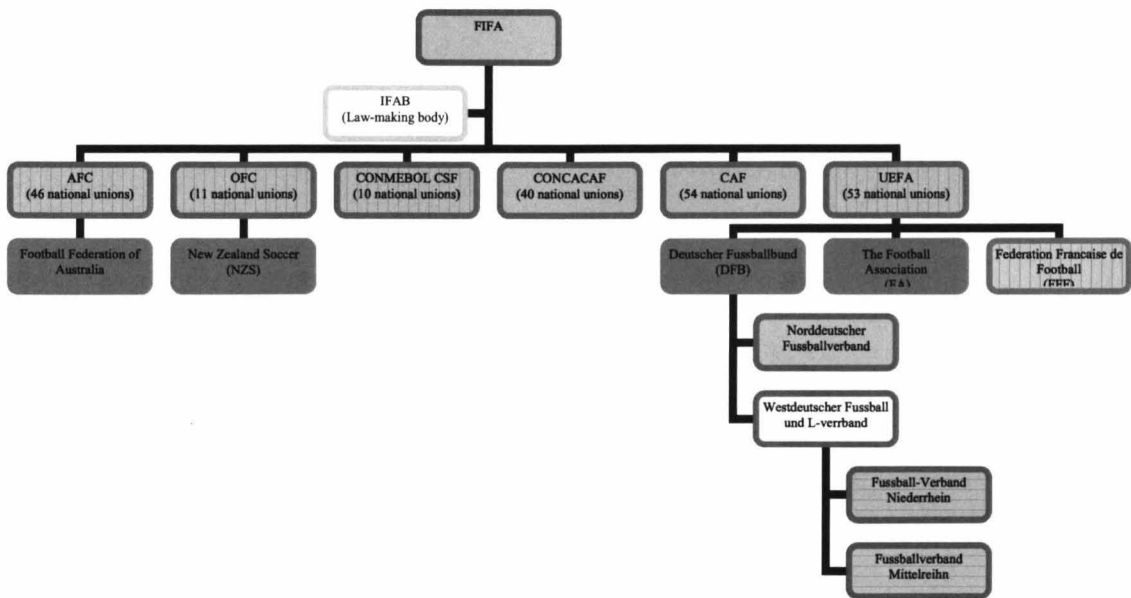
Furthermore, there are the FIFA Statutes. This is the Constitution of football's international governing body. The statutes provide the basic laws for football.

The FIFA Referee Committee is part of the Standing Committee and the most important committee for referees. To examine the possible liability of match officials it is essential to know about the responsibilities of the FIFA Referee Committee.

Membership is an object of legal protection. Between the club and member is a fiduciary duty. What is the main point of the membership?

To have liability only in case groups where an injury takes place results in legal uncertainty. But legal uncertainty should be avoided.

**B     *Structure of the sport organisations in football***



*C Demonstrated is an example of a sports official immunity act*

The immunity act is applicable for sporting events involving an amount not less than one hundred thousands dollars (\$ 100,000):

(1) A sports official is not liable when he or she is rendering his or her officiating services in a competition and makes minor mistakes. Match officials have qualified immunity for minor mistakes that are inherent with the sport.

Provided, match officials are not immunized from suit under following circumstances:

(a) for gross negligence, reckless, wilful or intentional conduct that is designed to harm a team, participant, an institution, or a professional sports organisation represented by such a team or participant involved in a competition;<sup>319</sup>

(b) for conduct in violating of any criminal statute; or

(c) for conduct making up a breach of any contract between the sports official and (1) any sports governing body, or (2) any team, or participant or any institution represented by such team or participants; or

(d) conduct or performance which falls substantially below that expected of an ordinary, reasonably prudent sports official under similar circumstances.”<sup>320</sup>

(2) Definitions

(a) “Sports official” means referee, umpire, judge, arbiter, or any person contracted, employed, hired for compensation, or who renders officiating services in a professional sport competition.

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<sup>319</sup> Lewis and Forbes above n 117, 707.

<sup>320</sup> Ibid.

(b) “One is “officiating” when exercising independent judgement while performing in the capacity of a referee, umpire, judge, or neutral party engaged to resolve disputes, make decisions, or to assure compliance with the rules of the contest in question.”<sup>321</sup>

(c) Sports governing body shall mean organisations which are the international umbrella organisation for the special sport. This organisation has monopoly for the sports and is the main body of this kind of sports. The sports governing body is responsible for the laws of the game and the change of them, allocates the referees and organises tournaments.

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<sup>321</sup> Ibid.

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