Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law

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5 Contract and fault liability of football clubs for supporters' misconduct

5.1 INTRODUCTION

Nowadays the disciplinary liability of football clubs for supporters' misconduct imposed by national and international football federations is an accepted practice. As mentioned above, the handling of damages that are caused by such supporters' misconduct is, however, completely absent from this issue. The type of damages varies and ranges from personal injury to third parties, damage to property of third parties, but also damage to the stadium and its surroundings.

It is stating the obvious that the main party liable would generally be the person who directly caused the damage: the rioting supporter. However, seeking compensation from this party can be complicated for a number of reasons. First, the supporter(s) in question need to be identified. Even with modern technology this is not always possible. Second, if supporters have been identified, chances are that they are not solvent, especially in cases of personal injury. In light of the existing and accepted disciplinary liability of clubs, the question thus arises whether victims of supporters' misconduct can instead turn to the club for the compensation of their damages.

One of the reasons to investigate the possible liability of the club is that the football club is the central point between all potentially involved parties. On the one hand, the club has a special relationship with its supporters. Although clubs often claim that 'rioting supporters' are 'not real fans', sociological research indicates otherwise.[1] On the other hand, the club often also has a relationship – in many cases a contractual relationship – with those who are at risk of incurring damage: other supporters who have bought tickets to watch the match but also business owners on or around the stadium premises.

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1 Eric Dunning, *Sport Matters. Sociological studies of sport, violence and civilization,* London: Routledge 1999 (chapter 6); Steve Frosdick and Peter E. Marsh, *Football Hooliganism*, Cullompton: Willan 2005; P. Gow and J. Rookwood, 'Doing it for the team – examining the causes of contemporary English football hooliganism', *Journal of Qualitative Research in Sports Studies* (2008/2-1) pp. 71-82. Joel Rockwood, Geoff Pearson, 'The hoolifan: Positive fan attitudes to football 'hooliganism'', *International Review for the Sociology of Sport* 2010/2, pp. 149-164.

It is important to note that in principle football clubs act as the main organisers of their home football matches.[2] As such, the organising club is responsible for order and security both inside and around the stadium before, during and after matches.[3] In the following, 'club' will be used for 'organising club'. It will be expressly indicated when the visiting club is included.

Approach

This chapter will focus on the various possible grounds for civil liability of football clubs for supporters' misconduct. Liability based on contract and tort (fault liability) will be consecutively examined in sections 5.2 and 5.3. As the overall approach that guides this research precludes a detailed examination of the laws of the countries chosen, the main goal is rather to examine the grounds of civil liability of clubs on a conceptual level, highlighting some of the specificities of Dutch, German, French, English and Swiss law where relevant. To assist with this exercise, a frame of reference has been chosen in the form of the Principles of European Contract Law (PECL) and the Principles of European Tort Law (PETL), which were developed with support from the European Commission.[4] Although not legally binding, these provide principles of law shared by the legal systems of the member states of the European Union, thus forming a useful tool in developing transnationally applicable solutions.[5] Finally, section 5.4 will look into three situations where establishing liability of clubs based on contract and fault are especially problematic before concluding in section 5.5.

5.2 CONTRACT LIABILITY OF ORGANISING FOOTBALL CLUBS

Football clubs enter into a number of different contracts that can trigger their liability for damages occurring in and around the stadium. Contract liability naturally requires a contract between the club and the victim who seeks

2 In some cases the main organiser is the national or international federation, for example during finals of cups on neutral ground.

3 Art. 2-3 UEFA Safety and Security regulations, edition 2006; Art. 16 UEFA Disciplinary Regulations, edition 2014.

4 The Commission of European Contract Law, Principles of European Contract Law. Parts I and II, Kluwer Law International 2000 (PECL); European Group on Tort Law, Principles of European Tort Law. Text and Commentary, Springer 2005 (PETL). The PECL and PETL were chosen as the main frame of reference considering their function of elucidating basic rules of contract law and more generally the law of obligations which most legal systems of the member states of the European Union hold in common. In addition, their aims to accommodate future development in legal thinking and development of contract and tort law fit with the goal of this research.

5 Switzerland is of course not a member state of the European Union. However, as the Swiss legal system is strongly susceptible to German and French influences, it still provides useful.

damages. Many parties are in a contractual relationship with football clubs, all of whom can potentially be affected by supporters' misconduct. These include other spectators who bought tickets from the club, the stadium owner (in cases where the stadium is not owned by the club), tradespeople present within or around the stadium, the club's players, and the attending media.

5.2.1 Contractual obligations of the parties

Before the question of liability can be treated, the contractual obligations of both parties need to be identified. These obligations – of the club on the one hand and the various potential contractual partners on the other – depend on the nature of the contract, the will expressed by the parties and the relevant circumstances.

The Principles of European Contract Law recognise these rules of interpretation in art. 5:102.

> "In interpreting the contract, regard shall be had, in particular, to: (a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the nature and purpose of the contract; (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves; (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received; (f) usages; and (g) good faith and fair dealing."

It should also be noted that contracts often give rise to obligations that are implied. These implied terms stem from the intention of the parties, the nature and purpose of the contract, and good faith and fair dealing.[6] The obligation of safety can be counted as such an implied term.

5.2.1.1 The obligation of safety

The contractual relationship between a club and a spectator is generally established through the sale of the match ticket. The ticket gives the spectator the right to entrance to the match at a certain price. In principal, the organising club sells the majority of tickets, with only a small number of tickets being allocated to the visiting club.

The main obligation of the spectator is to pay the ticket price and to adhere to the instructions or terms given by the organiser.[7] In the Netherlands, this obligation is included in standard terms of contract of the Dutch football

6 Compare art. 6:102 PECL.

7 Jochen Fritzweiler *et al.*, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, München: Beck 2014, 3. Teil, no. 170.

association (KNVB) that are applicable to tickets for virtually all matches in the Netherlands.[8] At the other end, the main obligation of the organising club is to ensure the organisation of the match. However, the contract additionally gives rise to a number of other obligations, of which the most important one is the obligation to ensure the safety of the spectator and avoid personal or property damage.

In some jurisdictions the obligation of safety has been specifically recognised as a contractual obligation of the organiser in a spectator contract.[9] Even in 1906, the Swiss Federal Supreme Court held that in regard to a cycling race where a spectator was injured after a cyclist came off the track 'the organisation has the contractual obligation to ensure that precautions are taken to protect the public against foreseeable hazards. Or in other words, against the inherent dangers of his business.'[10] In France, the obligation of safety (*obligation de sécurité*) was first introduced in a now famous case regarding a transport contract. According to the *Cour de Cassation* all transport contracts necessarily imply the obligation to transport the goods or passengers safely to their destination.[11] The obligation of safety in regard to spectator contracts was recognised in similar wording in 1938. The court (Orléans) held that,

> "Il serait immoral et contraire à l'ordre public que les organisateurs se fissent payer le droit d'y assister alors qu'il comporterait pour les spectateurs un risque de danger grave connu, ou devant l'être, des organisateurs".[12]

In other words, the organisers contract the obligation to organise the event in such a manner that the safety of the spectators is assured.

In other countries, the obligation of safety is identified rather as a general duty of care of the organiser. In Germany this general duty is by law and expressed in § 241 (2) BGB.[13] This provision holds that aside from performance, an obligation may also oblige each party to take account of the rights, legal interests and other interests of the other party. These interests include, among others, physical integrity and property. In the Netherlands, the obligation of safety has not explicitly been recognised by the courts in regard to the spectator contract. However, according to doctrinal opinion, in principle the organiser

8 Art. 3.6 KNVB Standaardvoorwaarden.

9 France: Landmark case on obligation of security in a transport contract: Cass. Civ.1 21.11.1911, *Recueil Dalloz* 1913.1, p. 249, note Louis Sarrut. See further, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1925.

10 Switzerland: BGE/ATF 32 II 300; BGE/ATF 70 II 218.

11 Louis Sarrut, Note under Cass. Civ.1 21.11.1911, *Recueil Dalloz* 1913.1, p. 250.

12 Cour d'appel d'Orléans 19.04.1937, *Recueil Dalloz* 19382, p. 68.

13 Germany: Gerhard Wagner, *Münchener Kommentar zum BGB. Band 5. Schuldrecht. Besonderer Teil III. 6. Auflage,* 2013, Vor § 823, no. 68 and § 823, no. 48.

of a sports event bears the primary responsibility for the safety of the spectators.[14]

In terms of potential litigation, it should be noted that the obligation of safety of the club is not limited to contracts with spectators. A similar obligation could be imagined for those who have a contract with the club to exploit their business on the premises of the club as well as for the club's employees. As in both situations it is the club that is in the position to control the safety situation, it should not be too difficult to discharge such an obligation.

5.2.1.2 Other contractual duties of care

Similar to the obligation of safety, clubs that rent or lease their stadiums have the obligation to take care of the rented property. If the organising club does not own the stadium it plays its home matches in, the stadium owner will be liable for the damage resulting from supporters' misconduct – to seats, bathrooms, security gates and walls, the pitch, etc.

A contractual relationship between the stadium owner and the club will most often be based on a rental or lease contract. The main obligation of the club in such a relationship is to pay the rental or lease fee. However, due to the duty of care, the club, as a tenant, is generally liable for damage to the stadium that occurs as a result of its activities. In French, German, Dutch and Swiss law, this duty is laid down in special provisions regarding rental contracts.[15] By contrast, in English law this duty derives directly from the tenancy contract by virtue of an express or implied contract term.[16] According to case law, rental contracts include the implied term to use the premises in a tenant-like manner, which includes "of course, not to damage the house, wilfully or negligently, and he must see that his family or guests do not damage it: and if they do, he must repair it".[17] However, as with the spectator contract, a claim will most likely be based on the tort of negligence.

In certain situations it is not a club, but rather the federation that rents a stadium for a specific match. For example, the 2014 Dutch Cup final between F.C. Ajax and PEC Zwolle was played in the home stadium of Ajax' arch rival Feyenoord, where Ajax supporters managed to cause EUR 70,000 worth of damages. In these types of situations, it will generally be the federation which

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14 Netherlands: K.J.O. Jansen, *GS Onrechtmatige daad*, artikel 162 Boek 6 BW, aant. 93.8.1 and the authors cited there.

15 France: art. 1728 and 1732 French Civil Code, which are also applicable to commercial rental agreements. Germany: § 535 BGB in connection with § 280 BGB; Martin Häublein, *Münchener Kommentar zum BGB. Band 3. Schuldrecht. Besonderer Teil. 6. Auflage*, 2012, § 535, no. 168-170; Netherlands: art. 7:218 and 7-219 BW, art. 7:353 BW for lease (*pacht*). Switzerland: Art. 257f CO.

16 Simon Garner and Alexandra Frith, *A Practical Approach to Landlord and Tenant*, Oxford University Press 2004, p. 57.

17 Denning LJ, in *Warren v Keen* [1953] 2 All ER 1118, 1121.

is liable for the damage based on a rental contract with the stadium. However, it is not inconceivable that the federation then seeks compensation from the club whose supporters caused the damage. In the Dutch Cup final case, this is exactly what happened. The KNVB withheld the amount from the premium Ajax received for its second place and the club decided not to take any fans to matches against and in Feyenoord's home stadium for three years.[18]

Both the obligation of safety as well as the obligation to be a good tenant can be categorised as contractual duties of care protecting the rights and interests of the other party.

5.2.2 Requirements for contract liability

When a contractual obligation is not met and damage occurs, there is non-performance. In general, such non-performance leads to a number of remedies; for example the option to terminate the contract or compensation of the damages.[19] In cases of personal and property damage, monetary compensation is often the most suitable remedy.

According to the PECL, 'the aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under article 8:108'.[20] Aligned with this starting point, the requirements to establish the contractual liability of the club are very similar across the jurisdictions. First and foremost, liability requires a culpable breach of a contractual obligation, as well as causation between the breach and the damage.[21]

With regard to the first element, the question thus arises what constitutes a breach of a club's contractual duty of care. Answering this question calls for a look into the nature and extent of this duty – the obligation of safety.

5.2.2.1 Obligation of result or obligation of means?

The club's obligation of safety can be qualified either as an obligation of result or an obligation of means. The main consequence of the qualification lies in the distribution of the burden of proof.

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18 http://www.rijnmond.nl/sport/12-06-2014/schade-bekerfinale-vergoed-aan-stadion-feijenoord ; http://www.ajax.nl/Ajax-Nieuws/Ajax-nieuwsarchief/Ajax-nieuwsartikel/196411/Drie-jaar-geen-Ajaxfans-in-Kuip.htm

19 See PECL 2000, chapters 8 and 9.

20 Art. 9:501 PECL.

21 France: art. 1147 CC, Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 246. Germany: § 280 (1) BGB. Netherlands: '*toerekenbare tekortkoming*' art. 6:74 and 6:75 BW. Switzerland: '*violation fautive*' art. 97 (1) CO, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 3.

If an obligation is qualified as an obligation of result, a fault is presupposed, which means that the claimant only needs to prove that the result was not met for there to be non-performance.[22] Opinions vary, however, as to whether an obligation of result culminates in strict liability.[23] In practice this means that if the obligation of safety of the organising club is qualified as an obligation of result, the only thing the claimant has to prove is that the damage has occurred. In contrast, if qualified as an obligation of means, the claimant needs to establish a fault of the club.

The issue of qualification is especially well-developed in French law, but also a topic of debate in Switzerland and the Netherlands.[24] In France, the dominant view in case law on the obligation of safety in regard to sport events is that this is qualified as an obligation of means.[25] However, this standpoint has been criticised in doctrine.[26] It is argued that according to its nature an obligation of safety should be of result, which is the case in contracts from which this doctrine was developed – e.g. labour contracts and passenger transport contracts.[27] Interestingly, however, according to France's highest administrative law court the obligation of safety of clubs is to be qualified as an obligation of result.[28]

According to Swiss author Bondallaz, the obligation of safety ought to be qualified as an obligation of means, seeing as an obligation of result would result in a *de facto* strict liability, which – in principle – is unknown in Swiss

22 PECL 2000, art. 8.101, comment 2; T.F.E. Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 1.

23 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3222. Geneviève Viney and Patrice Jourdain, Traité de droit civil. Les conditions de la responsabilité (4e édition), Paris: LGDJ 2013, no. 522ff. Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 280, no. F31-F39, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 54-58.

24 See for an elaborate overview: Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3208-3372.

25 Landmark case: Cour d'appel Orléans 19.04.1937, *Recueil Dalloz* 1938 (2e partie) p. 68, note J. Loup. See also: TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.), *Recueil Dalloz* 1986, p. 617; Cass. Civ.1 17.05.1965 (Le Peyrehorade Sports c. Labouyrie), *Recueil Dalloz* 1966, p. 1, note de Pierre Azard. For further case citations see, Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1925ff.

26 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no.1927; Christophe Albigès *et al*., *Responsabilité et sport*, Paris: Litec 2007, p. 182.

27 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 3227.

28 Conseil d'État 29.10.2007, n°307736 (Lille Olympic Sporting Club), *Recueil Dalloz* 2008, p. 1381. See further Chapter 4.3.2.

law.[29] However, in one of the more recent papers on this topic Chappuis *et al*. argue that the obligation of safety should be qualified as an obligation of result. This view implies that the burden of proof that no fault was made rests on the shoulders of the organiser. However, according to standing case law of the Swiss Federal Supreme Court, once the violation of a standard of care is established, it is practically impossible to prove that no fault was committed.[30] Perhaps the hesitation of qualifying the obligation of safety of the club as obligation of result is rooted in this consequence. The authors justly emphasise that it is difficult to imagine how one can violate a duty of care without fault.[31]

By contrast, the issue of qualification carries less weight in German law.[32] According to § 241 (2) BGB, obligations of safety are part of any and all contracts. A damages claim for a breach of such an obligation of safety is founded on § 280 BGB. Although contractual liability on this basis always requires culpability,[33] it is noted in doctrine that with the adoption of the breach of a safety duty 'zugleich das objektiv sorgfaltswidrige Verhalten festgestellt wird'.[34]

5.2.2.2 Culpable breach or force majeure?

Compensation for breach of contract is dependent on whether this breach can be excused. According to article 8.108 PECL,

> "a party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences".

The PECL thus presupposes fault in regard to liability based on contract, putting the burden of proof for his excuse on the debtor. This is also known as the

29 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 426.

30 Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97 no. 58. BGE/ATF 117 II 563, cons. 3c.

31 Benoit Chappuis, Franz Werro and Béatrice Hurni, 'La responsabilité du club sportif pour les actes de ses supporteurs', in: Pierre-André Wessner *et al*., *"Pour un droit équitable, engagé et chaleureux." Mélanges en l'honneur de Pierre Wessner*, Basel: Helbing Lichtenhahn 2011, pp. 65-110, p. 74.

32 The subject is, however, briefly discussed in the 2014 edition of the Staudinger Kommentar. Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 280, no. F31ff.

33 § 280 (1) second sentence BGB contains a rebuttable presumption of liability for the damages caused in connection with the contract.

34 Hansjörg Otto in the 2009 edition of the *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2009, § 280, no. F26.

theory of *force majeure*. *Force majeure* and culpability are thus two sides of the same coin. Either the breach is due to someone's fault and there is no *force majeure*, or the breach is due to *force majeure*, meaning there is no culpability and thus the conditions for contract liability are not met. In line with the PECL, Dutch, German, French and Swiss law all presuppose fault but accept exoneration for breach of contract if the debtor has a valid excuse.[35] Upon a closer look, however, the jurisdictions show some variation in their application.

In German law, breaching a contractual duty is excused if the debtor is not responsible.[36] According to § 276 (1) BGB the debtor is responsible for intention and negligence. However, a different standard of liability can be inferred from the content of the contract, in particular from giving a guarantee or the assumption of a procurement risk.[37] As already highlighted above, in case of a breach of a safety duty, negligence is practically inferred. Dutch law is very similar in this regard. It is required that the breach of a contractual obligation is attributable (*toerekenbaar*). A breach of contract is attributable if the debtor is at fault or if it constitutes a risk for which he is accountable by law or general accepted principles. For example, by virtue of articles 6:76 and 6:77, a debtor is strictly liable for his accessories in performance. As in Germany, attribution of a breach of a duty of care (*zorgplicht*) is virtually automatic. Furthermore, German, Dutch and Swiss law are all aligned with the PECL in that the debtor cannot be excused if the cause of the breach was foreseeable.[38]

In France, doctrinal opinion has nuanced the dogma of presupposition of fault. Where in principle the debtor bears the burden of proof that all obligations are fulfilled or that *force majeure* has occurred, according to literature this only holds in case of *inexécution totale*. If the main obligation has been fulfilled, however, the question which party bears the burden of proof depends

35 France: Art. 1147 CC. Germany: § 280 (1) BGB; Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 280, no. D2. Netherlands: Art. 6:75 BW; A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2011, no. 344. Switzerland: Art. 97 (1) CO; Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 97, no. 54-58.

36 See wording § 280 (1) BGB.

37 § 276 (1) BGB.

38 Germany: Manfred Löwisch and Cornelia Feldmann, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung* 2014, § 287, no. 10. Netherlands: A foreseeable circumstance is more than a circumstance that is deemed possible. Rather, the obstacle should be – at the time of entering into the contract – so likely to occur that a prudent debtor could reasonably have considered it and would have taken appropriate precautions. See A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 354. Switzerland: art. 119 CO. Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 119, no. 7.

on the nature of the accompanying obligations.[39] As the contractual duty of care in spectator contracts as well as in stadium rental or lease contracts is clearly a secondary obligation, the qualification of the obligation determines which party bears the burden of proof.[40] If qualified as an obligation of result, it only needs to be proved that the result was not met. The club can then only escape if it proves *force majeure*, which is only possible if the breach was unforeseeable and irresistible.[41] However, if qualified as an obligation of means, the victim needs to prove that the club's behaviour was faulty.

In English law, exoneration for breach of contract is not really an issue as the main question in all cases is: what did the parties agree? Whether liability for non-performance can be excused depends on the specific obligation. Nevertheless, in cases where the breach can also be based on the tort of negligence the burden of proof that applies is the same which would apply there.[42] It should be noted that in England, unless a contract contains an express provision warranting safety, actions resulting from damage occurring in and around the stadium will generally be based on the general tort of negligence or on the Occupiers Liability Act 1957. Previous to the enactment of this statute some cases were based on contract.[43] Section 5(1) of the statute now provides that, if a contract is silent on the matter – which it usually is – it shall be implied in the contract that the occupier owes the entrant the common duty of care'. However, a contractual entrant is allowed to frame his claim as a non-contractual visitor.[44]

Applying the PECL criteria to the case of supporters' misconduct gives rise to the following image. Supporters' misconduct is clearly something that is beyond the control of the club. However, it is not something that the club could not have been expected to take into account. The phenomenon is widely known, which is also exemplified by the risk analyses, which take place on a constant basis. The crucial point is thus whether the club could have been reasonably expected to overcome the supporters' misconduct or its consequences.

Force majeure originally applied to foreign – in the sense of strange – causes. Dutch scholar Tjong Tjin Tai explains that the early views on *force majeure*, which are based on Roman law, indicate the situation that the debtor cannot

39 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 2362-2363.

40 See also Section 5.2.2.1 above.

41 The third element of 'extériorité' was abandoned by the *Cour the Cassation* in 2006. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1806.

42 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 66.

43 Simon Gardiner *et al.*, *Sports Law*, Oxon: Routledge 2012, pp. 564-565.

44 See: *Sole v W.J. Halt* [1973] Q.B. 574.

be held responsible for the fact that he has failed to perform because the cause of the breach is a greater power to which the debtor does not need to – or be able to – offer any resistance.

> "Al deze begrippen duiden de situatie aan dat het de schuldenaar niet kan worden aangerekend dat hij niet is nagekomen, aangezien de oorzaak niet bij hem ligt, en hij ook geen voorzorgsmaatregelen had kunnen of hoeven treffen tegen deze oorzaak. De oorzaak is een 'groter geweld', een 'over-macht', iets waaraan de schuldenaar geen weerstand behoeft te (kunnen) bieden."[45]

Accordingly, it should thus be considered to what extent a debtor can exert influence on the onset or the effects of the causes or risks – even if that influence is not so strong that the breach is due to a lack of care, such as in the choice of employees or suppliers. Consequently, the cause is not completely 'foreign'.[46] In respect to supporters' misconduct clubs exert quite a strong influence on the risk of supporters' misconduct in their stadium, for example in the choice of preventative and repressive measures.

In summary, if the obligation of safety of the organising club is qualified as an obligation of result, it will be up to the club to then prove that the breach was not attributable to it, i.e. that there was *force majeure*. By contrast, if qualified as an obligation of means, the claimant needs to establish a fault of the club. Regardless of the qualification and thus of the question who bears the burden of proof, it is the scope of the duty of care of the club in the specific circumstances that will determine the club's liability. Only by determining the extent of this obligation in the concrete circumstances can it be discovered if a breach has occurred. As this is the same general standard that applies to fault liability in tort,[47] the scope of this obligation will be discussed in section 3.2 below.

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45 T.F.E. Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 2.

46 See Tjong Tjin Tai, Toerekenbare niet-nakoming en de zorg van een goed schuldenaar' in: *WPNR* 2004/6574, pp. 285-290, § 4.

47 France: Christoph Albiges *et al*., *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 181. Germany: Roland Schwarze, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 280 BGB, no. C45. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 344. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, Art. 41 CO, no. 62. See also Von Bar and Drobnig: "where the duty to compensate requires fault, the starting point is the same in both contract law and tort law". Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 46.

5.2.3 Contractual exclusion of liability

In contractual relationships, the parties are generally free to agree on exclusion of liability. In its various contracts, the club could attempt to exclude its liability for damage caused by supporters' misconduct. Such clauses excluding liability can be agreed upon individually or be included in a set of standard contract terms. This difference has implications for the legal assessment of the clause.

The general rule across all jurisdictions and expressed in the PECL is that clauses limiting or excluding liability are allowed unless it would be contrary to good faith or reasonableness to invoke the clause.[48] It follows that exclusion of liability for intentional acts and gross negligence is not permitted.[49] However, exclusion of liability for negligence is in principle allowed in Dutch, French, German and Swiss law.

The limits of whether it is contrary to good faith or reasonableness to invoke a specific exclusion clause are decided by the courts. Recurring criteria in this assessment in all jurisdictions include the exploitation of the weaker party through a position of power, blatant violation of the equality of the parties or granting excessive benefits to one party at the expense of the other, and excessive restriction of a party's economic or personal liberty.[50] According

48 Art. 8:109 PECL; France: art. 1134 CC, every contract must be executed according to good faith. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136, 1150; Germany: § 276 (1) BGB, Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 114, 128; Netherlands: art. 6:248 (2) BW, landmark case: HR 19.05.1967, *NJ* 1967, 261 note GJS (Saladin/HBU); A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 364; Switzerland: art. 100 CO is seen as a 'specialis' of 'Prinzips des guten Sitten', see Rolf H. Weber, *Das Obligationenrecht*, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband, Bern: Stämpfli Verlag 2000, art. 100, no. 134.

49 France: art. 1150 CC; Alain Bénabent, *Droit des Obligations* (13e édition), Paris: Montchrestien – Lextenso éditions 2012, no. 423; Germany: § 276 (3) BGB, Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 119; Netherlands: art. 6:248 (2) BW, A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2012, no. 364; Switzerland: Art. 100 (1) CO; Rolf H. Weber, *Das Obligationenrecht, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband,* Bern: Stämpfli Verlag 2000, art. 100, no. 92ff.

50 France: Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1080, Germany: Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, Nr. 128, Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-III, Algemeen overeenkomstenrecht*, Kluwer 2014, no. 482; Switzerland: Art. 100 CO ; Rolf H. Weber, *Das Obligationenrecht*, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband, Bern: Stämpfli Verlag 2000, art. 100, no. 138-141.

to doctrinal opinion in France, however, exclusion of liability is only allowed if there remains some kind of engagement.[51] In Germany, the courts also take into consideration which of the parties can and generally does insure themselves against the type of damage occurred.[52]

In contrast, in England, the possibility of excluding liability is more restrained. According to the Unfair Contract Terms Act (UCTA), limiting one's liability for negligence is only allowed insofar as the term or notice satisfies the requirement of reasonableness.[53] The UCTA only applies to business liability, which is defined as 'liability for breaches of obligations or duties arising: a) from things done or to be done by a person in the course of a business (whether it's his own business or another's); or b) from the occupation of premises used for the business purposes of the occupier'.[54] In cases of a club's liability for damage that occurred in relation to a football match, this criterion will be easily met.

5.2.3.1 Exclusion clause in general contract terms

In many situations, clauses that exclude liability are incorporated into general contract terms. As a result, the test of reasonableness is more stringent than in cases where the clause has been individually negotiated. Art. 4.110 (1) PECL illustrates the predominant view on exclusion clauses in the various jurisdictions.[55]

> "A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded."

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51 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136.

52 Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 128.

53 S. 2 (2) UCTA 1977.

54 S. 1 (3) UCTA 1977.

55 Germany: § 307 BGB; Netherlands: art. 6:233 BW, (A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-1*, De verbintenis in het algemeen, eerste gedeelte*, Kluwer 2011, no. 364; France and Switzerland: French and Swiss law do not provide separate rules for general contract terms in general but only for consumers. As a result, in business-to-business relations one has to return to general rules. Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1136; Alain Bénabent, *Droit des Obligations* (13e édition), Paris: Montchrestien – Lextenso éditions 2012, no. 165ff ; Rolf H. Weber, *Das Obligationenrecht, Berner Kommentar. Kommentar zum schweizerischen Privatrecht, Band VI/1, 5. Teilband*, Bern: Stämpfli Verlag 2000, art. 100, no. 128-133.

Furthermore, if the contract is a consumer contract – for example a contract between a club and spectator in the form of a match ticket – the exclusion of liability will be easily presumed unfair based on the EU Directive on unfair contract terms in consumer contracts, which is implemented in all EU jurisdictions.[56]

As a result of this legislation, it will be difficult for clubs to exclude liability in standard contract terms that are part of the spectator contract. Furthermore, also with regard to exclusion clauses in general contract terms in other – non-consumer – contracts the lists of unfair contract terms can be an indication of whether a term is unreasonable.[57]

5.2.3.2 Exclusion of liability for personal injury

With regard to the exclusion of liability for personal injury, the laws of the relevant jurisdictions are even more stringent.

In England, exclusion of liability for personal injury incurred by negligence is prohibited by law.[58] In German and Dutch law, there is no such general prohibition to exclude liability for personal injury. However, when incorporated into standard contract terms the exclusion is ineffective according to German law. In Dutch law such a clause is deemed unfair, but proof to the contrary is allowed.[59] Nevertheless, Dutch legal doctrine tends to reject the exclusion of liability for personal injury.[60]

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56 England: The Unfair Terms in Consumer Contracts Regulations 1999, France: In France, such a clause is illegal on the basis of art. R132-1 n°6 *Code de Consommation;* Germany: § 309 BGB; Jochen Fritzweiler *et al*., *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, München: Beck 2014, 5. Teil. no. 96; Netherlands: Art. 6:237 (f) BW. In Switzerland, protection of consumers against unfair contract terms is laid down in art. 8 of the Federal law against unfair competition *Bundesgesetz gegen den unlauteren Wettbewerb (UWG)/Loi fédérale contre la concurrence déloyale (LCD)*. With the new art. 8, the Swiss legislature has sought connection with the directive.

57 England: in England, the Unfair contract terms act also applies to business-to-business relations. France: in France, the definition of *consommateur* is broad and as a result can apply to business-to-business relations; Alain Bénabent, *Droit des Obligations (13e édition)*, Paris: Montchrestien – Lextenso éditions 2012, no. 174; Germany: Peter Schlosser, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse (Recht der Algemeinen Geschäftsbedingungen),* Berlin: Sellier de Gruyter 2013, Vorbem zu § 305ff, no. 24. Netherlands: A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-III, Algemeen overeenkomstenrecht*, Kluwer 2014, no. 502.

58 S. 2 (1) van de Unfair Contract Terms Act 1977 (UCTA). In s. 1 (1) UCTA negligence is defined as "the breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract, or any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty)".

59 § 309 (7)a BGB.

60 V. van den Brink, *De rechtshandeling in strijd met de goede zeden* (diss. Amsterdam UvA), Den Haag: Boom Juridische uitgevers 2002, pp. 71-72, T.H.M. van Wechem & J.G.J. Rinkes, 'Toepasselijke normering bij het toetsen van exoneraties voor letselschade', *AV&S* 2002,

Similarly, in France also it is controversial whether exclusion of liability for personal injury is allowed.[61] Certain authors argue that the human body cannot be the object of a contract and as a result *obligations de sécurité* are thus a matter of public policy which cannot be excluded.[62] In Switzerland, too, the majority view seems to be that exclusion of liability for personal injury is not permitted. Personal integrity is deemed such an important right that any exclusion of liability is contrary to morality and therefore void.[63]

In short, the exclusions of liability for personal injury featuring in contracts between clubs and the various relevant parties – most notably spectators – risk being unenforceable.

5.2.4 Summarising remarks

The goal of this section was to discover whether clubs can be held liable for damage caused by their supporters' misconduct on the basis of a contract. As a result of their main activity, clubs owe a contractual obligation of safety (or: duty of care) to various parties. Breaching this obligation leads to liability for the occurring damage unless the breach cannot be attributed to the club.

In regard to breach of contract, the fault of the club is generally presupposed and can only be excused if the breach was due to factors beyond the control of the club and that the club could not be expected to foresee. However, multiple jurisdictions struggle with the question whether or not the sole occurrence of damage constitutes a breach of contract. The doctrinal debate on whether the obligation of safety is qualified as an obligation of result or an obligation of means is primarily relevant to the question who bears the burden of proof in establishing or denying a breach of the obligation of safety. Although this is an important practical issue in light of the difficulty for the claimant to prove what the club should have done in a specific situation, it is first necessary to determine the extent of the obligation of safety.

One option to escape liability based on contract is for a club to contractually exclude its liability. However, clauses that are included in general contract terms, for example on the back of match tickets, are subjected to a strict test of reasonableness. In addition, clauses that exclude liability for personal injury are generally deemed unreasonable or even unlawful in the different juris-

178, par. 3.3, M.B.M. Loos, 'Exoneraties in Comsumentenovereenkomsten', *Ars Aequi* 2007, p. 745. *A contrario*: J.H. Duyvensz, *De redelijkheid van de exoneratieclausule* (diss. Tilburg), Den Haag: Boom Juridische uitgevers 2003, p. 178.

61 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1057-1058, 1137.

62 Alain Bénabent, *Droit des Obligations (13e édition)*, Paris: Montchrestien – Lextenso éditions 2012, no. 423; Philippe Malinvaud, *Droit des obligations*, Paris: LexisNexis 2003, no. 743.

63 Roland Brehm, *Berner Kommentar, Bd. VI/1/3/1, Die Entstehung durch unerlaubte Handlungen*, Bern: Stämpfli Verlag AG 2013, art. 41, no. 232a and references cited.

dictions. Clubs have a better chance with clauses that are individually negotiated. Nevertheless, these, too, need to pass the test of reasonableness. Finally, it is worth mentioning that allowing exclusion of liability that is based on a duty of care seems somewhat illogical.

5.3 Fault liability of organising football clubs

Aside from a breach of contract, the violation of a duty of care can also give ground to liability based on tort. If the victim is a party to a contract with the organising club, it depends on the rules of concurrence in his jurisdiction whether he can bring a claim based on tort. In some jurisdictions, the victim has no other choice than to stick with his contractual claim (i.e. France); in others he might make a choice. However, when there is no contractual relationship between the victim and the club, the victim will have no choice but to base his claim on tort. For example, in case of spectators who attend a match for free,[64] referees, players of the other team, volunteers, etc.

General findings of comparative tort law show that there are two forms of liability: fault liability and strict liability. According to Werro and Palmer, the first form is based on the deviation of a required standard of behaviour while the second is a liability according to which a defendant is accountable even though his behaviour was perfectly correct.[65] The systems of tort law in the jurisdictions relevant for this research are all different. However, all systems feature a general norm for fault liability and a number of different strict(er) liabilities. The difference between fault liability and strict liability is, however, far from clear-cut. Some even argue that the distinction is outdated.[66]

As discussed in the previous chapter, the disciplinary liability of football clubs is largely based on strict elements. In the absence of a specific rule in civil law, the issue of supporters' misconduct will, however, first be tested against the concept of fault liability. The concept of strict liability and possible application of this concept in relation to supporters' misconduct will be dealt with in the next chapter.

64 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 1928.

65 Franz Werro and Vernon Valentine Palmer (eds.), *The Boundaries of Strict Liability in European Tort Law*, Durham, North Carolina: Carolina Academic Press/Bern: Stämpfli Publishers Ltd./Brussels: Bruylant 2004, p. 7.

66 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1005.

5.3.1 Protected interests in tort law

Unlike contract law, which regulates the obligations between contractual parties, tort law concerns obligations towards everyone. In Europe, the general goal of tort law can be summarised in one word: protection.[67] More precisely, protection of a variety of rights and interests, which include but is not limited to life, physical integrity, privacy, property rights, and economic interests.

The rights and interests protected in tort law are dealt with in different ways in the relevant countries.[68] Some jurisdictions, such as France and Switzerland, are characterised by flexibility. French law does not limit the list of rights to be protected and it is left to the courts to decide on whether a *dommage* gives rise to compensation. By contrast, in Germany compensation based on tort law is only an option if there is an infringement of one of the rights listed in § 823 BGB. The rights listed include: right to life, bodily integrity, health, freedom, property and other rights.[69] In English law the starting point is different as the primary focus lies on the duty of care that is owed to someone in a specific situation. Breaching this duty constitutes an infringement of a right that is owed.[70]

As mentioned above, actions that fall under the scope of supporters' misconduct risk infringing a number of legally relevant rights. Looking back at past occurrences, different parties risk infringements of different rights. People that are present in the stadium while disturbances occur bear the risk of personal injury and damage to their property, for example clothes that are ripped or burnt due to fireworks. In addition, the phenomenon of racist chanting infringes personality rights.[71] The owner of the stadium very likely will suffer damage to his property, for example broken seats or trashed bathrooms.

An infringement of a right is often the starting point, but does not by itself result in liability. For a football club to be liable based on tort for damage that results from supporters' misconduct it is necessary that the legal requirements of liability are fulfilled.

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67 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study*, Munich: Sellier 2004, p. 26: "The purpose of tort law is to protect persons and the preservation of their property." See further on the goals of tort law Chapter 6.3.

68 See for an in-depth overview: Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, chapter 7.

69 These 'other rights' have to be absolute rights.

70 See: Robert Stevens, *Torts and Rights*, Oxford University Press 2007 cited by Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 701-2. F.n. 3.

71 See further on this issue Section 5.4.3 below.

5.3.2 Requirements for fault liability

Fault liability, or 'negligence' in different terminology, is based on the deviation of a required standard of behaviour and can exist both for intentional and negligent conduct. In the context of this research, the liability of clubs arises not from doing harm, but rather for not doing enough to avoid harm. Looking beyond national terminology, establishing liability of the club requires proving that the club has acted negligently, as well as (adequate) causation between the negligent act and the damage.[72] The requirements of damage and causation are expected to be fulfilled without any major issues. In contrast, establishing fault/negligence is the crucial and most challenging step.

A detailed explanation of the fault requirement in the different legal systems goes beyond the scope of this research.[73] However, the following brief overview will show that with regard to the liability of football clubs the basic applicable standard is practically identical across the jurisdictions.

5.3.2.1 Fault

According to the PETL, fault consists of the intentional or negligent violation of the required standard of care.[74] With this objective standard of conduct, to which everybody has to conform, the notion of blameworthiness has become obsolete.[75]

In comparison with the PETL and other jurisdictions, the structure of fault liability in French law is the simplest of all; one has to prove intention or negligence (*faute*), damage and causation. The French Code Civil features the most general provision on tort law. "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer."[76] The provision is followed by art. 1383 CC, which provides that 'everyone is liable for the damage he causes not only by his act, but also by his negligence or by his imprudence'. As the legislator has left interpreting '*faute*' to the courts, doctrinal opinions on the definition of '*faute*' are extensive and come in many variations.[77] However, generally speaking, most definitions include the following: conduct that breaches a pre-existing obligation, a

72 See also PETL Text and Commentary 2005, title II, III and IV.

73 See for detailed overviews comparative law works by: Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013; Christian von Bar, *The Common European Law of Torts (Volume 1)*, Oxford: Clarendon Press 1998 and the classic work Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law (3rd rev. ed. repr.)*, Oxford: Clarendon Press, 2011.

74 Art. 4:101 PETL.

75 PETL Text and Commentary 2005, Chapter 4, introduction, no. 3.

76 Art. 1382 CC.

77 Already in 1948, 23 different definitions of *faute* were distinguished. Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, p. 58.

statutory duty or conduct that does not meet the legal standard of conduct. In French this legal standard is better known in its classic formulation: *la conduit du bon père de famille*.[78]

By contrast, in Germany, Switzerland and the Netherlands fault liability consists of additional requirements.[79] In Germany, the three provisions of the BGB that regulate fault liability require (a) the violation of a codified normative rule, (b) unlawfulness, and (c) fault (*Verschulden*). As mentioned above, the violation of a codified rule concerns the infringement of another person's protected rights. In principle, by infringing one of these rights, the defendant acts unlawfully. However, in cases where a person suffers damage as a result of someone's omission, the sole infringement of his rights is not sufficient to establish liability as this would lead to undesirable results. The classic example of this issue is a tree belonging to the defendant falling on the claimant's house. As the tree cannot be qualified as another building or structure in the sense of § 836 BGB, the defendant cannot be held liable unless a duty of care exists. In 1902, this lacuna was filled by German case law.[80] Since then, an omission is deemed unlawful if it constitutes a breach of a safety duty (*Verkehrssicherungspflicht*) due to failing to take appropriate safety measures.[81] The third requirement is that the defendant acted intentionally or negligently; conduct is deemed negligent if it is contrary to the care required by society.[82]

The Swiss and Dutch systems take a middle ground between French and German law. In addition to damage and causation, the required elements are unlawfulness and fault – in Dutch law more precisely accountability (*toerekenbaarheid*).[83] Similar to the situation in Germany, in both systems a vast body of case law has been developed with regard to duties of care, which when they are breached, constitute unlawfulness.[84] In general, unlawfulness can be rebutted by a ground of justification. For example, during surgery, a doctor infringes the right of personal integrity which is justified by the patient's consent. However, it becomes clear that in cases of breached duties of care it has become difficult to separate the atmospheres of unlawfulness and fault.

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78 Philippe Le Tourneau, *Droit de la responsabilité et des contrats: régimes d'indemnisation*, 10th édition, Dalloz 2014, no. 6705; Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 445ff.

79 Germany: § 823 (1), § 823 (2) and § 826 BGB. Netherlands: art. 6:162 BW. Switzerland: art. 41 CO; Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41, no. 6.

80 RG 30.10.1902, RGZ 52, 373.

81 BGH 15.06.1954 – III ZR 125/53, BGHZ 14, 83; Gerhard Wagner, *Münchener Kommentar zum BGB. Band 5. Schuldrecht. Besonderer Teil III. 6. Auflage*, 2013, § 823, no. 311-365.

82 § 276 (I) BGB.

83 Art. 6:162 BW and art. 41 CO.

84 Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 79 and case law cited there. Netherlands: Landmark case: HR 05.11.1965 (Kelderluik), *NJ* 1966, 136, note. G.J. Scholten.

This is perhaps most visible in German law where the legal 'formula' to establish fault ('neglect of due care') is already needed to establish unlawfulness.[85] When unlawfulness is based on the breach of a safety duty, it follows that there can be no ground of justification. In Dutch law an unlawful act can be attributed if it is due to a person's own fault or if he is accountable by law or pursuant to generally accepted principles.[86] The latter is an objective accountability from the point of view of conventional standards (*verkeersopvatting*) and aims at providing a realistic foundation for liability rather than extending the notion of fault.[87] Similar to German law, once the breach of a duty of care is established, the accountability of this breach is automatically given on the basis of this standard.

In English law, the general liability rule is embodied in the tort of negligence, which consists of three elements: a duty of care, the breach of this duty and resulting damage.[88] The most difficult element is to establish whether or not a duty of care is legally owed in a specific situation. If there is no precedent, three requirements need to be fulfilled in order to establish a duty of care: the harm must be reasonably foreseeable, there has to be proximity between the claimant and the defendant, imposing a duty of care has to be fair, just and reasonable.[89] The key requirement is, however, the breach of the duty. This test focuses on the question: given the existence of a duty, what is the standard of care that was to be exercised? In similar wording to the legal standard in French law, this standard is that of the *reasonable man*. The classical formulation of this standard reads:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do: or doing something which a prudent and reasonable man would not do."[90]

However, in contrast to the continental law systems, in English law the general liability rule (tort of negligence) is not that relevant regarding liability of

85 'Neglect of due care', § 276 (2) BGB; Georg Caspers, *J. von Staudingers Kommentar zum BGB. Buch 2, Recht der Schuldverhältnisse, Neubearbeitung*, Berlin: Sellier de Gruyter 2014, § 276 BGB, no. 29. A similar view is defended in Switzerland too, Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 57 and 81.

86 Art. 6:162 (3) BW.

87 A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 121.

88 John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 1-34.

89 The so-called 'Caparo test' was developed by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617. See further: John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 2-29ff.

90 Alderson B. in *Blyth v Birmingham Waterworks* (1856) 156 ER 1047, 1049; John Charlesworth and Rodney Algernon Percy, *Charlesworth and Percy on Negligence (13th edition)*, London: Sweet & Maxwell 2014, no. 7-03.

organising clubs. In fact, this situation is covered by a separate tort: breach of a statutory duty; the statute in question being the Occupiers Liability Act 1957.[91] By virtue of this statute a duty is owed in respect to risks arising on the premises 'due to the state of the premises or to things done or omitted to be done on them'.[92]

The liability rule is nevertheless based on negligence and the applicable standard bears close resemblance to the duty of care in the tort of negligence. Section 2 (2) of the Occupier's Liability Act provides:

> "The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

In summary, in all jurisdictions the case of supporters' misconduct falls in the category of 'safety duties' or duty of care. As in contract law, whether in a specific situation an organising club is liable for the damage caused by its supporters depends on the scope of the standard of care that lies upon the club.

5.3.2.2 The standard of care: a transnationally uniform applicable standard

In all the relevant legal systems, establishing fault requires the comparison of the conduct of the club with the standard of care. This is not a normative standard, but a concrete standard of what was expected from the defendant in this exact situation. In other words: who is the reasonable man and what would he have done in this situation?[93]

In this assessment, all circumstances of the case have to be taken into account.[94] This generally accepted approach is reflected in Art. 4:102 (1) PETL:

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91 Before the Act was introduced, the occupier of premises owed different standards of care depending on his relationship with the other party. If there was a contract, there was an implied warranty that the premises were as safe as reasonable care and skill could make them. Lower duties were owed to those who entered the premises on business interests both to himself and the occupier, or with express or implied permission without such business interests. The Act abolished the common-law distinction and substituted this with one single duty of care owed to all 'visitors'. W.V.H. Rogers, *Winfield & Jolowicz on Tort* (16th ed.), London: Sweet and Maxwell 2002, no. 9.3.

92 S. 1 (1) Occupiers' Liability Act 1957.

93 On the complexity of the notion of the reasonable person: John Cartwright, 'The Fiction of the 'Reasonable Man'', in: A.G. Castermans *et al*. (eds.), *Ex libris Hans Nieuwenhuis*, Deventer: Kluwer 2009.

94 England: Lord Reid in *Morris v West Hartlepool Co Ltd* [1956] AC 552, 574. France: Geneviève Viney and Patrice Jourdain, *Traité de droit civil. Les conditions de la responsabilité (4e édition)*, Paris: LGDJ 2013, no. 462. Germany: Johannes Hager, *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, Buch 2 Recht der Schuldverhältnisse*, Berlin: Sellier – de Gruyter 2009, § 823, no. E25ff; Netherlands: HR 05.11.1965 (Kelderluik), *NJ* 1966, 136, note G.J. Scholten;

> "The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods."

The list of circumstances is by no means exhaustive. Many factors play a role in the evaluation of the applicable standard of care in a specific case and they all vary in weight. The assessment itself consists of balancing the expected risk and the precautions taken or needed. In other words: the interest of the victim not to get hurt is balanced against the interest of the club not to take burdensome precautionary measures.

It is important to note that in certain cases, courts require such a high level of precautionary measures that the defendant's duty is rather a guarantee of safety. An example of this is the standard that applies to drivers of motor vehicles. In many countries, the courts have set the standard of care so high that precautionary measures have become irrelevant.[95] As a result, when an accident occurs, the driver is practically strictly liable. The trend of a rising standard of care has manifested itself in many different situations and has been widely discussed in doctrine.[96] For the purpose of this research, it suffices to be aware of this trend and the reasons behind it, which include the rise and development of insurance and the notion of reaping benefits from a dangerous activity.[97]

5.3.3 The standard of care owed by organising clubs according to the courts

Extensive research shows that the occasions in which a victim of supporters' misconduct has brought a civil claim to obtain damages from a football club are few and far between.[98] Cases of supporters' misconduct that did result

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A.S. Hartkamp & C. Sieburgh, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht 6-IV*, De verbintenis uit de wet*, Kluwer 2011, no. 58. Switzerland: Luc Thévenoz and Franz Werro, *Commentaire Romand. Code des obligations I (2e édition)*, Basel: Helbing Lichtenhahn 2012, art. 41 CO, no. 88.

95 Following case law, most jurisdictions enacted special provisions to deal with this type of liability, the majority in a strict liability rule.

96 See for example Bénédict Winiger, 'Strict Liability: What About Fault?', in: Helmut Koziol and Barbara C. Steiniger (eds.), *European Tort Law 2001*, Vienna: Springer Verlag 2002, pp. 2-17; Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1001-1002.

97 See further Chapter 6.4.1.

98 Providing reasons for this lack would be only speculation. It should, however, be noted that the high-profile Hillsborough disaster, which resulted in the death of 96 people and injuries to 766 others, was settled out of court. In addition, the Heysel disturbances took place in Belgium. It is not inconceivable that victims (or their insurers) of other occurrences

in litigation against the organising club show the courts' struggle between the necessity and willingness to apply a standard of care that is apt to prevent damage on the one hand and the averseness that this standard practically manifests as strict liability on the other.[99]

5.3.3.1 France

The idea to look at the club for compensation for damages incurred by supporters' misconduct is not novel. This is exemplified by *Cts Fuster c/Olympique Lyonnais et autres*, which is perhaps the first published case of its kind.[100]

During a match between Olympique Lyonnais and Olympique Marseille, a twenty-one-year-old man was seriously injured in the face by the explosion of a flare launched by an unknown supporter and died as a result. His family turns to the club for compensation, arguing that Olympique Lyonnais breached its contractual obligation of safety which it owed towards the spectators. According to the family the club failed to provide appropriate security measures to avoid the occurrence of incidents, which were predictable considering the rivalry between the two teams, the particularly high number of spectators (35,000) and the increasing violence prevalent in stadiums. Furthermore, from the start of the match, violent incidents between the supporters of both teams resulted in the throwing of many different projectiles. The club defends itself by stating that it has taken all necessary measures for safety and to avoid damage by increasing the presence of municipal police and private security guards. Further, the club stressed that the accident could not be foreseen and that it seemed to be attributable to Marseille fans, for which the club thus cannot be held responsible.

In its assessment of the case, the court first considers that Olympique Lyonnais as the organiser of the event is held under a contractual obligation of safety in respect of spectators. Based on the fact that the match between the two rivalling clubs was likely to result in disturbances, the large number of spectators as well as the violence that had prevailed during the 'away' match, the club should have taken increased, even exceptional, security measures in anticipation of any incident that could pose a danger to the spectators. The court continues that, on the basis of the regulation of the

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reached settlements or have not thought to bring the club before the court rather than the responsible individuals.

99 This paragraph focuses on cases resulting from claims for damages. Cases based on other claims – such as *Stichting Ban/ADO* in the Netherlands, which is covered in Section 5.4.3 below – are excluded for structural reasons.

100 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.), *Recueil Dalloz* 1986, p. 617 note Gérard Sousi; La semaine juridique 1990 II, no. 21510, note Pierre Collomb. Appeal from Olympique lyonnais rejected: Cass. Civ.1 12.06.1990, n°89-11.815, via: <http://www.legifrance.gouv.fr>.

national federation the club had to ensure that no dangerous objects – such as rockets – enter the stadium.[101]

> "Attendu que force est de constater que l'association susnommée a méconnu l'article 20 du règlement de la Ligue nationale de football, auquel elle ne prétend pas ne pas être soumise, qui prévoit une interdiction d'accès du stade aux personnes en possession d'objets de nature provoquer des blessures aux spectateurs, ladite interdiction s'appliquant aux articles pyrotechniques, tels que pétards, fusées ou feux de bingale".[102]

The court also considered that the twenty-meter barrier between the spectators clearly was insufficient to constitute an effective protection area as fireworks easily reach a distance of 80 to 100 meters. Finally, it was considered that the disturbances between the spectators and the throwing of missiles and firing of rockets lasted at least several minutes without an immediate response from the security personnel. According to the court, this lack of intervention revealed that the number of security personnel was not sufficient – at least in the vicinity of supporter groups, while their presence there was essential. Ultimately, the club is held liable for the death of the young man due to its lack in taking appropriate measures during the organisation of the match to ensure the safety of spectators. This conclusion held before the *Cour de Cassation*.

It is interesting to note that, although the club owes an obligation of means, for each precaution the court takes the *result* as the starting point. For example, the fact that so many fireworks entered the stadium proves that the club did not take enough measures to comply with the obligation to prevent fireworks from entering. The court's line of reasoning practically results in an obligation of result or even strict liability as it is difficult to see how a club can prove that the breach of the obligation cannot be attributed to it.

A similar train of thought can be seen in a case from the same court where a supporter of the visiting team was hit on the head by a large object launched from an adjourning stand while waiting to leave the stands.[103] The court considered that as the match in question between two regional teams was susceptible to result in violent conflicts – as it had in the past – the organiser could not exclude the risk of aggression between the supporters. The fact that a group of fans was left waiting for over an hour on a closed platform, while supporters of the organising team on the adjourning grandstand were able to move, constituted a breach of the duty of the organiser.

The *Cour d'appel de Toulouse* laid a similar foundation for its decision to hold an organising club liable for the injuries of a sixteen-year-old who hurt

101 On the autonomy of the national federation to create and impose such rules see Chapter 2.2.

102 TGI Lyon 25.06.1986 (Consorts Fuster c. L'Olympique lyonnais et autre.).

103 Cour d'appel de Lyon (6e chambre) 17.02.1999, n°97/00170 (Rousset c/Association Olympique Lyonnais).

himself with a smoke grenade he found in a room in the stadium that was made available to the supporters' club the victim was a member of.[104]

> "La SAOS TFC savait que les supporters faisaient usage régulièrement de fumigènes, ce qui laissait supposer que ces fumigènes faisaient partie du matériel entreposé dans cette salle, d'autant plus que le TFC avait été informé que des fumigènes avaient été dérobés à la SNCF et que ceux-ci avaient été retrouvés sur des supporters. La SAOS se devait donc de prendre des précautions renforcées, d'assurer une surveillance accrue du local, du parcours menant de celui-ci aux tribunes et aux places réservées aux supporters."[105]

Even though the courts demonstrate severity on the issue of security, the liability of organisers is not always systematic.[106] For example, a rugby referee that was attacked by a spectator was denied his claim for damages from the club as, according to the court, they did not exercise control over the supporters.[107] In another case it was held that a match that took place in a village of 5000 inhabitants and in the presence of a few dozen supporters did not warrant additional security measures.[108]

Nevertheless, considering the facts of these cases, they do not provide sufficient arguments to conclude that professional football clubs do not owe a virtual guarantee of safety. On the contrary, clubs risk almost automatic liability if supporters' misconduct causes damage.

Considering the many case notes and commentaries that followed the disciplinary cases in France between 2007-2010, it is interesting that the civil-law cases, especially *Fuster/Olympique Lyonnais,* remained absent from the debate on disciplinary liability.[109] Perhaps this can be explained from the administrative-law nature of the disciplinary cases. However, the civil-law liability of football clubs has not received much scrutiny at all and seems firmly established in French civil liability law.[110] An explanation could be that in French law the contractual liability of clubs, which results from a 'strict' obligation of safety, is seen as more logical compared to a strict liability for

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104 Cour d'appel de Toulouse (3e chambre, 1re section) 14.05.2002, n°2001/01793 (Roussillon c/SAOS Toulouse Football Club).

105 Cour d'appel de Toulouse (3e chambre, 1re section) 14.05.2002, n°2001/01793 (Roussillon c/SAOS Toulouse Football Club), cons. B.

106 Compare Christophe Albiges, Stéphane Darmaisin, Olivier Sautel, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 187.

107 CA Agen 09.02.1999, n°96001345 (Assoc. le club de rugby Le Vernet c/Bringuier et al.).

108 Cass. Civ.1, 07.02.2006, n°03-21157 (Fonds de guaranties des victims des actes de terrorisme et d'autres infractions c/Swiss life et al.).

109 See case notes referenced in Chapter 4.3.2.

110 Neither right after in case notes or later in time. Sports law books only refer to the case when talking about the obligation of safety of event organisers, but criticism is absent. For example, Buy *et al. Droit du sport (3e éd)*, Paris: LGDJ 2012, no. 957; and, Christopthe Albiges, Stéphane Darmaisin, Olivier Sautel, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 186.

the behaviour of third parties – even though in practice the results could end up being very similar.

5.3.3.2 England

In England, case law has been limited to one relevant decision so far.[111] In *Cunningham v Reading Football Club*, police officers brought a claim against Reading after they were injured during a match against Bristol in 1984. Already during the first half, Bristol fans had broken barriers between their section and that of the home fans and some fighting occurred. Then, just after the second half had started there was a lot of fighting and Bristol fans threw a very large number of missiles onto the pitch and towards the area where the Reading supporters were seated. After a number of people invaded the pitch, the referee stopped the match and police went onto the pitch to clear it of the invaders. It was then that a number of police officers were injured. They all were struck by pieces of concrete and one unfortunate officer was severely kicked and punched by hooligans after being hit on the head by a heavy chunk of concrete.

According to the claimants, the football club breached its duty as occupier to take reasonable steps to ensure that visitors to the stadium, including police officers, were not unreasonably exposed to danger arising from violence from spectators. In particular, the club knew that it was likely that violence would occur during this particular match and that no measures were taken to repair the ground although the club knew that hooligans had broken pieces of concrete from the stands and used them as missiles before. It was also argued that fencing was inadequate and that insufficient steps were taken to exclude hooligans from attending the match.

J. Drake found the club to be liable based on breach of its statutory duty and under common-law negligence, considering that,

> "the club knew very well that the visiting Bristol crowd was very likely indeed to contain a violent element. They also knew from previous experience, particularly at a match less than four months earlier, that unruly fans might very well throw pieces of concrete as missiles, should they be able to obtain such ammunition and no steps whatsoever had been taken to make it more difficult for that to be done".[112]

The claimants' argument that more stewards could have prevented the outbreak of violence was also considered. However, it was held that in the light

111 *Cunningham and Others v Reading Football Club Limited*, 19.031991, [1992] P.I.Q.R. p. 141.
112 J. Drake in *Cunningham and Others v Reading Football Club Limited*, 19.03.1991, [1992] P.I.Q.R. p. 150.

of circumstances and knowledge at the time of the match, the club was not negligent in this respect.

Interestingly, the Football Association (FA) did not initiate disciplinary proceedings as a Commission decided on the match day that all relevant measures were taken. According to Justice Drake, this discrepancy in evaluation could be explained from the fact that the evidence before the Commission was not as complete as before the courts. Notwithstanding, he considers that the outcome of such disciplinary proceedings would not be relevant as the Football Association had to consider the events according to FA Rules and not according to civil law.[113] This latter view contrasts with developments in English law where private regulations have become increasingly relevant to determining the applicable standard of care.[114]

5.3.3.3 Germany

In Germany, the standard of care of football clubs has been considered in a small number of cases. However, in contrast to France, it proves challenging to establish liability based on a breach of the standard of care.

As far as is known, only once was a football club held liable on the basis of § 823 BGB in a German court.[115] After a promotion match which was won by the organising team, the separation between the field and spectator area was left open resulting in supporters storming onto the field to celebrate the victory. A number of young fans climbed the trainers' shelter, which collapsed and injured another spectator. The court reiterated standing case law from the *BGH* that the organiser is held to take all necessary precautions to protect third parties.[116] The scope of this duty also extends to risks arising from faulty or intentional acts of third parties.[117] The court continues by considering that sufficient personnel should be employed when panicky crowd reactions are to be expected.

> "Soweit hysterische und panikartige Massenreaktionen zu befürchten sind, müssen inbesondere Ordnungskräfte in der Anzahl zum Einsatz kommen, die nach polizeilichen Erfahrungen erforderlich ist, um gegebenenfalls jede kritische Situation, die noch im Rahmen des Vorhersehbaren liegt, zu beherrschen".[118]

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113 J. Drake in *Cunningham and Others v Reading Football Club Limited*, 19.03.1991, [1992] P.I.Q.R. pp. 147-148. See Chapter 6 for another approach.
114 See further Chapter 6.2.
115 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148
116 BGH 02.10.1979 – VI ZR 245/78, *NJW* 1980, 233.
117 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148, cons. 1.
118 OLG Düsseldorf 04.03.1994 – 22 U 209/93, *SpuRt* 1994/4, pp. 146-148, cons. 1.

In short, by not having prevented the spectators from accessing the field and climbing on the trainers' shelter the organising club was held liable for the damage incurred by the claimant.

In another case, a spectator was injured at the entrance to the stadium after a large group of 50-70 young people suddenly started running in the direction of the entrance.[119] Again, it is presupposed that the club has the obligation to take all necessary measures to protect spectators from harm. However, in this case the court considers that a standard of safety that excludes any accident or harmful event cannot be met; one only needs to only take those precautions that are suitable to avert danger to third parties in light of the expected safety concerns.

> "Da jedoch eine Verkehrssicherung, die jeden Unfall oder jedes schädigende Ereignis ausschließt, nicht erreichbar ist, muss nicht für alle denkbaren, entfernteren Möglichkeiten eines Schadenseintrittes Vorsorge genommen werden. Vielmehr sind nur diejenigen Vorkehrungen zu treffen, die nach den Sicherheitserwartungen des jeweiligen Verkehrssicherungspflichtigen geeignet sind, Gefahren von Dritten tunlichst abzuwenden."[120]

In the case at hand the required level of precautionary measures was high, notably because the clubs' supporters had shown violent behaviour in the past. However, according to the court, neither the deployment of more security forces, nor earlier separation of supporter groups could have prevented the horde of young people unexpectedly storming into the stadium. It was further added that the club could only have intervened inside the stadium and not outside. This last point was not further elaborated upon, however.

A similar situation happened in 2001 when two friends visited an international football match between Germany and England at the Olympic Stadium in Munich.[121] Just before entering the stadium, one of them found himself in a 'rampaging horde of English hooligans' who knocked him down and kicked him. The attack was so massive that he passed out and only regained consciousness after the police arrived. The unfortunate man claimed damages arguing that the organiser – in this case the German football federation (DFB) – had not taken sufficient measures to prevent the disturbances. The court of first instance considered that, during major sporting events such as the sold-out match between Germany and England, incidents of this nature cannot be completely ruled out in spite of all the reasonable safeguards taken by the organiser.[122] The attack of the English hooligans had been sudden, unforeseeable and unprovoked. According to the court, such incidents could only be

119 LG Gera 27.09.1996 – 6O 543/96, *SpuRt* 1997/6, pp. 205-206.
120 LG Gera 27.09.1996 – 6O 543/96, *SpuRt* 1997/6, p. 205.
121 LG München I, 04.11.2005 – 34 S 1125/05, *SpuRt* 2006/3, p. 122.
122 AG München 08.12.2004 – 242 C 28746/04, via:< http://www.kostenlose-urteile.de>.

prevented if there was a security person for every stadium visitor and requiring this would be an unfair burden on the operators. The appeal that followed was also rejected, with the consideration that, both organisers and visitors of international football matches should expect supporters' misconduct and that it is unreasonable to require such extensive measures for incidents to be completely ruled out.

> "Grundsätzlich müssen sowohl Veranstalter als auch Besucher von internationalen Fußballspielen und Großveranstaltungen des Sports mit Krawallen, Gewalttätigkeiten und Angriffen rechnen. Die Verkehrssicherungspflicht des Veranstalters wird jedoch durch die Zumutbarkeitsgrenze eingeschränkt. Wie das Amtsgericht zutreffend festgestellt hat, ist es unzumutbar, solche umfassende Sicherheitsvorkehrungen zu treffen, dass derartige Vorkommnisse vollständig ausgeschlossen werden."[123]

In both these cases, the courts' appreciation of the facts to establish the concrete scope of the standard of care remained quite brief. In the most recent case, the Court of Appeal of Frankfurt took a much more elaborate approach.[124] The facts of the case were as follows.

A club was brought before the courts following injuries to one of the landscapers at the stadium at a Bundesliga match in 2008. During the match, various fireworks were thrown from the visiting section, some of which exploded in the vicinity of where the landscaper was standing. As a result, the landscaper suffered permanent damage to his hearing, as well as headaches, dizziness and insomnia. According to the court of second instance, the district court rightly dismissed the claim as the stadium operator did not violate its safety duties. Following standing case law, whoever creates a dangerous situation is obliged to take reasonable precautions to avoid damage. In its assessment of the claim, the court first considers that this duty also applies to organisers of football matches vis-à-vis their spectators. The reason being that,

> "der Veranstalter eines solchen planmäßig durchgeführten sportlichen Wettkampfes mit öffentlichem Interesse, zu dem Zuschauer gegen Entgelt eingeladen werden, „schafft" die Gefahr, indem er den Zustand, von dem für die Zuschauer eine Gefährdung ausgehen kann, herbeiführt oder andauern lässt".[125]

Secondly, the court notes that as safety duties that exclude all damage are impossible to achieve, one has to take those precautions that result in a level of security that is deemed necessary in the sector of activity. In the present case that meant that the defendant had to bear in mind that the common risks

123 LG München I, 04.11.2005 – 34 S 1125/05, *SpuRt* 2006/3, p. 122.
124 OLG Frankfurt 24.02.2011 – 3 U 140/10, <http://dejure.org/2011,2037>, *SpuRt* 2011/4, p. 162. The appeal to the BGH is still pending.
125 Idem.

of Bundesliga football matches include fans throwing burning articles and fireworks which can injure other people in the stadium. As the match was categorised as a high-risk match, because the fans of both clubs had been rivals for years and there had been riots at previous matches, the organiser had to take this into account as well. Finally, the court comes to the conclusion that considering the state of security standards in 2008, the club put in place sufficient measures (although barely) and thus did not breach its duty of care.

> "Auch wenn man davon ausgeht, dass bei Sportveranstaltungen, insbesondere Fußballspielen, an den Schadensverhütungsaufwand nicht nur zum Schutz der Sportler, sondern auch zum Schutz der übrigen Beteiligten besonders große Anforderungen zu stellen sind, weil durch das Aufeinandertreffen rivalisierender, emotionsaufgeladener und zum Teil sogar gewaltbereiter Fans in großer Zahl die nicht unerhebliche Gefahr bewusster tätlicher Auseinandersetzungen besteht, hat die Beklagte vorliegend die an ihre Sicherungspflicht zu stellenden Anforderungen (gerade noch) erfüllt."[126]

The measures taken were in line with those at other national and international football matches and there was no evidence that measures beyond this standard were needed. Acknowledging that other *Bundesliga* football matches take place at much lower controls, the court deemed that the increased security efforts recognised the extra risk of this particular match.

An interesting point to highlight in regard to the reasoning of the court is that it takes time to explore the relevance of developments in security technology. It specifically notes that nowadays scanners and detectors, which are used at airports for example, could prevent the entrance of fireworks to a much greater extent. That this would entail considerable financial expenses or would require more time for the entrance of the public is not deemed to be a valid excuse.[127] Given the turnover achieved in professional football such costs are negligible and requiring such measures from clubs would be neither impossible nor unreasonable, says the court.

This last case is perhaps the best illustration of the difficulty to determine a standard of care which is apt to prevent the majority of foreseen risks without resorting to practically imposing strict liability. It is not surprising that in the majority of German cases care was deemed sufficient, considering the inclination of strict application of legal concepts. In light of the trend of the increasing standard of care, the result of the case is arguable, however, and definitely unsatisfactory for the victim. However, if the same situation were to happen today, the level of security measures required by the court would

126 Idem.

127 In general, when it comes to the scope of the necessary safety precautions the financial capacity of the organiser of sporting events is only of minor importance – if of any. See, BGH 29.11.1983 – VI ZR 137/82, *NJW* 1984, 801-803.

likely be much higher. Considering the security systems available today, a few extra checks would not have sufficed. The court's anticipation of future cases and its dismissal of the argument that implementing such systems is 'too expensive', is at least encouraging.

5.3.4 In summary: the relevant factors to establishing the scope of the standard of care

The goal of this section was to uncover whether football clubs can be held liable for damage caused by their supporters' misconduct based on fault in the relevant jurisdictions. Establishing liability of the club requires proving that the club has acted negligently, as well as causation between the negligent act and the damage. As the concept of fault consists of the intentional or negligent violation of the required standard of care, it is the scope of the latter which determines liability of a club in a specific situation. This is regardless of whether the claim is founded in tort or contract.

From the comparative analysis of fault liability in the different countries as well as the relevant case law, it emerges that in the appreciation of the conduct of clubs in regard to damage caused by supporters' misconduct a number of circumstances should be taken into account.

First, the nature and value of protected interests. The type of interest or right that is at stake has influence on the required care. In cases of supporters' misconduct, the interests at stake will often likely be personal integrity or property, both of which are valued highly in law.

Secondly, the dangerousness of the activity. It is clear that organising professional football matches is not a dangerous activity in itself. However, nowadays supporters' misconduct is an unfortunate but familiar aspect of this activity and a well-known risk. In multiple countries risk assessment of matches takes place on a continuous basis. If supporters' misconduct materialises, the foreseeability of damage as a result of fireworks, fighting, vandalising etc. is great.

Thirdly, the availability and costs of precautionary measures. In their defence, it is not unlikely that clubs will use the argument that complete security is a myth or that heavy security measures ruin the unique atmosphere in the stadium and with this the game of football.[128] In this light it can also be noted that the organising club is the only party that can influence the security. After all, one is not allowed to bring any means of self-defence into the stadium and is thus completely dependent on the organising club to ensure safety. Case law suggests that it is expected that clubs at least adhere to sector

128 As does for example András A. Gurovitz Kohli, 'Die zivilrechtliche Haftung bei Zuschauerausschreitungen', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 161-188, p. 177.

standards – which are laid down in the applicable regulations of the international and national federations. However, this does not entail that compliance with the rules is always sufficient. It is not unusual for organisers to be liable even if they complied with all security rules.[129]

These three factors, whilst not forming an exhaustive list, have guided the limited civil-law case law up until now. However, it is important to remember that these rulings essentially only remain an illustration of the possibilities as well as the difficulties in dealing with damage caused by supporters' misconduct. A clear red thread remains yet to be developed.

5.4 Situations where establishing liability is problematic

Up until now, the focus of this chapter has been on the liability of organising clubs for damage occurring inside the stadium. The reason for this is to be able to clearly distinguish between the situations in which football clubs can be held liable for the damage caused by supporters' misconduct and on what basis. However, in addition to this 'standard situation', supporters' misconduct manifests itself in other situations as well. These situations include more complex cases where causality and other tricky points could stand in the way of liability based on contract or fault. This section consecutively examines whether football clubs also owe a duty of care if they are the visiting club, for damage caused outside the stadium, or, for racist acts.

5.4.1 The standard of care owed by visiting clubs

Fault liability of organising clubs is based on a breach of the standard of care owed by them, which is most often related to safety in the stadium. In light of the disciplinary liability of football clubs – whether they are organising or visiting – the question arises whether the visiting club also owes a duty of care in relation to the behaviour of its own supporters. This is especially relevant in light of the possibility that visiting supporters instigate disturbances with the aim of hurting the organising club, thus provoking both sanctions as well as possible civil liability.[130]

In Germany, case law from a lower court has indeed considered the thought that a visiting club also has obligations in terms of preventing supporters'

129 Benoit Chappuis, Franz Werro and Béatrice Hurni, 'La responsabilité du club sportif pour les actes de ses supporteurs', in: Pierre-André Wessner *et al.*, *"Pour un droit équitable, engagé et chaleureux." Mélanges en l'honneur de Pierre Wessner*, Basel: Helbing Lichtenhahn 2011, pp. 65-110, p. 89.

130 The same issue is observed by Ros. Nathalie Ros, 'Décisions commentées. CE 27 Octobre 2007', *Jurisport* 2007/85, p. 41ff, par. II.B.2

misconduct. Although the case dealt with an appeal to the disciplinary sanction imposed on the visiting club after one of its supporters hit a steward, its considerations are nevertheless relevant in light of the duty of care of visiting clubs.

The court considered that if the disturbances are instigated by the visiting team, this team is also responsible if there was a fault (*Verschulden*). As disturbances had already occurred during the home match, the visiting team should have taken measures to prevent further problems during the away match. In the case at issue, however, the club had remained passive. The court further added that the club can also not argue that the deployment of stewards would not have prevented the disturbances.[131]

Following this case, it has been rightfully questioned whether such deployment of stewards would actually mitigate the possibility of disturbances.[132] However, it is difficult to argue that visiting clubs have no duty whatsoever to attempt the prevention of misconduct among their own supporters. Indeed, the few authors that have touched upon this question all consider that the visiting club owes a duty of care – albeit limited.[133]

However, according to Bondallaz, such a duty of care can only be assumed in exceptional cases, for example if the supporters are known to be susceptible to violence, if those doing the damage are clearly part of the visiting club's supporters, or if the visiting clubs has created conditions favourable to violence in terms of, for example, transport or match ticket sales.[134] Furthermore, Bondallaz argues that it would not be unreasonable to hold the visiting club accountable for accepting insufficient safety measures taken by the organising club or for continuing a match while spectators start to act violently.[135]

Considering the risks involved, it is not unreasonable to require the visiting club to take measures to prevent misconduct from its own supporters, for example by putting in place surveillance measures or organising and obliging specific modes of transport to away matches. These measures all include things

131 LG Koblenz 21.02.2003 – 411 C 367/03, *SpuRt* 2006, pp. 81-83, p. 82.

132 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49.

133 Switzerland: Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 75ff; Germany: Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 205; Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49. In French, English and Dutch literature, this issue is largely, if not completely, disregarded.

134 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 92-102.

135 Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 84-85.

visiting clubs can control – at least in some way. Some federations include such obligations in their regulations.

In summary, if the visiting club indeed also owes a duty of care, this can lead to civil liability. In this case, joint liability of the organising and visiting club for damage caused by a supporter of the latter in the stadium is a possibility. After all, if disturbances arise, it is not unlikely that both clubs breached their respective duties of care. It will then be up to the courts to decide the distribution of the liability and damages between the two clubs – and possibly also the injurious supporters if they can be identified. However, if no breach of the visiting club's duty of care can be established, this leads to the undesirable situation in which the organising club risks full liability; also in the case of intentional rioting by the visiting club with the aim of hurting the organising club.

5.4.2 The standard of care owed outside the stadium

So far, the focus of this chapter has been on exposing the liability of football clubs for damage caused by their supporters inside the stadium. It is, however, not unusual – and unfortunately increasingly common – that supporters' misconduct leads to damage outside stadiums. For example, during the 2014 Cup final in Switzerland, supporters caused at least 40,000 CHF in property damage during their march from the station to the stadium and looted a souvenir shop.[136]

For those who have suffered damage, a claim based on contract will be impossible as it is unlikely that a club has contractual relations with people living or exercising their business in the vicinity of the stadium. For a claim based on fault liability to succeed, it needs to be established that the club has breached a duty of care.

The essential conditions to hold a club liable for damage outside the stadium risk being very difficult to meet. Only when a third party's protected interest is harmed and when the circumstances require that the club should have averted such damage, can a duty of care be assumed.[137] This is where the problem arises, since clubs often do not have the possibility or authority to implement measures outside the stadium that could avoid this. In the public space it is the police who have not only the duty, but also the monopoly to

136 Afterwards, the SFV offered to pay CHF 200,000 towards the security costs, which were estimated at half a million. <http://www.srf.ch/news/regional/bern-freiburg-wallis/fussballverband-soll-fuer-cupfinal-randale-bezahlen>. In 2015 the Cup final took place in Basel, after Bern no longer wanted to host.

137 Compare András Gurovitz, 'Die zivilrechtliche Haftung für Zuschauerverhalten', *Causa Sport* 2014, pp. 267-276, p. 269.

ensure safety.[138] However, the clubs do have to inform and collaborate with the relevant police forces so as to ensure they can do their job.[139]

Despite the police's responsibility, an organising club's duty of care does not start and end at the stadium gates. On match days, the immediate surroundings of a stadium clearly pose risks that are closely connected to the club's activities and controlled by them, such as tickets sales at the entrance and entrance control.[140] As aptly phrased by Haslinger, "[d]ie Verkehrssicherungspflicht umfasst insoweit die Abscherung von Gefahren, die an die Veranstaltung und nicht das Grundstück als solches anknüpfen, auch wenn sie über das Stadiongelände hinausgehen".[141]

However, the further away the damage is incurred the more difficult it will be to prove the club owed a duty of care and breached it. In France, the *Cour de Cassation* decided that the organiser of a motor racing event was not responsible for damages suffered by the owners of a refreshment bar built at the circuit, which was ransacked and partially burned by unidentified spectators. The court considered that, firstly, the police force that was present on the premises in order to ensure order and security was not acting under the direction and control of the organiser. Secondly, the organiser had taken all necessary measures for the smooth running of the event and had had no opportunity to prevent the fire and subsequent demolition of the building.[142]

This is especially relevant in connection with the views defended in literature that clubs should be expected to take measures to ensure proper circumstances for the arrival and departure of the different spectator groups.[143] However, here too it will be difficult to accept a duty of care that extends further than the immediate vicinity of the stadium. One of the German courts already cited above considered that the organisers can only exercise powers of intervention inside the stadium, which seemed to suggest that no duty of care exists outside the stadium.[144] Furthermore, one has to agree with Walker, that even if there is a certain standard, it is still very difficult, if not impossible

138 In England, the police are often hired to do indoor security work as well. Simon Gardiner *et al*., *Sports Law. Fourth edition*, Oxon: Routledge 2012, p. 567ff.

139 Neglecting this duty likely leads to liability, as it is in breach of the standard of care.

140 Jochen Fritzweiler, Bernhard Pfister,Thomas Summerer, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, Munich: CH Beck Verlag 2014, p. 546.

141 Bastian Haslinger, *Zuschauerausschreitungen und Verbandssanktionen im Fußball* (diss. Zurich), Baden-Baden: Nomos 2011, p. 204.

142 Cass. Civ.2 22.02.1984, n°82-16041, Bull civ II, n°36.

143 András A. Gurovitz Kohli, 'Die zivilrechtliche Haftung bei Zuschauerausschreitungen', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 161-188, p. 180ff; Jacques Bondallaz, *La responsabilité pour les préjudices causés dans les stades lors de compétitions sportives* (diss. Fribourg), Bern: Stämpfli 1996, no. 741-800.

144 LG Gera 27.09.1996, 6O 543/96, *SpuRt* 1997, 206.

to secure the entire way from the station to the stadium with stewards, who also don't have the authority to intervene.[145]

Another, perhaps somewhat unrealistic – option for residents or business owners in the vicinity of the stadium is to base a claim on nuisance. In short, nuisance can be described as causing a substantial and unreasonable interference with someone's land or his use or enjoyment of that land.[146] Classic nuisance cases related to sports infrastructures and events generally involve either noise or the risk of balls flying out of the field and causing damage to property or passing people.[147] So far, no cases are known to have been filed following supporters' misconduct and whether this would succeed is doubtful.[148]

In short, unless a club has been negligent in accurately informing the police about the expected security risks, it will be virtually impossible to bring a successful claim against a club for damage incurred outside the stadium grounds.

5.4.3 Liability for racist acts

Up until now, the main focus has been liability for damage caused by supporters' misconduct. However, the issue of racism in football has received increasingly more attention in recent years. With both UEFA and FIFA having launched campaigns to combat racism and verbal violence in football, it is firmly on the agenda. Additionally, a number of federations have modified

145 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 49.

146 Cees van Dam, *European Tort Law* (2nd edition), Oxford University Press 2013, no. 1412, 1414-1, 1416.

147 Nuisance cases. Germany: Jochen Fritzweiler, Bernhard Pfister,Thomas Summerer, *Praxishandbuch Sportrecht (3. neu bearbeite Auflage)*, Munich: CH Beck Verlag 2014, p. 546; England: Simon Gardiner *et al.*, *Sports Law. Fourth edition*, Oxon: Routledge 2012, p. 555ff, see cases cited. France: Christoph Albiges *et al.*, *Responsabilité et sport*, Paris: LexisNexis SA 2007, p. 195.

148 A number of German authors have attempted to compare disciplinary strict liability to § 1004 BGB, the majority ultimately concluding that this analogy is faulty. Ulrich Haas and Julia Jansen, 'Die verbandrechtliche Verantwortlichkeit für Zuschauerausschreitungen im Fussball', in: Oliver Arter and Margareta Baddeley, *Sport und Recht. Sicherheit im Sport*, Bern: Stämpfli Verlag AG 2008, pp. 129-159; Frank Bahners, 'Die Rechtmässigkeit von Verbandsstrafen gegenüber Fussballvereinen bei Zuschauerausschreitungen', *Causa Sport* 2009/1, pp. 26-28.

their regulations in order to provide for minimum sentences and stricter rules regarding (enforcement and) recidivism.[149]

As holds for physical or property damage caused by supporters' misconduct, identifying the original tortfeasor of racist or discriminatory acts is also difficult – if not even more so. Is it feasible for victims of racist or discriminatory acts to address the clubs instead?

This question has been examined by Dippel from a German law perspective. Depending on the victim's relationship with the club there are a few options available to him. First, in its capacity as employer, a club can be held liable for discriminatory acts of players (of both teams) as well as supporters if the act is aimed at one of its employees.[150] Based on the German General Equal Treatment Act (*AGG*), the employer has the duty to take measures necessary to ensure protection against discrimination, including preventive measures.[151] However, these measures are limited to those risks the employer should reasonably take into account.[152] The risk of racist chants from supporters can definitely be categorised as such a risk.[153] Although it has been doubted whether the obligation of preventive measures also applies in regard to third parties such as supporters, Dippel argues that clubs have various options to influence supporters to prevent racist acts, including the display of banners, information stands, fan coaching and provisions on tickets.[154] According to the *AGG*, the club also has the obligation to employ repressive measures.[155] However, the scope of these measures has not yet been developed. Nevertheless, in regard to repressive measures following racist acts at football matches, one could think of banning orders.[156] In principle, if an employer breaches these duties, the victim can claim damages by virtue of article 15 *AGG*. However, the majority opinion in Germany is that such claims would go too far and are contrary to the history of the statute.[157]

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149 UEFA implemented recidivism aggravation in the 2013 edition of its Disciplinary Regulations. The Dutch Federation has also tightened its rules over the last few years: <http://home.knvb.nl/themas/veiligheid/spreekkoren-in-het-voetbal/>.

150 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 206.

151 Art. 12 AGG.

152 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 209.

153 See also: Marc-Philippe Weller, 'Die Haftung von Fußballvereinen für Randale und Rassismus', *NJW* 2007, p. 963.

154 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 210.

155 Art. 12 (3), (4) AGG.

156 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 218.

157 See Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 220; Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart:

Despite the existence of equality statutes in all jurisdictions, victims of racist acts during football matches will generally have to resort to basing their claim on a breach of the (contractual) standard of care. The idea that clubs owe the duty to prevent racist acts is in principle supported in literature.[158] However, as no clear standard has been developed yet, courts will have to resort to a balancing of interests of the club and the victim.[159]

So far, the sole example of a club having been brought before a court following racist acts from its supporters is the Dutch case *Stichting Bestrijding Antisemitisme/ADO Den Haag*.[160] The *Stichting Bestrijding Antisemitisme* (hereafter: BAN), a foundation fighting anti-Semitism, brought summary court proceedings to football club ADO Den Haag for failing to prevent and react to anti-Semitic chanting during a league match between ADO Den Haag and A.F.C. Ajax on March 20, 2011.[161] During the confrontation ADO supporters frequently chanted anti-Semitic slogans. After having unsuccessfully approached ADO to ensure it would take measures in the future, BAN demanded the court in preliminary relief proceedings to order ADO to immediately take action when anti-Semitic chants are sung, and if necessary stop the match.[162] The foundation argues that the repeated and offensive anti-Semitic chants generated by the public during the match are totally unacceptable in a civilised society. According to the applicable law and regulations of the KNVB, ADO was required to act promptly against the chanting by stopping the match, which was within its power, and acted unlawfully by failing to do so. ADO defends itself by arguing that the chants were not massive and only short-lived and, furthermore, that it did not notice the chants. The foundation's main argument is thus that ADO has breached KNVB regulations as well as its own.

The court presupposes that it is the primary responsibility of a professional club to act against unwanted chants as this follows clearly from the applicable

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Richard Boorberg Verlag 2009, pp. 35-59, p. 58; Gregor Thüsing, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1: Allgemeiner Teil*, München: Verlag C.H. Beck 2012, § 15 AGG, no. 25.

158 Marc-Philippe Weller, Die Haftung von Fußballvereinen für Randale und Rassismus', *NJW* 2007, pp. 960-964, p. 963; Gregor Thüsing, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 1: Allgemeiner Teil*, München: Verlag C.H. Beck 2012, § 12 AGG, no. 12.

159 Compare, Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 269.

160 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>. See for a more detailed case note, R.H.C. van Kleef, Football Club held Liable in Dutch Court for Failing to Take Measures against Racist Chanting', in *International Sports Law Journal* 2012/1-2, pp. 101-103.

161 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>. See for a more detailed case note, R.H.C. van Kleef, Football Club held Liable in Dutch Court for failing to take Measures against Racist Chanting', in *International Sports Law Journal* 2012/1-2, pp. 101-103.

162 Pres. Rb. Den Haag 9.08.2011, ECLI:NL:RBSGR:2011:BR4406, <www.rechtspraak.nl>, cons. 2.1.

internal regulations.[163] The court goes on to consider that under the circumstances and based on social decency (*maatschappelijke betamelijkheid)*, the KNVB regulations and its own by-laws, ADO had the duty to take immediate action against the anti-Semitic chanting.[164] By failing to do so, ADO acted unlawfully. With regard to the scope of eventual preventive measures required, the court considered that racist chants do not necessitate the immediate shutdown of the match. Before doing so, a club can take a number of other steps that are less intrusive. Only when these have no effect, will the match have to be temporarily or permanently suspended.[165] The argument that suspension of the match could lead to disturbances was countered by the court, considering that clubs should anticipate such possible risks.

> "Dat het stilleggen van een wedstrijd kan leiden tot organisatorische problemen en/of risico's voor de handhaving van de openbare orde ontslaat ADO niet van voormelde verplichting. Dat zou immers kunnen meebrengen dat kwetsende spreekkoren worden getolereerd, hetgeen moet worden uitgesloten. Het ligt op de weg van ADO om te anticiperen op de mogelijkheid dat een wedstrijd wordt stilgelegd, opdat in een voorkomend geval snel en adequaat kan worden gehandeld, bijvoorbeeld door met het oog daarop afspraken te maken met de verschillende betrokken instanties."[166]

In the assessment of any potential future cases, the following indicators will be relevant in establishing the standard of care. First, protection against discrimination or racism is regarded as one of the most important interests to be protected by law.[167] Secondly, it should be noted that although the occurrence of racist acts is perhaps not a typical risk inherent to the organisation of football matches, it is most definitely a probable risk in the football context. With regard to the availability and costs of precautionary measures it should not come as a surprise that racist acts of supporters are practically impossible to prevent.[168] There are some options available, but even with stadium bans, dismissals of supporters, and stadium-wide announcements, racists chants remain very difficult to prevent. Considering the costs of measures, one has to agree that although this is a factor, an economic approach is difficult to imagine when the interest at stake is human dignity.[169]

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163 Cons. 3.3.
164 Cons. 3.5.
165 Cons. 3.9.
166 Cons. 3.10.
167 See for example, art. 2:102 (2) PETL: 'Life, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection'.
168 This argument only covers verbal acts. When, for example, banners featuring discriminatory phrases are displayed, preventive measures could have avoided such banners from entering the stadium.
169 Martin Dippel, *Zivilrechtliche Haftung für Rassismus bei Sportveranstaltungen. Am Beispiel des Fußballsports* (diss. Göttingen), Hamburg: Verlag Dr. Kovač 2011, p. 282.

Finally, in regard to causation it should be noted that the connection between the violation of the victim's rights and the breach of standard of care will not be too difficult to prove if there were no measures put in place. However, if the club did implement measures, the argument that racist acts would have happened anyway might hold.[170] In line with the ADO case, in order to escape liability the most important thing clubs can do is reacting to racist acts, in other words, by implementing repressive measures.

In summary, even more so than in regard to other forms of supporters' misconduct, racist acts are almost impossible to prevent. Unless the club has remained completely passive or breached its own internal regulations, it seems highly unlikely it would be held liable.

5.5 Concluding remarks

Liability of organising clubs based on contract or fault liability requires the victim to prove that the club breached the required standard of care. In the assessment of the standard of care in specific cases, courts have been guided by three main factors: the nature and value of protected interests, the dangerousness of the activity, and the availability and costs of precautionary measures.

In general, the interests at stake – property and personal integrity – are valued highly and thus require a high standard of care. Regarding the dangerousness of the activity, it was argued that the occurrence of supporters' misconduct is a known risk. Furthermore, significant damage is foreseeable, which provides further argument for a high standard of care. With regard to the critical factor of availability and costs of precautionary measures, *Stichting Bestrijding Antisemitisme/ADO Den Haag* shows that although the assessment of this factor is guided by the applicable regulations from the federation, compliance with these rules does not equal compliance with the standard of care. It became clear that considering the interests at stake, the dangerousness of the activity and foreseeability of damage, the requirements of precautionary measures to be put in place are very high and will likely be almost impossible to meet.

The available case law has further shown the courts' struggle between the necessity and willingness to apply a standard of care that is apt to prevent damage on the one hand and the averseness that this standard practically manifests as strict liability on the other. However, the case law also shows that organising clubs do owe a high standard of care to their contractual

170 Wolf-Dietrich Walker, 'Zivilrechtliche Haftung für Zuschauerausschreitungen', in: Wolf-Dietrich Walker (ed.), *Hooliganismus. Verantwortlichkeit und Haftung für Zuschauerausschreitungen*, Stuttgart: Richard Boorberg Verlag 2009, pp. 35-59, p. 58.

partners and third parties and that liability for damage caused by supporters' misconduct is a very real possibility for clubs, especially in England and France, where the standard of care is set very high. Although case law is absent, the same conclusion can be drawn for the Netherlands considering the continuous rising standard of care in this jurisdiction. In Germany, the courts seem to be a bit more reluctant. However, a club has been held liable before and there has been no sign of a systematic reluctance.

Nevertheless, it can be questioned whether it is desirable that the liability of clubs for supporters' misconduct is dependent on a breach of the applicable standard of care. Especially, since this standard has to rise to extreme heights in order to be attainable. In addition, there remain instances of supporters' misconduct for which the club cannot be held liable – or only in very unusual circumstances – on the basis of a breach of the standard of care while voices from society seem to expect more here. In the next chapter it will be explored whether strict liability – similar to the disciplinary liability rule – could solve these issues.