

**VOLUNTARY ASSUMPTION OF RISK AS  
A DEFENCE, EXCLUDING DELICTUAL  
LIABILITY WITH REGARD TO  
SPORTS INJURIES**

*Hattingh v Roux* 2011 (5) SA 135 (WCC)\*

## 1 Introduction

In the case of sports injuries which occur in the ordinary course of the practice of sport, delictual liability may be excluded as a result of voluntary assumption of risk, also known as consent to the risk of injury (a ground of justification) which is embodied in the well-known maxim *volenti non fit iniuria* (*Hattingh v Roux* 2011 5 SA 135 (WCC) 141 hereinafter "*Hattingh*"; Prinsloo "Liability in Sport and Recreation" 1991 *TSAR* 42–43; and *Stoffberg v Elliott* 1923 (CPD) 148–149). There is no doubt of the risk of injury inherent in sport, and all participants such as players, coaches, referees, supervisors, managers or spectators are at risk. In order to exclude delictual liability based on a successful reliance of voluntary assumption of risk as a ground of justification, all the requirements for consent must be present. In *Hattingh*, the court had to decide *inter alia* whether the plaintiff (R) voluntarily assumed the risk of injury inherent in participating in a game of rugby. In this note, *Hattingh* is discussed with specific reference to the delictual elements of wrongfulness and fault, and the defence of voluntary assumption of risk. Reference is also made to other cases dealing with the defence.

## 2 Facts

R, a former school rugby player was severely injured by his opponent (A) during a scrum. It was alleged *inter alia* that R's injury "was caused by the breach of duty to care (*sic*), alternatively negligence, further alternatively deliberate action" of A (137D) who not only transgressed law 20.1(f) of the official laws of the game of rugby, but also "[i]n accordance with an illegal and highly dangerous manoeuvre, apparently coded "jack-knife" by the Stellenbosch team, forcibly placed his head in the incorrect channel of the scrum, as a result of which [A]'s head impacted directly and with force onto [R]'s neck, thereby causing the fracture to his neck" (137D–E). R instituted an action against A for the payment of compensation for damage allegedly suffered by R with regard to the neck injury. A denied the allegations underlying R's cause of action and further raised the defence of voluntary assumption of risk as a ground of justification alleging that R assumed the risk of injury involved in

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participating as a hooker in the rugby match (137H). At the start of the action, the coach of the Stellenbosch team, the principal of the Stellenbosch High School, as well as the MEC for High School Education of the Western Cape, were joined as co-defendants, but a settlement was reached resulting in the withdrawal of the claim against the co-defendants, ruling out the question of vicarious liability.

### 3 Decision

Fourie J (139H–I) identified that *in casu* the legal remedy would have to be found in the law of delict, and proceeded to decide upon firstly, whether the alleged rare and particularly dangerous manoeuvre called “jack-knife” was executed by player A (143F–155F). Secondly, if such a manoeuvre were executed, whether the conduct of player A was wrongful and whether the injured participant, R, was exposed to the normal and acceptable type of risk that a participant in a game of rugby would have voluntarily assumed (155F–157A). Thirdly, if such conduct was wrongful, whether player A was at fault, thus resulting in his being delictually liable for the harm caused to player R (157B).

The court was faced with two mutually destructive versions of what happened by R and his expert, on the one hand, and A and his experts on the other hand. R therefore had to prove, on a balance of probabilities, that his version was the more plausible one (146F–G). Medical reports as well as three well-known rugby experts (who testified at the hearing of the matter) confirmed that R’s injury was sustained upon engagement, but according to Dr Coetzee, may have been worsened by the scrum thereafter collapsing on R (148J–149A).

Fourie J (153F–G) took note of the argument that the execution of the alleged manoeuvre would not benefit A’s team, “as it would only cause the scrum to collapse and expose [A] to the risk of serious injury” but opined that the manoeuvre was most likely used in the scrum (the “main arena where sixteen forwards of two teams meet head-on in a contest of brute physical strength”) to show dominance. He (155F–157F) found after considering all the relevant evidence that A did execute the illegal and dangerous manoeuvre coded “jack-knife” which according to the experts and players is rarely encountered, dangerous and contrary to the laws and conventions of the game of rugby.

With regard to the defence of consent to the risk of injury, Fourie J (141F–H) briefly confirmed the requirements for consent as set out by Neethling and Potgieter (but referred to Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 92–94, instead of the more recent edition, Neethling and Potgieter *Neethling-Potgieter-Visser Law of Delict* 6ed (2010) 106–108, which was available. The later edition will be referred to from here on) that:

- “(a) Consent must be given freely or voluntarily.
- (b) The person giving the consent must be capable of volition.
- (c) The consenting person must have full knowledge of the nature and extent of the risk of possible prejudice.

- (d) The consenting party must also comprehend and understand the nature and extent of the harm or risk.
- (e) The person consenting must in fact subjectively consent to the prejudicial act. This consent has to be inferred from the proven facts.
- (f) The consent must be permitted by the legal order; in other words, it must not be *contra bonos mores*”.

This last requirement is of great importance and the courts at times have overlooked its significance. If consent in the form of voluntary assumption of risk is *contra bonos mores*, it cannot apply as a ground of justification but what may be relevant is to enquire and establish whether contributory intent may apply as a ground excluding fault.

Fourie J (141I–J) cited *Boshoff v Boshoff* (1987 (2) SA 694 (O)) as an example of voluntary assumption of risk in lawful sport which was not *contra bonos mores* and stated (139F–H):

“Rugby is a high-speed contact sport, so there will always be the risk of injury. The participants in a rugby game can expect to sustain injuries, even serious ones, in the normal course of a game ... and in particular the hookers ... find themselves in the most dangerous position when engaging in a scrum. It is well-known in the rugby world that serious neck injuries are frequently sustained by hookers while scrumming ... Notwithstanding this widely accepted inherent risk of injury, it would be legally offensive to deny an injured player a legal remedy in appropriate circumstances, merely because his injury has been sustained in a sporting contest such as a rugby game.”

The judge (157D–F) concluded:

“In view of the evidence as to the unexpected and dangerous nature of a manoeuvre of this kind, it will be immediately apparent that this defence cannot succeed ... It can therefore not be said that [R] participated in this game with full knowledge of the nature and extent of the risk of being injured by [A]’s execution of the ‘jack-knife’ manoeuvre. This is not the normal type of risk that a participant in a scrum would have consented to.”

Fourie J (156I–157J) found that the manoeuvre was extremely dangerous, unexpected and therefore unlawful with regard to the rules and conventions of the sport concerned, and “it would not have constituted conduct which rugby players would accept as part and parcel of the normal risks inherent in their participation in a game of rugby”.

The judge, with regard to delictual liability, found that an act was committed which was wrongful and intentional, thereby causing harm to R and gave judgment in favour of R (157).

## 4 Comment

### 4 1 *Legal principles relating to wrongfulness and fault*

Fourie J’s logical approach in determining wrongfulness first (155F–157B) and then fault is commendable, but according to the Supreme Court of Appeal, there is no hard and fast rule on whether to establish wrongfulness or fault first (see cases cited by Neethling and Potgieter *Delict* 123–124 fn 6; Loubser, Midgley, Mukheibir, Niesing and Perumal *The Law of Delict in South Africa*

(2010) 152 refer to *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) par 20; and see also *Hawekwa Youth Camp v Byrne* 2010 (6) SA 83 (SCA) 91). His reference (140F–141E) to the practical application of the *boni mores* that wrongfulness is constituted by the infringement of a subjective right *in casu* is also commendable (see Neethling and Potgieter *Delict* 44–46). The recent formulation of one variation of the test for wrongfulness in our law, namely that wrongfulness depends on whether it would be reasonable to hold the defendant liable (see, eg, *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) 468; *Le Roux v Dey* 2011 (3) SA 274 (CC) 315; and *Hawekwa Youth Camp v Byrne supra* 90–91), is controversial, subject to criticism and therefore not acceptable by Neethling and Potgieter (see Neethling and Potgieter *Delict* 78–82; and Neethling and Potgieter “Liability for an Omission: Control Over a Dangerous Object” 2011 *THRHR* 693–694).

Fourie J (142B) referred to *Santam Insurance Co Ltd v Vorster* (1973 (4) SA 764 (A) 780G–781H), where it was pointed out that “considerable obscurity surrounds the nature and extent of the proof required to establish a defence of consent. It was held that the view that such consent is to be inferred whenever a complainant had knowingly exposed himself or herself to danger, is too widely stated. On the other hand ... proof of an express or implied bargain, which connotes a bilateral consensus, places an unduly heavy onus on the defendant”. It is safe to state that with regard to the characteristics of consent, consent to (the risk of) injury is a unilateral (and therefore may be revoked), manifest legal act by the person who gives consent, express or implied, before the prejudicial conduct (Neethling and Potgieter *Delict* 104–105). Thus a communication, agreement, contract or “bargain” (see *Santam Insurance Co Ltd v Vorster supra* 780–781) between the prejudiced person and the actor is not necessary.

Turning to the element of fault, Fourie J (157B) found A’s actions intentional as opposed to negligent. He (142D) confirmed the two elements of intention, namely: direction of the will and consciousness of wrongfulness in that “a person acts intentionally if his or her will is directed at causing injury and he or she is conscious of the unlawfulness of such conduct”. Up to the decision of the Supreme Court of Appeal in *Le Roux v Dey* (2010 (4) SA 210 (SCA) 219–225) it was generally accepted, apart from certain well justified exceptions (see Neethling “Onregmatigheids-bewussyn as Element van *Animus Iniuriandi* by *Iniuria*” 2010 *Obiter* 703–706), that consciousness of wrongfulness is an element of intent. In *Dey* it was held that as far as *iniuria* is concerned, intention to injure (*animus iniuriandi*) as a “requirement generally does not require consciousness of wrongfulness” (*Le Roux v Dey supra* 224). However, since this decision was *obiter*, subject to criticism and in any case not confirmed by the Constitutional Court, (see Neethling 2010 *Obiter* 706–714) consciousness of wrongfulness is still generally accepted as an element of intention, also in instances of *iniuria* (see also Loubser *et al Delict* 108; Neethling and Potgieter *Delict* 128–129; and Mckerron *The Law of Delict* 7ed (1971) 47).

Fourie J agreed with Loubser (142F) that unlawfulness and fault “are mostly telescoped into one when the courts examine the reasonableness of

the defendant's conduct", however, the tests for wrongfulness, intention and negligence are rather distinct, specific and cannot (in a theoretically correct or practical sense) be combined. As mentioned with regard to wrongfulness what must be questioned is whether objectively viewed, the defendant's alleged manoeuvre is considered reasonable (and justifiable) according to the *boni mores*. Referring to intent, the test is subjective especially with regard to the element of consciousness of wrongfulness, whereas with regard to negligence as Fourie J (142D) correctly confirmed "there is negligence if a reasonable person in the circumstances would have foreseen the injury and would have taken steps to prevent the injury; and the defendant failed to take such steps" (see Neethling and Potgieter *Delict* 157–161 with regard to the distinction between wrongfulness and negligence). *In casu* the defendant's conduct was found to be intentional; therefore the role of "reasonableness" with regard to this form of fault is questionable as even an unreasonable belief on the part of the defendant that his conduct is lawful (when in fact it is wrongful) may exclude intent (see Neethling and Potgieter *Delict* 129).

Fourie J (139I–140E) also referred to the allegation that R's injury was caused by a "breach of duty of care" which "not only conflates the delictual elements of wrongfulness and culpability but unnecessarily introduces the concept". The "duty of care" doctrine is foreign to Roman-Dutch law (which forms the basis of our law of delict) and should be rejected (see Neethling and Potgieter *Delict* 152–154) as it is unnecessary and merely constitutes a roundabout way of establishing negligence. The doctrine further confuses the tests for wrongfulness and negligence, thereby undermining the theoretical foundations of our law of delict and leading to legal uncertainty (see Neethling and Potgieter *Delict* 153, especially fn 183). Fourie J (140C–E) explained with reference to *Hawekwa Youth Camp v Byrne* (2010 2 All SA 312 (SCA) par 21) that the concept of "breach of a legal duty is employed in cases where the conduct complained of manifests itself in an omission. The wrongfulness of the omission depends on the existence of a legal duty to act without negligence and the breach thereof by the defendant. It is ... unnecessary in a case such as the present ... to employ the concept of the breach of a legal duty (or duty of care)".

#### 4.2 Legal principles relating to voluntary assumption of risk

*Volenti non fit iniuria* is a maxim used to describe two forms of consent, that is, consent to injury and consent to the risk of injury (see generally *Waring and Gillow Ltd v Sherborne* 1904 TS 340 344; Neethling and Potgieter *Delict* 103 fn 498; Van der Walt and Midgley *Principles of Delict* 3ed (2005) 140; Boberg *The Law of Delict* Volume 1: Aquilian liability (1984) 724; Burchell *Principles of Delict* (1993) 68; and McKerron *Delict* 67). In practice, consent to a specific injury usually does not present any problems where the consent is freely and lawfully given by a person who has the legal capacity to give consent. Such consent justifies the conduct consented to, making the infliction of harm lawful. It is clearly a defence that negates wrongfulness (Boberg *Delict* 724). It is the application of the second form of consent, consent to the risk of injury or voluntary assumption of risk which is problematic and which was dealt with by most of the decided cases (see *Santam Insurance Co Ltd v*

*Vorster supra* 775; *Lampert v Hefer* 1955 2 SA 507 (A) 508; *Boberg Delict* 724; *McKerron Delict* 67; *Loubser et al Delict* 162; and Ahmed "The Defence of Contributory Intent (Voluntary Assumption of Risk)" 2010 *THRHR* 699). Although voluntary assumption of risk as a ground of justification is recognized in our law, it has been applied with great caution and circumspection (*Waring and Gillow Ltd v Sherborne* 1904 TS 344; *Santam Insurance Co Ltd v Vorster supra* 764; *cf Van Wyk v Thrills Incorporated (Pty) Ltd* 1978 2 SA 614 (A) 616; *Clark v Welsh* 1975 4 SA 469 (W); and *Van der Walt and Midgley Delict* 140). This is evident from the fact that, since 1928, as far as could be ascertained, the defence of *volenti non fit iniuria* as a ground of justification has only been successfully invoked in *Card v Sparg* (1984 4 SA 667 (E)), *Boshoff v Boshoff (supra)* and *Maartens v Pope* (1992 4 SA 883 (N)). *Van der Walt and Midgley (Delict* 145 fn 4) refer to these three cases as well as *Lampert v Hefer (supra)*, as instances where the defence of *volenti non fit iniuria* has been successfully raised (since 1928). However, with regard to the latter case this defence was rather concerned with contributory intent (see Ahmed 2010 *THRHR* 700). Also in *Castell v De Greef* (1994 4 SA 408 (C)) it seems that by implication the defence of *volenti non fit iniuria* succeeded, at least as far as certain claims were concerned.

As mentioned before, voluntary assumption of risk may imply consent to the risk of injury (a ground of justification excluding delictual liability) applicable in instances where all the requirements of consent are met, or depending on the circumstances may constitute "contributory intent", a ground excluding fault in the form of negligence in instances where the voluntary assumption of risk cannot serve as a ground of justification because it does not meet all the requirements for a valid consent (see Neethling and Potgieter *Delict* 171; and Ahmed 2010 *THRHR* 699). This occurs where the plaintiff voluntarily assumes the risk of harm by "intentionally" exposing him- or herself to a risk of harm knowing full well the consequences of doing so and simultaneously acts unreasonably (not towards the achievement of a lawful goal). It must be noted that, technically speaking, a person cannot have intent in respect of himself. Intent can logically only exist when wrongfulness is already present. After all, there can be no question of consciousness of wrongfulness before wrongfulness is established (see Neethling and Potgieter *Delict* 43 fn 55, 123 fn 6). But since a person cannot act wrongfully in respect of himself, it is legally impossible for him to be conscious of the wrongfulness of his conduct and therefore to have intent in respect of himself. Contributory intent is thus not the same as intent but a term used to determine the extent of the plaintiff's fault by a method which is analogous to that of determining intent (*cf Van der Walt and Midgley Delict* 241). Contributory intent can take different forms (direct, indirect or *dolus eventualis*) but with regard to voluntary assumption of risk in the form of contributory intent, *dolus eventualis* is the most common form of intent referred to. *Dolus eventualis* is present where the wrongdoer foresees the possibility that he may cause a particular result (while not desiring it), but reconciles him- or herself to that possible consequence and performs the act which results in the said consequence (Neethling and Potgieter *Delict* 127).

The courts are reluctant to recognize contributory intent as a separate and distinct defence. Some leading academics are uncertain of whether it applies

as a separate ground of justification which negates wrongfulness or whether it may serve as a ground excluding fault (see Ahmed 2010 *THRHR* 700–701). In spite of this the principle of a conscious undertaking of an unreasonable risk by the plaintiff cancelling negligence on the part of the defendant is embedded in our common law and accepted by the courts (see *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) 418; *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) 512–513; Neethling and Potgieter *Delict* 171; Van der Walt and Midgley *Delict* 244; and Ahmed 2010 *THRHR* 701).

#### 4.3 Case law dealing with voluntary assumption of risk inherent in sport

Schwietering (“Insake: *Lampert v Hefer* 1955 2 SA 507 (A)” 1957 *THRHR* 141), Neethling and Potgieter (*Delict* 171), Knobel (“Vrywillige Aanvaarding van Risiko: Toestemming tot Benadeling, Medewerkende Skuld en die *Actio de Pauperie: Maartens v Pope* 1992 4 SA 883 (N)” 1993 *THRHR* 303–304) and Pretorius (*Medewerkende Opset as ’n Verweer/Absolute Verweer vir Deliktuele Aanspreeklikheid* (Unpublished LLM dissertation University of Cape Town 1977) 135) all acknowledge the preferred approach of taking special cognisance of the important requirement that consent must not be *contra bonos mores*, and point out that if the consent is rendered invalid due to the *boni mores* requirement then contributory intent as a form of fault may be relevant. Neethling and Potgieter further (*Delict* 104 fn 502) provide the correct (practical) approach almost by a process of elimination. They state that, instead of being confused with all the terminology, the courts should establish whether a ground of justification is applicable where wrongfulness is excluded, if not whether contributory intent of the plaintiff (as a form of fault) cancels the defendant’s negligence, and if no ground of justification is applicable, or if contributory intent cannot be imputed to the plaintiff, then contributory negligence may be applicable. The only case in which voluntary assumption of risk in the form of consent to the risk of injury in participating in lawful sport was successful was *Boshoff v Boshoff*. However, as will be illustrated with regard to some of the cases discussed below (in order of older to later decisions), where voluntary assumption of risk as a ground of justification is not applicable, voluntary assumption of risk in the form of contributory intent could have been applicable.

*Madelbaum v Bekker* (1927 CPD 375): In this early case the plaintiff and defendant participated in a mock battle. During the mock attack the defendant approached the plaintiff and deliberately shot a blank cartridge at him, which resulted in an injury to the plaintiff’s eye and face. The court decided in favour of the plaintiff on the grounds that the voluntary assumption of risk by the plaintiff did not cover the risk of being shot with a gun loaded with a blank cartridge. (See Prinsloo 1991 *TSAR* 45. Prinsloo cites this case as an example where the courts correctly illustrated that consent was only valid for the risks of injuries inherent in a particular game). Apart from this, voluntary assumption of risk as a ground of justification would in any event fail, as consent to the risk of such serious bodily injury would have been *contra bonos mores*. Contributory intent as a ground excluding fault on the part of the defendant could be applicable if it could be proved that the plaintiff voluntarily

assumed the risk of harm by intentionally exposing himself to such risk of harm inherent in mock battles, knowing full well the consequences of doing so and, simultaneously, acting consciously unreasonably. However, in this case it seems though (as was the case in *Hattingh*) that contributory fault (whether in the form of intention or negligence) on the part of the plaintiff would not be applicable due to the deliberate and intentional conduct on the part of the defendant.

*Broom v Administrator, Natal* (1966 3 SA 505 (D)): In this case the first plaintiff, a 16-year old school boy had taken part in a game of baseball (rounders or softball). The game was supervised by an assistant master of a school. An old cricket stump without a metal tip was used as a bat. At the time of the incident the first plaintiff was fourth in the queue of an informal line approximately twenty feet away from the batsman. When the batsman hit the ball, the stump left his hand, travelled through the air and then hit the first plaintiff's head behind his right ear, injuring him (*supra* 505). A claim was instituted against the Administrator (the assistant master's employer) on the ground of the latter's alleged negligence. The defences of contributory negligence, voluntary assumption of risk and a denial in respect of negligence were initially pleaded, but later the defences of contributory negligence and voluntary assumption of risk were abandoned (*supra* 507H–508E). As a result of this Harcourt J only had to establish whether the assistant master was negligent and found that he was not (*supra* 524F–525F).

Owing to the fact that the batsman deliberately let go of the bat, in the manner that he did, it is unlikely that the game was played according to the rules. Consent to the risk of injury is only valid if a participant acts according to the rules of the game and if the injuries sustained by a participant result from reasonable sports conduct (Prinsloo 1991 *TSAR* 43). Nevertheless, if consent to the risk of injury is rendered invalid, voluntary assumption of risk as a form of intent may be relevant as a ground excluding negligence.

*Rousseau v Viljoen* (1970 3 SA 413 (C)): The plaintiff, a flag marshal on a midget-car race track was injured when the defendant's midget car left the track for no apparent reason (while it was under his control and while he was in a position to bring the car to a stop), headed towards the plaintiff and injured him. The defendant alleged that the plaintiff, by "standing in the position in which he was while acting as a flag marshal, voluntarily and knowingly accepted the risk of injury and accordingly could not recover damages" (*Rousseau v Viljoen supra* 414C–D). The court held that even though the plaintiff was a flag marshal, it did not relieve the defendant of the "duty of care" in relation to him and that the defendant was therefore negligent. In regard to the defence of voluntary assumption of risk, the court held, in light of the evidence that, while the sport did involve some risk, it was not one particularly dangerous to life and limb and that therefore the defence was not applicable (*Rousseau v Viljoen supra* 413H).

Van Winsen J held (*Rousseau v Viljoen supra* 417F) that the defendant had to prove that the "plaintiff understood that there was a chance (*ie*, a risk) of occurrence of those events which occasioned him the injury of which he complains and that he accepted that risk", and further stated (*Rousseau v Viljoen supra* 419A) that "there is clearly also some risk involved to officials



who, by the assistance they give to competitors, can also be said to be indirectly participating in midget-car racing ... [T]he sport of midget-car racing, while it does involve some risk, is not one particularly dangerous to life or limb”.

Van Winsen J (*Rousseau v Viljoen supra* 420G–421D) concluded:

“[A] flag marshal standing at approximately point 3 is exposed to some risks of cars unavoidably coming off the track infield because of, for instance, a collision between one or more cars, or in the execution of a manoeuvre in an endeavour to evade such a collision.

The risk of [the events giving rise to the plaintiff’s injury] ... clearly falls without the ambit of the risk [described in the previous paragraph] ... There is no evidence that conduct of this nature occurs – even exceptionally – in the conduct of midget car racing ... On this ground alone I think the doctrine of voluntary acceptance of risk affords no shield to a defendant against the usual legal consequences of his negligence.”

Van Winsen J no doubt was correct in concluding that voluntary assumption of risk as a ground of justification was not applicable in this case, especially when tested against the *boni mores* requirement, but contributory intent as a ground excluding fault may have been applicable if the plaintiff subjectively foresaw the possibility of being hit by a midget racing-car and reconciled himself with that possibility while simultaneously acting consciously unreasonably. Unfortunately this is an example of one of the cases where our courts have referred to the doctrine of “duty of care” which should be disregarded in our law.

*Clark v Welsh* (1975 4 All SA 124 (W)): During a game of golf, the plaintiff (Mrs Clark) was struck in the eye by a golf ball hit at a wide angle by the defendant. As a result of the serious injury to her eye it had to be removed. It was alleged that the injury was caused by the negligence of the defendant who teed off at right angles and failed to warn the plaintiff not to stand in the line of her shot. One of the defences raised by the defendant was *volenti non fit iniuria*. Van Reenen AJ (*Clark v Welsh supra* 125), however, stated that the defence was not applicable in this case for the reason that the defendant did not establish “the concluding, as between himself and the plaintiff, of a ‘bargain whereby the plaintiff gave up his right of action for negligence’”.

Van Reenen AJ referred to the judgment of *Santam Insurance Co Ltd v Vorster (supra)* that “a bargain could be inferred from the evidence” and that it was important to establish the plaintiff’s foresight of the risk of injury, but rejected this approach and preferred to look for the solution in British, Canadian and Australian cases (*Clark v Welsh supra* 126). She referred at length to the well-known English case of *Wooldridge v Sumner* (1962 2 All ER 978 (CA); and *Clark v Welsh supra* 125) and held that in this case the correct approach was to decide whether or not the defendant was negligent and concluded that she did not act negligently.

Loubser *et al* (*Delict* 164) are of the view that the court could “also have argued that the injury was caused lawfully because it was reasonable to cause such injury in the normal course of the game”. It is submitted that the theoretically correct approach in this case should have been to consider voluntary assumption of risk as a ground of justification as it seems that all the

requirements would have been met, including the requirement that such consent must not be *contra bonos mores*. There is no reason why the defence should not have succeeded in this case as it did in the case of *Boshoff v Boshoff*. It was not necessary for the court to consider negligence and in any case, the “bargain theory” used in English Law as mentioned by Van Reenen AJ above was rejected by Ogilvie Thompson CJ in *Santam Insurance Co Ltd v Vorster* (*supra* 780–881). Therefore there was no valid reason why the defence of *volenti non fit iniuria* should not have been applicable.

*Van Wyk v Thrills Incorporated (Pty) Ltd* (1978 2 SA 614 (A)): in this case the plaintiff (deceased’s widow) sued the promoter of a “hot-rod” motor race for damages on the ground that the promoter failed to provide proper protection for the safety of members of the public who attended the race meeting. Her husband, a spectator, was killed instantly when the entrance gate used for cars sprang open and hit him. The court *a quo* found on the evidence that the promoter had not failed to take the necessary precautions as far as safety of the public was concerned and that the widow had failed to discharge the *onus* on her proving that the respondent had been negligent. The widow then appealed. On appeal the parties in a pre-trial conference had agreed on the following issues that had to be decided upon: (i) whether the promoter was negligent in relation to persons in the position of the deceased at the time of the accident; and (ii) whether the deceased had voluntarily assumed the risk of harm which exempted the promoter from any liability flowing from any “duty of care” owed by the defendant to the deceased (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 619C–E).

According to the evidence, the track was adequately protected but there was a gate (which enabled participants to drive in and out) at which a couple of accidents had occurred. As a result of the prior accidents steps were taken to strengthen the gate with a welded flange. Evidence was also led that the gate was mechanically reinforced so that it would not spring open in the event of a collision. Nevertheless, on this occasion the gate sprang open for inexplicable reasons when it was hit by a car (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 615B).

Klopper AJA (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 619H) acknowledged that “hot-rod” racing was a dangerous sport which drew tremendous crowds and stated that:

“It is also clear from the evidence that the deceased regularly attended these ‘hot rod’ races and on the day in question he took it upon himself to assist two Black employees who attended to the gate, to open and close the gate. In fact he was making a nuisance of himself to such an extent that one of the Black employees went to the witness Samons, one of the officials, to request him to tell the deceased to go away from the gate as he was hindering them. Samons thereupon went up to the deceased and asked him please to come away from the gate as it was dangerous and that he had seen many accidents. Deceased merely replied ‘What me, I’ll never die.’ Samons then shrugged his shoulders and walked away.” (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 620B–D)

Just after the deceased had uttered these words one of the cars came crashing over the railings which resulted in a pile up, and another car involved in the pile up angled out and crashed into the gate. It apparently hit the hinge post and flung the gate open towards the outside, where the deceased was

standing and he was killed instantaneously (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 620E).

The court also pointed out that, in addition to the precautions at the gate, several warnings were given to spectators that “hot rod” racing is a dangerous sport. They were informed that they attend these races at their own risk. These warnings were issued in several forms, for instance, on a large warning sign at the entrance to the stadium, on the admission ticket, on the programme, on notice boards and verbally over the loudspeaker system.

Klopper AJA (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 622D–F) held (upon lack of expert evidence led on what effect a collision with the hinge post on the flange, even when strongly welded, could have had) that it was impossible to determine why the flange came off or the reason for the gate opening on this occasion while it had withstood repeated knocks over the past seven years. He (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 623F–H) further stated:

“The necessity for not cordoning off the gate was influenced by the fact that the ordinary spectator would not venture close to the barrier or the gate because, not only was it dangerous to do so, but according to the evidence, the closer one gets to the barrier gate the less one is able to see the race. In any event it is obvious that no such barrier would have prevented the deceased from going up to the gate.”

The court concluded (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 623–624) that the promoter did not fail to take the necessary precautions as far as the safety of the public was concerned and that the widow had failed to discharge the *onus* resting upon her of proving that the respondent was negligent. Therefore the court found it unnecessary to decide the issues raised by the plea of *volenti non fit iniuria*. The appeal was dismissed.

In this case voluntary assumption of risk as a ground of justification would have failed due to the requirement that the consent must not be *contra bonos mores*, as one cannot consent to death. It has, however, been suggested by Prinsloo (1991 *TSAR* 52) that in that instance any possible negligence on the part of the promoter would have been cancelled by the contributory intent of the deceased. The deceased spectator was aware of the danger of standing near the gate and was further warned of the danger, but deliberately and voluntarily exposed himself to the risk of harm. Nevertheless, it is questionable whether contributory intent would have been applicable. *Dolus eventualis* was probably not present since the deceased did state that “I’ll never die” (*Van Wyk v Thrills Incorporated (Pty) Ltd supra* 620C–D). Therefore, in all probability he did not subjectively foresee such a possibility and did not reconcile himself with it. Rather *luxuria* or conscious negligence could have been present (see Neethling and Potgieter *Delict* 128).

*Boshoff v Boshoff* (1987 (2) SA 694 (O)): The plaintiff, an advocate, took part in a squash game where he was hit by his opponent’s (his own brother) racket and injured. As a result of the injuries sustained, the plaintiff sued the opponent. The defence of consent was raised (*Boshoff v Boshoff supra* 695).

The court held (*Boshoff v Boshoff supra* 695H–J) that it was not *contra bonos mores* for a person capable of forming an “intention to consent” during

lawful sport or physical recreation, to sustain reasonable physical injuries or to run the risk of sustaining injuries as long as the conduct of the fellow players had been reasonable. Such injuries are reasonably to be expected in a social game of squash between amateurs, and the general standard of reasonableness would not require such a consequence to be regarded as a delict. Although the plaintiff had not expressly admitted that he had accepted the risk of injury, the court found that, had the plaintiff been asked before the game whether he had consented to the risk of injury, he would have answered in the affirmative. It was further held that it was the "will" of the plaintiff to run the risk of injury. In this regard, the concept of "will" refers to "legal will" or acceptance of injury or the risk of injury. Thus a *bona fide* sportsman, who causes injury to a fellow player in a reasonable manner in the normal course of a game, may rely on the defence of consent. The defence is based on the fact that the players know, accept and consent to the risk of injury in the normal course of the game. However, Kotze J mentioned (*Boshoff v Boshoff supra* 702) that if the injury was deliberately intended by the defendant, or if he was reckless and acted in disregard of all safety of others so that it is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused.

This case is a classic example of where voluntary assumption of risk as a ground of justification is applicable, as all the requirements of a valid consent have been met including the requirement that the consent must not be *contra bonos mores*.

Turning to the facts of *Hattingh*, the court was correct in finding that voluntary assumption of risk as a ground of justification was not applicable as the consent was invalid, not only due to the absence of the requirement of knowledge of the nature and extent of the risk of being injured by the unexpected "jack-knife" manoeuvre, but also due to the fact that a participant could not consent to or run the risk of sustaining serious injuries where the conduct of the fellow players was unlawful. Such consent would be *contra bonos mores*, unlawful and therefore invalid.

Voluntary assumption of risk as a form of contributory intent, being applied as a ground excluding fault would also not be applicable as *in casu* the defendant's actions were found to be intentional and not merely negligent. As reiterated, contributory intent is applicable as a ground cancelling negligence.

Consequently, if the plaintiff did not consent to the risk of injury and if contributory intent could not be attributed to the plaintiff then it might be relevant to establish whether the plaintiff was in fact contributory negligent in respect of his damage, because he acted in a manner different from that of the reasonable person. *In casu*, however, this was not raised and even if it were, taking into account that the defendant was found to have acted intentionally, the defence of contributory negligence would not have resulted in the plaintiff receiving a reduction in his award for damages as in instances where the defendant intentionally had caused damage to a negligent plaintiff, the Apportionment of Damages Act 34 of 1956 would not be applicable (see Du Bois, Bradfield, Himonga, Hutchison, Lehmann, Le Roux, Paleker, Pope, Van der Merwe and Visser *Wille's Principles of South African Law* 9ed (2007)

1148). This is in line with the rule emanating from our common law that a plea of contributory negligence (on the part of the plaintiff) cannot be raised in instances where the defendant intentionally caused damage to the plaintiff (see *Pierce v Hau Mon* 1944 AD 175 198; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570; Neethling and Potgieter *Delict* 162 fn 228; and *cf* Kotze “Die Wet op Verdeling van Skadevergoeding, No. 34 van 1956” 1956 *THRHR* 149). It must be accepted that the statutory provisions of the Act do not change this principle (see *Wapnick v Durban City Garage supra* 418; McKerron *Delict* 297; Scott “Some Reflections on Section 1(1)(a) of the Apportionment of Damages Act 1956 and Contributory Intent” in Van der Westhuizen (ed) *Huldigingsbundel Paul van Warmelo* (1984) 176; and Neethling and Potgieter *Delict* 162 fn 229).

## 5 Conclusion

Whether the voluntary assumption of risk is considered “reasonable” in the normal course of the game as found in *Boshoff*, or not, as found in *Hattingh*, the question of whether a player is exposed to an acceptable inherent risk of injury in a particular game, still falls under the umbrella of what is acceptable according to the *boni mores* yardstick as submitted by Strauss (“Bodily Injury and the Defence of Consent” 1964 *SALJ* 183–184). Judges should try and adopt the approach proposed by Neethling and Potgieter (see 420 above) when faced with the defence of voluntary assumption of risk, that is, to test the facts firstly against the requirement of consent, failing which, for contributory intent. If this also fails, to consider lastly contributory negligence as a defence. Consequently such defences must be pleaded.

Although *Boshoff* remains the *locus classicus* decision for voluntary assumption of risk in lawful sport, *Hattingh* has been hailed as a landmark ruling that could open the floodgates for civil claims against participants in any sport if the conduct of the injuring player goes beyond the rules of the game and is considered offensive and unlawful (See Nicholson “Shock Rugby Injury Ruling” <http://www.iol.co.za/news/crime-courts/shock-rugby-injury-ruling> (accessed 2012-02-16)).

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