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# Public Health Policy and Personal Responsibility in Sport - Competitive or Collaborative?

## **Abstract**

Public health policy is designed to offer a utilitarian approach to the management of public health issues. New developments in civil liability legislation support the move towards individuals accepting personal responsibility for their actions particularly in areas of sport and recreation. An examination of both reveals the potential for policy and law to clash when examined in light of the burgeoning obesity epidemic, where encouragement to engage in physical activity is viewed as a cornerstone to managing the associated health issues, but the risk of injury whilst doing so is high.

## **Keywords**

sport, public, health, policy

## PUBLIC HEALTH POLICY AND PERSONAL RESPONSIBILITY IN SPORT – COMPETITIVE OR COLLABORATIVE?

RUTH TOWNSEND\*

Public health policy is designed to offer a utilitarian approach to the management of public health issues. New developments in civil liability legislation support the move towards individuals accepting personal responsibility for their actions particularly in areas of sport and recreation. An examination of both reveals the potential for policy and law to clash when examined in light of the burgeoning obesity epidemic, where encouragement to engage in physical activity is viewed as a cornerstone to managing the associated health issues, but the risk of injury whilst doing so is high.

The common law, along with the legislature, has the power to create an environment in which people are able to live healthier lives. Some would argue that there even exists a legal and ethical duty for them to do so.<sup>1</sup> The nature of sport is that people are often injured. The 'insurance crisis' has meant that community sport and recreational organizations have had to implement risk management policy that takes account of risk of personal injury and public liability when sport and recreation is undertaken. With respect to obese or overweight participants in sport this risk is increased. From a public health perspective it would be agreed that laws that dissuade people from participating in sport should be avoided. How can a balance between the two be struck?

Public health law is utilitarian in nature. That is, its purpose is to offer protection for the community and provide solutions to health issues that are likely to be far reaching and have wide social and economic impacts.

Public health is primarily concerned with the health of the entire population, rather than the health of individuals. Its features include an emphasis on the promotion of health and the prevention of disease and disability...<sup>2</sup>

Obesity is one such health issue. Over the past 25 years, the proportion of the population that has become overweight or obese has risen almost 50%.<sup>3</sup> The cost to society is enormous both in economic and social terms.<sup>4</sup> There are a variety of measures that may assist in managing obesity, but the most effective weapon in the public health arsenal is without question, prevention.<sup>5</sup> Preventative health policy and implementation are required to be led from the front and promotes the ideal of 'community responsibility'.<sup>6</sup> Having the community working

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1 Mello, Rimm and Studdert, 'The McLawsuit: The fast food industry and legal accountability for obesity' (2003) 22 *Health Affairs* No 6.

2 Childress JF, Faden RR, Gaare RD, Gostin LO, Kahn J, Bonnie RJ, Kass NE, Mastroianni AC, Moreno JD, Nieburg P, 'Public health ethics: mapping the terrain' (2002) 30 *J Law Med Ethics* 170-8.

3 Reynolds C, 'Law and public health. Addressing obesity' (2004) 29:4 August *Alt LJ*.

4 Department of Health and Ageing (2002) About overweight and obesity. *Australian Government* at <http://www.health.gov.au/internet/wcms/publishing.nsf/content/health-pubhlth-strateg-hlthwt-obesity.htm> viewed May 2007; Bagaric, M and Erbacher, S (2005) Fat and the law: who should take the blame? *Journal of Law and Medicine* 12 at 324-5 suggest that the associated health costs are close to A\$3 billion per year.

5 Ingrid Wickelgren, 'Obesity: How big a problem?' 280 *Science*, Issue 5368.

6 Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) [*Woodhouse Report*].

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together to help prevent health risks from developing is the cornerstone of public health policy. Despite this, it has been argued by the current Federal Health Minister, Tony Abbott, that responsibility for obesity lies not so much with the community as it does with the individual.<sup>7</sup>

Paternalistic intervention versus the notion of personal responsibility is a common theme expounded by many in the obesity debate.<sup>8</sup> However, research supports the view that there are many factors that contribute to obesity that go beyond the scope of the individual. These include the environment where the community lives and works, genetic factors and levels of education.<sup>9</sup> The commercialization of sport has led to sponsorship from well known corporations keen to cash in on the wide exposure that both amateur and professional sports can provide. Even at the local children's football club, rewards for good sportsmanship or skilled play can be and are provided by groups like McDonald's. With the recent controversy over the role that fast food advertising and marketing to children plays in the obesity debate, the inclusion of fast food sponsorship in children's sport should also be examined. A recent litigation<sup>10</sup> of McDonald's in the US based on an accusation that the company had caused obesity in the plaintiff, highlights the way in which society is slowly coming to view these businesses and its association with this public health menace. Obesity is as much a condition of poverty as it is of anything else<sup>11</sup> and those who are most at risk are those who are least able to defend themselves against such well resourced and targeted promotions as those offered up by the wealthy, well equipped fast food companies. Reynolds points out that,

People are more likely to exercise personal responsibility if they're not expected to swim against a current of advertising and promotion.<sup>12</sup>

Just as there was in the tobacco debate, it is suggested that there needs to be policy and legislative frameworks established to assist in guiding the community through this public health crisis.<sup>13</sup> It has been acknowledged that the areas in which the government can assist includes regulating advertising and marketing of fast food to children, creating healthy living environments and promoting physical activity and recreation.<sup>14</sup>

Polls suggest that broadly-speaking the electorate believes that if the government is not prepared to intervene to regulate advertising for children then it should, at the least,

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<sup>7</sup> Ticky Fullerton's 'Four Corners' interview with Tony Abbott MP (2005) on the subject of childhood obesity in Australia <<http://www.abc.net.au/4corners/content/2005/s1480656.htm>> at May 2007.

<sup>8</sup> R Armstrong, 'Obesity, law and personal responsibility' (2007) 20 *Medical Journal of Australia* 186 and M Bagaric and S Erbacher, 'Fat and the law: who should take the blame?' (2005) 12 *Journal of Law and Medicine* 324-5.

<sup>9</sup> Kim, S and Popkin, B (2006) 35 'Commentary: Understanding the epidemiology of overweight and obesity – a real global public health concern' *International Journal of Epidemiology* 60-67.

<sup>10</sup> *Pelman v McDonald's Corp* 237 F Supp 2d 512, 519-20 (2003) see Mello, Rimm and Studdert, 'The McLawsuit: The fast food industry and legal accountability for obesity' (2003) 22 No 6 *Health Affairs*. No. 6; M Bagaric and S Erbacher S, 'Fat and the law: who should take the blame?' (2005) 12 *Journal of Law and Medicine* 324-5.

<sup>11</sup> Manual Pena and Jorge Bacolla, (ND) *Obesity and poverty: a new public health challenge*. Scientific publication 576. Pan American Health Organisation. Adam Drewnowski, S E Specter (2004) Poverty and obesity: the role of energy density and energy costs. *The American Journal of Clinical Nutrition*, Vol 79, No 1. Drewnowski and Specter state that the highest rates of obesity occur among population groups with the highest poverty rates and the least education.

<sup>12</sup> Cited by Armstrong, R (2007) Obesity, law and personal responsibility. *Medical Journal of Australia*. 186 (1) 20.

<sup>13</sup> Dietz, W, Bland, M, Gortmaker, S, Molloy, M and Schmid, T (2002) Policy tools for the childhood obesity epidemic. *The journal of law, medicine and ethics*. Supp Vol 30:3, Fall.

<sup>14</sup> Reynolds, C. (2004) Law and public health. Addressing obesity. *Alt. LJ* Vol. 29:4 Aug.

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encourage young people into sport and physical activity programs.<sup>15</sup> To this end, the government has endeavoured to launch some federal programs like the Health Active Australia Community and Schools Program.<sup>16</sup> This program falls into the preventative health category. In addition, community sport and recreation groups form part of the front line public health response to this epidemic.<sup>17</sup> In order for them to better address the problem, it requires an examination of ways in which those organisations can best be supported. Government promotion and funding provides one avenue but it is insufficient on its own. Another method is via legislation. Previously, tort law led these community organizations to face financial and operational difficulties, but recent law reform is attempting to balance the scales. The question is, has it gone too far?

## CIVIL LIABILITY

In the early 1970s, during the Whitlam years, the government commissioned Owen Woodhouse, a Justice of the New Zealand High Court, to head a Royal Commission to examine the law of compensation for personal injuries. The report recommended that there should be a single system of accident insurance, regardless of fault, with compensation paid from a fund sponsored by levies on employers and motorists.<sup>18</sup>

The Woodhouse Report integrate[d] personal-injury law with social welfare principles, paying attention to both sides of the equation...<sup>19</sup>

Importantly, Woodhouse recognised that injuries sustained through accidents were often the result of a complex series of events that, through social analysis could be seen to include multiple causes and agents. He said;

Strictly personal choices are not the ultimate building blocks of the universe, but are always socially embedded. Collective action is more than the sum of its parts. It follows that responsibility for accidents is not completely reduced to private individuals and their discrete choices, but assumes parallel lines of responsibility for groups, networks, organisations, corporations and government agencies ... Their success depends on social co-ordination, not just assertions of personal choices.<sup>20</sup>

Gaskins went on to analyse Woodhouse's propositions further:

Prevention ... requires careful attention to environmental design, public education, group interaction, organisational cultures and political coordination. Any modern policy of accident prevention that does not consider these strategies will miss the important health and safety challenges of the coming century.<sup>21</sup>

Woodhouse essentially espoused the view that deterrence was not a sufficient remedy for personal injury management. He instead stated that the most promising model of injury

<sup>15</sup> Brownell, K (2005) The chronicling of obesity; growing awareness of its social, economic and political contexts. *Journal of Health, Politics and Law*. Vol 30. No. 5

<sup>16</sup> See <http://www.healthyactive.gov.au/> viewed May 2007

<sup>17</sup> Dietz W, Bland M, Gortmaker S, Molloy M and Schmid T, (2002) Policy tools for the childhood obesity epidemic (2002) 30:3 *The Journal of Law, Medicine and Ethics*. See also Victorian Minister for Sport and Recreation Justin Madden: 'Our grassroots sports clubs are at the frontline in our fight against childhood obesity as well as building stronger, healthier communities.' Media Release 7 October 7 2005  
<[http://www.legislation.vic.gov.au/domino/Web\\_Notes/newmedia.nsf/b0222c68d27626e2ca256c8c001a3d2d/d2d8c57103e12a08ca2570960001ee86!OpenDocument](http://www.legislation.vic.gov.au/domino/Web_Notes/newmedia.nsf/b0222c68d27626e2ca256c8c001a3d2d/d2d8c57103e12a08ca2570960001ee86!OpenDocument)> at May 2007.

<sup>18</sup> This system has operated successfully in New Zealand for over 30 years.

<sup>19</sup> Gaskins, R (2000) Recalling the future of ACC. *Victoria university of Wellington law review* 17

<sup>20</sup> Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (Government Printer, Wellington, 1967) [*Woodhouse Report*].

<sup>21</sup> Gaskins R, 'Recalling the future of ACC' (2000) *Victoria University of Wellington Law Review* 17.

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prevention rested on public health principles. He called for a coordinated response to health and safety issues and acceptance of 'community responsibility.'<sup>22</sup> Woodhouse effectively supported the utilitarian approach to personal injury and thus countenanced the philosophy of public health policy in tort law.

By the late 1990's, changes were afoot with a distinct move away from the values of community responsibility and paternalism and a shift towards 'risk-choice'<sup>23</sup> and self-responsibility.<sup>24</sup> In 2001, the High Court held that councils do not owe a duty of care to pedestrians who trip on an uneven footpath.<sup>25</sup> There were a string of negligence actions that were linked with council play equipment and other recreational areas.<sup>26</sup> This resulted in many local councils removing play equipment and restricting access to recreational areas in an attempt to limit litigation.<sup>27</sup> In *Agar v Hyde*<sup>28</sup> the High Court determined that no duty of care was owed to two men who sustained spinal injuries whilst playing rugby. The Court stated that the plaintiffs were freely consenting adults who chose to participate in a game which held an obvious element of danger. They could not reasonably expect to hold anyone other than themselves to blame for their injuries.

A similar decision was arrived at in *Woods v Multi-Sport Holdings Pty Ltd*.<sup>29</sup> The maxim, *volenti non fit injuria* (the voluntary assumption of risk of injury), was applied. By 2002, most states had introduced Civil Liability legislation<sup>30</sup> which incorporated this maxim and placed a certain onus of responsibility on the individual when participating in recreational activities. These laws were introduced in an attempt to return accountability to individuals for undertaking activities that were of known risk. Harold Luntz commented: 'No longer does the Woodhouse call for "community responsibility" resonate among politicians and the public'.<sup>31</sup>

Ironically, Justice David Ipp, the author of the *Report* that led to the reforms suggests that personal responsibility legislation is used to reduce social welfare and diminish government

<sup>22</sup> Ibid.

<sup>23</sup> McMurdo, M (2006) *Dangerous liaisons with the civil liability act 2003* (Qld). Address to the lexisnexis professional development conference. Viewed May 2007.  
<<http://www.courts.qld.gov.au/publications/articles/speeches/2006/mcmurdo260406.pdf>>

<sup>24</sup> K Burns, 'It's just not cricket: The High Court, sport and legislative facts' (2002) 10 *Torts Law Journal* 1.

<sup>25</sup> *Ghantous v Hawkesbury City Council* [2001] HCA 29 at [6].

<sup>26</sup> L Saleh and K Murray, 'Time runs out: Community anger as insurance crisis worsens' *Daily Telegraph* (11 June 2002) 1, 8; *Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn* [2005] HCA 31 <<http://www.austlii.edu.au/au/cases/cth/HCA/2005/31.html>>; see also Yvonne LM Helps and Sophie C Pointer, (2006) 'Child injury due to falls from playground equipment' Australia 2002-04 *Australian Institute of Health and Welfare* Canberra; W Watson, J Ozanne-Smith and J Lough, (2000) Consumer product-related injuries to children *Monash University Accident Research Centre* (2000) <<http://www.monash.edu.au/muarc/reports/muarc168.html> viewed May 2007>.

<sup>27</sup> P Kirkwood, (2001) 'A blaming and claiming society' ABCTV Compass program. Viewed at <http://www.abc.net.au/compass.s425412.htm>. In this program, Dr Michael Booth, a researcher from the New Children's Hospital, Westmead, stated that the removal of access to these recreational activities were contributing to childhood obesity.

<sup>28</sup> (2000) 201 CLR 552.

<sup>29</sup> (2002) 208 CLR 460.

<sup>30</sup> *Civil Liability Act 2002* (NSW), *Civil Liability Act 2003* (Qld); *Wrongs (Liability And Damages for Personal Injury) Act 2002* (SA); *Recreational Services (limitation of liability) Act 2002* (SA); *Civil law (wrongs) Act 2002* (ACT); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas).

<sup>31</sup> H Luntz, 'Looking Back at Accident Compensation; an Australian Perspective' [2003] *Victoria University of Wellington Law Review* 16.

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programs on health, education and equal opportunity.<sup>32</sup> As a result of the new laws personal injury claims fell.<sup>33</sup> The *Civil Liability Act*<sup>34</sup> sought to categorise levels of risk in sport or recreation<sup>35</sup> and determine an associated level of personal responsibility with the corresponding level of risk.<sup>36</sup> The legislation resulted in fewer cases being filed<sup>37</sup> leaving the Act virtually untested with unknown implications for plaintiffs seeking compensation for injury.

However, in 2006 two cases went to the New South Wales Court of Appeal that related to recreational activities, injuries and liability. In *Fallas v Mourlas*<sup>38</sup> the Court heard of two friends who had been participating in a weekend shooting party hunting kangaroos. During this expedition, Fallas accidentally shot Mourlas in the leg. Mourlas sued and was successful in the first instance with the only issue considered on appeal the provision in s 5L of the Act, which essentially asked whether or not shooting was considered a 'dangerous recreational activity' and whether an 'obvious risk materialised' that resulted in the damage. If so, then no liability for harm could be made out. In a 2:1 decision, the Court dismissed the appeal. Justice Ipp determined that the activity was dangerous and Mr Mourlas was engaged in it. Justice Tobias concurred. Justice Basten dissented, suggesting that it was not established that amateurs shooting kangaroos at night ran a significant risk of injury and therefore this activity could not be deemed to have been a 'dangerous recreational activity'. Justice Basten determined that finding 'significant risk' would be assuming that the outcome of such a risk eventuating would be catastrophic; would be drawn from a statistical analysis or would depend upon examining the particular circumstances of the case. Because 'catastrophic' was not written into the Act, the first basis of determination was not applied and because the other methods of determination were not raised, then they also did not apply.<sup>39</sup> As such, the question of 'significant risk' could not be determined. Basten did make the point that 'significant risk of harm' does not extend to significant risk of **any** harm for to do so would classify many 'safe' sports that do incur a high number of relatively minor injuries as 'dangerous recreational activities'.<sup>40</sup>

In deciding whether the risk involved was 'obvious' – which in effect amounts to an examination of reasonable foreseeability and causation - Justice Ipp determined that the harm

<sup>32</sup> D Ipp, 'Taking responsibility' *Quadrant* 13-19 September 2004. This view is supported by the likes of sociologist and philosopher Michel Foucault who suggested that health is a tool utilised by the government as a tool of control known as 'biopolitics'. See *History of Sexuality* Vol 1.

<sup>33</sup> EW Wright, (2006) *National Trends in Personal Injury Litigation: Before and After Ipp* (2006, Law Council of Australia). This report showed that claim rates had fallen nationally by 60% in 2004-05.

<sup>34</sup> NSW (2002).

<sup>35</sup> Section 5K defines 'recreational activity' as 'any sport (whether or not it is organised) and any activity engaged in for enjoyment, relaxation or leisure and any activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in the activity for enjoyment, relaxation or leisure.'

<sup>36</sup> Division 4 – Assumption of risk. 'Section 5F Meaning of 'obvious risk' – 'obvious risk' to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person' which includes matters of common knowledge, it can be obvious even if there is a low probability of it occurring and it can be obvious even if it is not visible or conspicuous. Section 5K defines "'dangerous recreational activity' as a recreational activity that involves a significant risk of physical harm.'

<sup>37</sup> EW Wright, (2006) *National Trends in Personal Injury Litigation: Before and After Ipp* (2006, Law Council of Australia). This Report showed that claim rates had fallen nationally by 60% in 2004-05. [2006] NSWCA 32.

<sup>38</sup> [2006] NSWCA 32.

<sup>39</sup> With due respect to Justice Basten, it is difficult indeed to understand how this particular recreational activity could not be seen to involve a significant risk of physical harm no matter how the term 'significant risk' was defined.

<sup>40</sup> *Fallas v Mourlas* [2006] NSWCA 32, 131 (Basten J).

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that befell Mr Mourlas was so extreme as to not constitute an obvious risk as defined by the Act. Justice Basten concurred. Justice Tobias, however, stated that a reasonable person should have, on the balance of probabilities, been aware that it was likely that such an accident could have occurred and as such the risk was obvious. Essentially, Tobias' decision highlights that the court will consider the severity of an injury sustained by a plaintiff and the likelihood, or probability of that injury occurring in the circumstances. By determining risk of physical injury based on probability and severity of harm, then only significant injuries would be litigated.

In *Falvo v Australian Oztag Sports Association*<sup>41</sup> Justice Ipp suggested that a 'dangerous recreational activity' could not mean a sport like Oztag which was designed to minimize risk of injury and that any risk associated with the sport was unlikely to be significant.<sup>42</sup> Ipp J suggested in *Fallas* that when determining whether an activity was dangerous or not, objective facts such as time, place, competence, age, sobriety, equipment and weather should all be considered.<sup>43</sup> However, as there have been only two cases to significantly examine the terminology, it is possible that it may be argued in the future that 'significant risk of harm' extends to so called 'safe' sports that have a high probability of injury associated with them. Given that Justice Basten determined that kangaroo shooting was *not* a 'dangerous activity', any interpretation of the legislation in the future may be possible.

## OBESITY AND INJURY

Much evidence supports the view that an effective tool against obesity is exercise and physical activity.<sup>44</sup> Leisure time physical activity along with dietary management can result in weight loss.<sup>45</sup> As public health policy, the recommendation of such is sound. Unfortunately, there is also much evidence to suggest that there is a high risk of an obese person becoming injured whilst participating in the physical activity that is necessary to counter weight gain.<sup>46</sup> Herein lies a dilemma - more exercise will lead to less obesity and obesity related disease but ultimately, exercise related injuries may negate these benefits.<sup>47</sup>

It is necessary from a public health perspective to encourage those who are overweight to become healthier. The cost of obesity in real terms includes an increased risk of diabetes, cardiac disease, renal failure, orthopaedic injury, related cancers and other detrimental health

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<sup>41</sup> [2006] NSWCA 17.

<sup>42</sup> *Ibid*, Ipp J, 30.

<sup>43</sup> Interestingly, McHugh and Callinan JJ both referred to statistical evidence in respect the likelihood or prevalence of injury in the sport involved in *Agar v Hyde*, above at n 27.

<sup>44</sup> LT Wier, GW Ayers, AS Jackson, AC Rossum, WS Carlos Poston and JP Foreyt, 'Determining The Amount of Physical Activity Needed for Long Term Weight Control' (2001) 25 *International Journal of Obesity* 613-621.

<sup>45</sup> King GA, Fitzhugh EC, Bassett DR, McLaughlin JE, Strath SJ, Swartz AM and Thompson DL, 'Relationship of Leisure-Time Physical Activity and Occupational Activity to the Prevalence of Obesity' (2001) 25 *International Journal of Obesity* 606-12.

<sup>46</sup> Kaplan, TA, Diegel, SL, Scavo, VA, Arellana SB (1995) Effect of obesity on injury risk in high school football players. *Clinical Journal of Sports Medicine* 5 (1) 43-7. This study showed that those with a higher body mass index were 2.5 more likely to be injured. JE Gomez, SK Ross, WL Calmbach, KB Kimmel, DR Schmidt and R Dhanda, (1998) 8 (2) *Clinical Journal of Sports Medicine* 115-20. C Cooper, H Inskip, P Croft, L Campbell, G Smith, M McLaren and D Coggon, 'Individual risk factors for hip osteoarthritis: obesity, hip injury and physical activity' (1998) 147 No 6 *American Journal of Epidemiology*. C Cooper, S Snow, TE McAlindon, S Kellingray, B Stuart, D Coggon and PA Dieppe, (2000) 'Risk factors for the incidence and progression of radiographic knee osteoarthritis' (2000) 43 (5) *American College of Rheumatology* 995-1000.

<sup>47</sup> SW Marshall and KM Guskiewicz, 'Sports and Recreational Injury: the Hidden Cost of a Healthy Lifestyle' (2003) 9 *Injury Prevention* 100-2.

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effects.<sup>48</sup> The cost financially of treating these conditions is greater than the cost of a preventative health care policy. The dilemma comes when weighing up the cost of successful litigation to small community sports and recreation groups. Given Justice Ipp's view of how a dangerous recreational activity may be defined, does reasonable care extend to taking into account the rapidly rising obese population and ensuring that equipment and conditions are appropriate for these people at the time that they utilise them? This is important for obese participants in sport and recreation, but conversely is also an important issue with respect to cost and risk benefits in the administration of community clubs and organizations. Would it be 'reasonable' to expect these clubs to bear the cost of taking the steps necessary to ensure the safety of obese participants in activities offered by the club.

The statistics<sup>49</sup> support the view that those who are obese are more likely to sustain an injury when participating in physical activity. This links in with the issue of 'duty to warn' with respect to obvious risk and applies to those participating in amateur sport and recreation. It is important to ask whether those who are obese may be aware that they are at a significantly higher risk of injury even when participating in less dangerous activities than other members of the population. It is suggested that this would require community sport and recreational facilities to ensure that they made adequate provision for this in their risk management strategies. In doing so, they would be required to be mindful of issues such as discrimination.<sup>50</sup> If however there is an identifiable risk of injury due to the participant's physical condition, then a warning that non-participation may lessen the risk of injury is an appropriate method of managing the risk. By giving such a warning the duty of care is negated if that risk materializes.<sup>51</sup> However, this advice runs contrary to public health policy which would seek to encourage obese individuals to participate in sport.

The decisions in *Woods*, *Agar* and *Falvo* and the development of the Act toward shifting the onus of responsibility for injury to the individual, begs the question of whether the law dissuades people from participating in sport and recreation.<sup>52</sup> If so, this would amount to a clash in philosophy between public health policy and tort law.

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<sup>48</sup> L Segal, R Carter and P Zimmet, 'The cost of obesity: the Australian perspective' (1994) 5 *Pharmacoeconomics* (Suppl 1) 45-52. Segal, Carter and Zimmet state that the management of obesity extends to the concomitant diseases such as non-insulin-dependent diabetes mellitus (NIDDM), gallstones, hypertension, coronary heart disease (CHD), breast cancer (among postmenopausal women), and colon cancer.

<sup>49</sup> LT Wier, GW Ayers, AS Jackson, AC Rossum, WS Carlos Poston and JP Foreyt, 'Determining The Amount of Physical Activity Needed for Long Term Weight Control' (2001) 25 *International Journal of Obesity* 613-621.

<sup>50</sup> Can you discriminate on the basis of obesity? If obesity is viewed as a disability under the *Disability Discrimination Act* 1992 (Cth) It would be expected that a person whose weight (or lack of it) actually impairs his or her functioning would be covered. There may be a defence on the basis of reasonableness. See <[http://www.hreoc.gov.au/disability\\_rights/faq/Who\\_is\\_protected\\_/who\\_is\\_protected\\_.html#obesity](http://www.hreoc.gov.au/disability_rights/faq/Who_is_protected_/who_is_protected_.html#obesity)> at May 2007; K Rose, 'Size discrimination hurts' (2007) *Herald-Sun* <<http://www.news.com.au/heraldsun/story/0,21985,21861025-2862,00.html>>; also guidelines for pregnant women to avoid discrimination but offer adequate protections - 'Pregnancy in Sport: Guidelines for the Australian Sporting Industry' (2000, Australian Sports Commission); also *Gardiner v National Netball League Pty Ltd* (2001) FMCA 500.

<sup>51</sup> *Civil Liability Act* 2002 (NSW) s 5M; *Civil Liability Act* 2002 (WA) s 5I; *Civil Liability Act* 2002 (Tas) s 39. In addition, those giving the warning are not required to determine if those receiving the warning have in fact received the warning nor understood it for it to still have effect.

<sup>52</sup> See also Rubinstein I, 'The law of tort and amateur sport: an incentive to stay at home?' (2003) 8 *Deakin Law Review*.

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### THE RESULTS SO-FAR

Burns<sup>53</sup> argues that in *Agar* and *Woods* the High Court viewed, 'sport, risk choice and autonomy [as] intrinsically linked and endorsed'.

Given the decisions by the Court of Appeal so far, it might be argued that, although prima facie the *Civil Liability Act* presents as a document that is designed to encourage self-responsibility and acceptance of accountability for an individual's actions, the interpretation by the court of the terms in the Act don't necessarily support this view. In *Fallas*, it could be reasonably argued that to avoid being shot it would have been possible for Mr Mourlas to simply remove himself from the close proximity of his friend, Mr Fallas. Mr Mourlas had asked him several times to put the gun away but his friend had refused. Instead of removing himself then, Mr Mourlas chose to stay and as a consequence suffered an injury.<sup>54</sup>

### PUBLIC HEALTH CLASH WITH LIABILITY LAWS?

Public health activities combine community collaborations with partnerships for health. Community recreation and sporting clubs rely on being able to secure insurance to run their organisations. Community sports and recreation clubs form part of the front-line public health response to fighting the obesity epidemic. As such they should be supported by the government. This involves the government encouraging members of the community into physical activity and participation in sports and recreation. It also involves assisting these clubs to provide this service safely, to stay viable and to procure insurance.

The Civil Liability laws were designed to ensure that small clubs and councils could continue to provide sport and recreational facilities without running a risk of litigation that would have resulted in the loss of their insurance premiums and subsequent inability to operate. Have the liability laws served their purpose? Ipp argues that it is a matter of balance.<sup>55</sup> Certainly the number of claims has substantially lessened, but those cases that have been litigated have perhaps led to some surprising results.

Protection is provided for community organisations where they ensure there are risk warnings and well-constructed waivers for participants. Indeed, there is great social utility in the type of recreational activities and sports that are offered by community groups. Balance is achieved by ensuring that the playing field is level, that the teams are even and that the competition is fair. Public health law espouses the virtues of community in tackling public health issues and in the case of obesity, sport and recreation forms part of the forward pack. Civil liability laws provide the necessary support for the community clubs and organisations to continue moving forward. Enabled by those laws, they may well score a goal against 'Team Obesity'.

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<sup>53</sup> K Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts' (2002) 10 *Torts Law Journal* 1.

<sup>54</sup> M McMurdo, 'Dangerous Liaisons with the Civil Liability Act 2003 (Qld)' (2006), states that the cases heard so far 'suggest that whether an activity involves a significant degree of risk of physical harm is apparently a difficult jurisprudential concept about which distinguished legal minds may disagree'. [www.courts.qld.gov.au/publications/articles/speeches/2006/mcmurdo260406.pdf](http://www.courts.qld.gov.au/publications/articles/speeches/2006/mcmurdo260406.pdf) - pg 17 at May 2007.

<sup>55</sup> D Ipp, 'Taking responsibility' (16-19 Sept 2004) *Quadrant*.