

4-1-1990

Torts & Sports: Participant Liability to Co-participants for Injuries Sustained During Competition

Daniel E. Lazaroff

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-participants for Injuries Sustained During Competition*, 7 U. Miami Ent. & Sports L. Rev. 191 (1990)

Available at: <http://repository.law.miami.edu/umeslr/vol7/iss2/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

UNIVERSITY OF MIAMI ENTERTAINMENT & SPORTS LAW REVIEW

ARTICLES

TORTS & SPORTS: PARTICIPANT LIABILITY TO CO-PARTICIPANTS FOR INJURIES SUSTAINED DURING COMPETITION

DANIEL E. LAZAROFF*

I. INTRODUCTION	192
II. THEORIES OF TORT LIABILITY—SEARCHING FOR A WORKABLE STANDARD OF FAULT	194
A. <i>Identifying the Practical Problems and Difficult Questions</i>	194
B. <i>The Relevant Case Law: The Applicable Legal Theories</i>	195
1. Suggestions of a Negligence Standard and Reliance on Assumption of Risk	195
2. Beyond Negligence—Movement Toward a Recklessness Standard ...	198
3. The Effects of Comparative Fault Principles	205
III. CRITIQUING THE CASE LAW—SOME UNRESOLVED PROBLEMS	213
A. <i>Questioning Recklessness as a Workable Standard</i>	213
B. <i>Assumption of Risk and Consent—Elusive Concepts in the Sports Context</i>	214
C. <i>Continuing Problems with Comparative Fault</i>	216
D. <i>Is Overly Aggressive Behavior Tolerated, Encouraged, and Emulated?</i> ..	217
IV. CONSIDERING ALTERNATIVE APPROACHES	221
A. <i>Relying on Internal Rules as an Objective Standard for Tort Liability</i> ..	222

* Professor of Law, Loyola Law School, Los Angeles; B.A. 1971, State University of New York at Stony Brook; J.D. 1974, New York University.

B. Combining the Internal Rules Approach and the Recklessness Standard	223
C. The Unresolved Problems—Dealing With Sports Violence Generally	224
1. Self-Regulation by Sports Organizations	225
2. Governmental Intervention—The Ultimate Weapon in Creating a New Ethos of Sport	226
V. CONCLUSION	227

I. INTRODUCTION

Damaging and painful physical injury to participants is an unfortunate yet inevitable consequence of many professional and amateur sports activities. The general purpose of this Article is to examine the tort issues presented when injuries result from the actions of co-participants.¹ More specifically, this Article discusses

1. For commentary dealing with the civil and criminal legal issues raised by sports injuries and violence, see DiNicola and Mendeloff, *Controlling Violence in Professional Sports: Rule Reform and the Federal Professional Sports Violence Commission*, 21 DUQ. L. REV. 842 (1983); Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425 (1977); Horrow, *Violence in Professional Sports: Is it Part of the Game?*, 9 J. LEGIS. 1 (1982); Lambert, *Tort Law and Participant Sports: The Line Between Vigor and Violence*, 4 J. CONTEMP. L. 211 (1978); Letourneau and Manganas, *Violence in Sports: Evidentiary Problems in Criminal Prosecutions*, 16 OSGOODE HALL L.J. 577 (1978); Luntz, *Compensation for Injuries Due to Sport*, 54 AUSTL. L.J. 588 (1980); Note, *Tort Liability in Professional Sports*, 44 ALB. L. REV. 696 (1980); Note, *Liability in Professional Sports: An Alternative to Violence?*, 22 ARIZ. L. REV. 919 (1980); Comment, *The Consent Defense: Sports, Violence and the Criminal Law*, 13 AM. CRIM. L. REV. 235 (1975); Note, *Participant's Liability for Injury to a Fellow Participant in an Organized Athletic Event*, 53 CHI. KENT L. REV. 97 (1976); Note, *Violence in Professional Sports: A Proposal for Self-Regulation*, 3 COMM./ENT. 425 (1981); Note, *Uniform Health and Safety Standards for Professional Boxing: A Problem in Search of a Federal Solution?*, 15 COLUM. HUM. RTS. L. REV. 259 (1984); Comment, *A Proposed Legislative Solution to the Problem of Violent Acts by Participants During Professional Sporting Events: The Sports Violence Act of 1980*, 7 U. DAYTON L. REV. 91 (1981); Note, *Professional Sports and Tort Liability: A Victory for the Intentionally Injured Player*, 1980 DET. C.L. REV. 687 (1980); Note, *Torts—Civil Liability of Athletes—Professional Football Player May Have Tort Claim for Injuries Intentionally Inflicted During Football Game*, 84 DICK. L. REV. 753 (1980); Note, *Assumption of Risk and Vicarious Liability in Personal Injury Actions Brought by Professional Athletes*, 1980 DUKE L.J. 742; Note, *Tort Law—Reckless Misconduct in Sports*, 19 DUQ. L. REV. 191 (1980); Note, *Torts in Sports—Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764 (1980); Note, *Torts—Assumption of Risk—A Professional Football Player Assumes the Risk of Receiving a Blow, Delivered Out of Anger and Frustration, but Without Specific Intention to Injure During a Game*, 12 GA. L. REV. 380 (1978); Comment, *Controlling Violence in Professional Sports*, 2 GLENDALE L. REV. 323 (1978); Note, *Negligence—A Professional Football Player Owes a Duty to All Participants to Refrain from Reckless Misconduct in the Course of a Professional Football Game*, 15 GONZ. L. REV. 867 (1980); Comment, *It's Not How You Play the Game, It's Whether You Win or Lose: The Need for Criminal Sanctions to Curb Violence in Professional Sports*, 12 HAMLINE L. REV. 71 (1988); Note, *Injuries Resulting From Non-Intentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete*, 12 IND. L. REV. 687 (1979); Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681 (1989); Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976); Note, *Assault and Battery—Liability for Injuries Received in Athletic Contests*, 26

the theories of civil liability available to athletes who are injured by co-participants during the course of a sporting event.² These injuries may result from contact with fast-moving baseballs, hockey pucks, or other potentially dangerous objects that are necessary equipment in many sports. In other cases, participant injury may result from altercations or bodily contact with other players in or around the arena before, during, or after an athletic contest. A significant body of case law has evolved regarding participant injury, and questions of tort liability continue to be litigated frequently.³

The Article begins by identifying and analyzing applicable legal principles. This requires a discussion of participant injury resulting from alleged negligence by other players, as well as injury resulting from reckless and even intentionally dangerous or violent behavior. The Article then focuses upon the problems not adequately addressed by the major judicial decisions, contending that the current legal standards provide inadequate and uncertain protection from unnecessary violence and injury to sports participants. The Article also explores the viability of current legal standards in light of developments with respect to comparative fault, assumption of risk, and the doctrine of consent, and questions the application of conventional tort theories to sports participant liability. Finally, alternative approaches will be examined, including self-regulation and a discussion of how revised expectations of sports participants, promoters, and fans could provide a solution. This Article concludes by suggesting a tort standard that includes

MICH. L. REV. 322 (1927); Note, *Sports Violence: A Matter of Societal Concern*, 55 NOTRE DAME L. REV. 796 (1980); Note, *Compensating Injured Professional Athletes: The Mystique of Sports Versus Traditional Tort Principles*, 55 N.Y.U. L. REV. 971 (1980); Comment, *Civil Liability: An Alternative to Violence in Sporting Events*, 15 OHIO N.U.L. REV. 243 (1988); Note, *Criminal Law: Consent as a Defense to Criminal Battery—The Problem of Athletic Contests*, 28 OKLA. L. REV. 840 (1975); Note, *Sports and the Law*, 5 OKLA. CITY U.L. REV. 659 (1980); Note, *Sports Liability: Blowing the Whistle on Referees*, 12 PAC. L.J. 937 (1981); Note, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399 (1982); Note, *Aftermath of a Tragedy—Liability of the New York State Athletic Commission for Injuries Suffered in a Prizefight*, 14 SYRACUSE L. REV. 79 (1962); Note, *Torts: Athlete States Cause of Action for Injury During a Professional Football Game*, 19 WASHBURN L.J. 646 (1980).

2. Although potential criminal liability for sports participants has been addressed in some of the literature, that issue is beyond the scope of this Article. This piece concentrates on the civil liability questions raised by athletic participation. In addition, this Article limits its consideration of the tort issues to co-participant liability. Tort claims resulting, for example, from defective equipment, inadequate supervision, medical malpractice, or unsafe playing conditions will not be discussed in this piece.

3. See *supra* note 1 for scholarly works discussing the legal issues involved in co-participant injury liability.

some of the subjective elements of the recklessness standard, and some of the objective elements of a sport's internal rules and customs.

II. THEORIES OF TORT LIABILITY—SEARCHING FOR A WORKABLE STANDARD OF FAULT

As even weekend athletes could attest, vigorous participation in sporting activities all too often results in painful or debilitating injury. In both individual and team events, players frequently suffer injuries from overexertion, contact with other participants, or contact with playing equipment. These injuries may cause permanent and disabling bodily damage and, in the case of professional athletes, significantly impair or destroy vast earning potential. Given the reality that many sports necessarily involve risk of personal injury, the emergence of any simple, uniform legal standard applicable to all sports would be of questionable validity and utility. This section of the Article explores the potential liability of sports participants who find themselves faced with tort claims because of injuries sustained by a co-participant.

A. Identifying the Practical Problems and Difficult Questions

Prior to discussion of case law, it is important to note briefly the unique problems presented by sports participant tort claims. Most human interaction is predicated upon nonviolence and due care; sports activities, however, often result in injury caused by one player to another. In some "contact" sports, infliction of pain and injury is expected and even encouraged by coaches, fans and the players themselves. For example, it is inconceivable that professional boxing or full contact karate matches could be conducted without some injury to one or both participants. Causing bodily harm is the very essence of the match. Even in so-called "non-contact" sports such as basketball or baseball, contact with other players or their equipment is common and sometimes produces serious injury.

On the other hand, certain activities fall outside any conceivable bounds of legitimate conduct, even for a contact sport.⁴ This section examines existing tort principles and attempts to mark the

4. For example, a participant in a football game could not use a weapon on the field. While this is a rather extreme example, it establishes that there must be some limits to potentially injurious conduct in the context of sports.

boundaries of acceptable behavior for athletes. Physical contact in some sports is necessary and predictable; however, a concomitant need to establish some limits on dangerous behavior exists. Where should the line of demarcation be drawn? Is there any room for a conventional negligence standard in the sports context, or does public policy require a different standard of liability such as recklessness or specific intent to injure? Are contributory negligence or assumption of risk viable defenses? Do emerging comparative fault principles alter the analysis? Should it matter whether the participants are adults or minors? Is there a distinction between amateur and professional sports activities? Should standards vary depending upon whether a sport is viewed as a "contact" or "non-contact" sport, and can that distinction be drawn easily? Should internal rule violations become the standard for tort liability? The formulation of any general principle must address these fundamental questions.

B. The Relevant Case Law: The Applicable Legal Theories

Sports participant plaintiffs commonly advance three theories of tort liability: (1) negligence; (2) recklessness; and (3) assault and battery. Although some courts discuss participant liability in terms of negligence, most contemporary courts have been reluctant to predicate participant liability upon ordinary negligence. The emerging legal standard requires either recklessness or specific intent to injure by defendant.

1. Suggestions of a Negligence Standard and Reliance on Assumption of Risk

In *Gaspard v. Grain Dealers Mutual Ins. Co.*,⁵ plaintiff was struck by a baseball bat that had slipped out of defendant's hands during a school recess baseball game.⁶ Defendant denied any negligence and pleaded both assumption of risk and contributory negligence as affirmative defenses to the action.⁷ Plaintiff argued that defendant was negligent in using a heavy bat with a defective grip while his hands were "dirty and wet with sweat."⁸ The Louisiana appellate court affirmed a judgment for defendant, agreeing that negligence was not established given the fact that defendant was a

5. 131 So. 2d 831 (La. Ct. App. 1961).

6. *Id.*

7. *Id.* at 831-32.

8. *Id.* at 833.

minor.⁹ In addition, the court explicitly sanctioned the application of the assumption of risk doctrine to bar recovery: "[A]ll of the necessary elements of assumption of the risk are present in the instant case. Flying balls and bats are dangerous, young [plaintiff] knew of the danger and he clearly acquiesced or proceeded in the face of danger by voluntarily playing the game."¹⁰ The court analogized this case to spectator injury cases, emphasizing that baseball was a "strenuous game involving danger to both players and spectators."¹¹ If a player knowingly exposed himself to the risks, he assumed the risks "inherent" in the game.¹²

The *Gaspard* holding left important questions unanswered. What if a plaintiff was an unsophisticated player who was unaware of baseball's inherent dangers? Would the defendant then be liable, or could he still argue successfully the absence of negligence or assumption of the risk? What risks should a knowledgeable participant assume? If the *Gaspard* court implicitly endorsed a negligence standard, what constitutes reasonable care under these circumstances? Can courts develop an objective standard of reasonable behavior, or is an *ad hoc* approach necessary? Should the critical issues be treated as matters of law, or as questions of fact for a jury? *Gaspard* did little to provide clear responses.

In *Richmond v. Employers' Fire Ins. Co.*,¹³ an accident similar to the *Gaspard* incident occurred. A college baseball player was struck in the face by a "fungo" bat which slipped from the hands of a coach during a practice session.¹⁴ Plaintiff advanced several theories of negligence, but the court found that defendant was not negligent.¹⁵ The court stated that even if any negligence had been established, "[i]t is settled law that one who participates in a game or sport assumes the risk of injuries which are inherent in or incidental to that game or sport."¹⁶ The court concluded that the risk of being struck by a bat released by another player was a "foreseeable risk inherent in baseball practice."¹⁷

The *Richmond* court seemed to assume that a negligence stan-

9. *Id.* at 833-34.

10. *Id.* at 834.

11. *Id.*

12. *Id.*

13. 298 So. 2d 118 (La. Ct. App. 1974).

14. *Id.* at 120.

15. *Id.* at 121.

16. *Id.* at 122.

17. *Id.* See also *Dillard v. Little League Baseball, Inc.*, 55 A.D.2d 477, 390 N.Y.S.2d 735 (N.Y. App. Div. 1977) (umpire who was hit by a baseball pitched after umpire had called "time out" assumed the risk of injury as a matter of law).

dard did apply to participants in sporting activities. However, the court appeared to endorse a strict standard of ordinary care, and permitted assumption of risk to function as an alternative rationale for denying recovery. *Richmond* failed to clarify which risks should be deemed "inherent" in particular sports, or whether plaintiff's subjective appreciation or ignorance of specific risks was dispositive.

In *Niemczyk v. Burleson*,¹⁸ the Missouri Court of Appeals struggled with the questions of the legal duty of sports participants and what role assumption of risk was to play. In that case, plaintiff was injured when defendant, who was playing shortstop on the opposing softball team, ran across the infield and collided with plaintiff as she attempted to run from first to second base.¹⁹ The trial court noted that the complaint was predicated solely upon a theory of negligence,²⁰ and dismissed the action.²¹

The Missouri Court of Appeals reversed and remanded, recognizing that a line of cases established that a "voluntary participant in a baseball or softball game assumes the risks ordinarily incident thereto and only in exceptional circumstances may he recover from a co-participant for injuries unintentionally caused by the latter."²² The court conceded that "[a]cts or omissions which may constitute negligence off the playing field may not be such when taking place upon it."²³ The court then identified the criteria to be used in determining whether actionable negligence had occurred: (1) the game involved; (2) the ages and physical attributes of the participants; (3) their respective skills at the game and their knowledge of its rules and customs; (4) their status as amateurs or professionals; (5) the risks inherent in the game as opposed to those not within the realm of reasonable anticipation; (6) the presence or absence of protective equipment; (7) the "degree of zest" with which the game was being played; and (8) doubtless others.²⁴ Because plaintiff specifically pleaded that the blocking of the base path was negligent, the *Niemczyk* court found it was inappropriate to dismiss the action at the pleading stage.²⁵

18. 538 S.W.2d 737 (Mo. Ct. App. 1976).

19. *Id.* at 739.

20. *Id.*

21. *Id.* at 743.

22. *Id.* at 740.

23. *Id.* at 741.

24. *Id.* at 741-42.

25. *Id.* at 743. The dissenting judge in *Niemczyk*, however, argued that the case could just as easily have been dismissed based upon the failure to allege any intentional wrongdoing, as well as the fact that baseline collisions were inherent to softball and baseball games.

2. Beyond Negligence—Movement Toward a Recklessness Standard

Other cases demonstrate judicial unwillingness to hold sports participant defendants liable for mere negligence. Most modern courts raise the threshold for tort liability and require proof of reckless behavior. In *Nabozny v. Barnhill*,²⁶ the goaltender of an amateur soccer team was injured when defendant, a forward on the opposing squad, kicked plaintiff in the head while the latter was on one knee cradling the ball.²⁷ This contact occurred while plaintiff was positioned within the "penalty area," a rectangular area between the goal and the eighteen yard line.²⁸ Contact with a goalkeeper in the penalty area while he was in possession of the ball violated the rules of the game.²⁹

The *Nabozny* court began its analysis by recognizing the policy justification for a balanced approach to tort liability in the context of sports: "[T]he law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe organized athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. . . ."³⁰ In pursuit of this policy, the court noted that when all parties know the rules, and a safety rule is included, players are charged with a legal duty to refrain from violating that rule.³¹ Yet, the court did not appear to endorse a negligence standard for liability in this context. It instead held that a participant was liable for injury in tort if his conduct was either deliberate, willful or with reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.³² While little or no guidance was provided in *Nabozny* with respect to what constituted recklessness rather than negligence, the case signaled an

Id. (Billings, C.J., dissenting). The dissent may have the better viewpoint because well-trained professionals collide unintentionally during the heat of a game, and to hold amateur players to a stricter standard of care is difficult to justify.

26. 31 Ill. App. 3d 212, 334 N.E.2d 258 (Ill. App. Ct. 1975). For further commentary on this case, see Note, *Torts—Participant in Athletic Competition States Cause of Action for Injuries Against Other Participants: Nabozny v. Barnhill*, 42 Mo. L. Rev. 347 (1977); Note, *Tort Liability for Players in Contact Sports: Nabozny v. Barnhill*, 45 U. Mo. K.C. L. Rev. 119 (1976).

27. *Nabozny*, 31 Ill. App. 3d at 214, 334 N.E.2d at 260.

28. *Id.*

29. *Id.*

30. *Id.* at 215, 334 N.E.2d at 261.

31. *Id.*

32. *Id.*

attempt to articulate a more stringent standard for liability when a sports participant injured another participant during the course of play.

Another application of a recklessness standard is found in *Bourque v. Duplechin*.³³ In *Bourque*, plaintiff, while playing second base in an amateur softball game, was hit by the opposing team's base runner.³⁴ According to the testimony at trial, defendant made no effort to slide, brought his left arm up under plaintiff's chin upon contact, and veered from the base path in order to strike plaintiff, who was some four or five feet away from second base.³⁵ In a somewhat cryptic and inconsistent manner, the Louisiana Court of Appeals explained what it perceived to be the applicable rule of law. Initially, the court stated that defendant had a duty to play softball "in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players."³⁶ The court characterized defendant's conduct as "substandard and negligent,"³⁷ implying that the governing legal standard was negligence rather than recklessness or some other higher standard. Plaintiff assumed the risk of being hit by a bat or ball, and may have also assumed the risk of being injured while standing in the base path by someone sliding into second base.³⁸ Plaintiff did not assume, however, the risk of a base runner going out of his way to run into him at full speed. The court commented:

A participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and foreseeable. A participant does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating.³⁹

Yet, the *Bourque* court later contradicted itself, stating that plaintiff had not assumed the risk of defendant's negligent (as opposed to reckless) act.⁴⁰ Confusing matters further, the court again, in two successive sentences, characterized defendant's actions as both negligent and reckless.⁴¹

The *Bourque* decision is hardly a model of clarity; it is uncer-

33. 331 So. 2d 40 (La. Ct. App. 1976).

34. *Id.* at 41.

35. *Id.* at 42.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (emphasis added).

40. *Id.* at 43.

41. *Id.*

tain whether the decision rejected or endorsed a negligence or recklessness standard. What may be gleaned from the facts is that defendant's conduct, while arguably not intentionally harmful, went beyond mere negligent conduct and was actionable. On the other hand, *Bourque* is too ambiguous to stand for the proposition that a claim based upon ordinary negligence would be precluded.

A significant and celebrated decision regarding participant injury is *Hackbart v. Cincinnati Bengals, Inc.*⁴² In *Hackbart*, plaintiff was playing safety for the Denver Broncos while defendant was playing fullback for the Cincinnati Bengals. After the Broncos intercepted a pass, plaintiff, attempting to block defendant, fell to the ground.⁴³ Defendant, "[a]cting out of anger and frustration, but without a specific intent to injure,"⁴⁴ hit plaintiff with his forearm on the back of the head. Because the play was not observed by an official, special notice of the incident was not taken and a penalty was not assessed.⁴⁵ At a later date, however, it was discovered that plaintiff had sustained a neck injury.⁴⁶

The district court began its analysis by emphasizing that the liability issue had to be decided in the context of football as a commercial enterprise that necessarily involved violent physical behavior and serious collisions.⁴⁷ The court recognized that while rules of play existed to limit contact, application of those rules required subjective evaluation.⁴⁸ Consequently, many penalties occur as a natural incident of the game.⁴⁹ Serious and disabling injuries may

42. 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). For further commentary, see Zuchman, *Throw 'Em to the Lions (or Bengals): The Decline & Fall of Sports Civilization as Seen Through the Eyes of a United States District Court*, 5 J.C. & U.L. 55 (1977); Note, *Judicial Scrutiny of Tortious Conduct in Professional Sports: Do Professional Athletes Assume the Risk of Injuries Resulting from Rule Violations?*—*Hackbart v. Cincinnati Bengals, Inc.*, 17 CAL. W.L. REV. 149 (1980); Note, *The "Booby" Trap: Does the Violent Nature of Professional Football Vitiating the Doctrine of Due Care in Participant Tort Litigation?* *Hackbart v. Cincinnati Bengals, Inc.*, 10 CONN. L. REV. 365 (1978); Note, *Tort Liability in Professional Sports: Battle in the Sports Arena*, *Hackbart v. Cincinnati Bengals, Inc.*, 57 NEB. L. REV. 1128 (1978); Note, *On Finding Civil Liability Between Professional Football Players: Hackbart v. Cincinnati Bengals, Inc.*, 15 NEW ENG. L. REV. 741 (1980); Note, *Federal Jurisdiction—Torts—Federal District Court in Diversity Suit May Not Refuse Jurisdiction Over Professional Football Player's Claim for Damages Resulting From Blow Intentionally Inflicted—Applicable Tort Standard for Recovery is Reckless Misconduct: Hackbart v. Cincinnati Bengals, Inc.*, 11 RUT.-CAM. L.J. 497 (1980).

43. *Hackbart*, 435 F. Supp. at 353.

44. *Id.*

45. *Id.*

46. *Id.* at 353-54.

47. *Id.* at 354.

48. *Id.*

49. *Id.*

also occur.⁵⁰ Coaches encourage players to reach a level of controlled rage prior to the commencement of a game, and as large and noisy crowds add to the emotional intensity of the game, the outbreak of fights is not uncommon.⁵¹ The court also noted that, for some, the appeal of football is the "spectacle of savagery."⁵²

Against this background, the trial court considered plaintiff's theories of liability.⁵³ Plaintiff relied primarily upon a theory of reckless misconduct, advancing a theory of negligence as an alternative basis for recovery.⁵⁴ The court characterized the dispositive question as what a reasonably prudent football player would be expected to do under the circumstances confronting defendant.⁵⁵ The court determined that it was "wholly incongruous" to think in terms of reasonable conduct in the context of a profession that was inherently violent and likely to result in bodily harm.⁵⁶ The trial court entered judgment for defendants, finding that plaintiff's liability theories were subject to the defenses of consent and assumption of risk.⁵⁷

Additionally, the court in *Hackbart* explored the limits of judicial competence with respect to professional football injuries. Stating that there were "no Athenian virtues in this form of athletics,"⁵⁸ the trial court concluded that difficult problems of proving causation, the threat of voluminous litigation, and the likelihood of the development of conflicting legal principles precluded judicial inquiry.⁵⁹ While deferring to the legislature to provide guidance,⁶⁰ the court limited its holding to professional football and an injury claim resulting from a blow without weaponry and without specific intent to injure.⁶¹

On appeal,⁶² the Tenth Circuit Court of Appeals rejected the trial court's conclusion that the judiciary was ill-suited to deal with this issue, noting that even the rules of professional football pro-

50. *Id.* at 355.

51. *Id.*

52. *Id.*

53. Any claim of intentional misconduct was barred by the statute of limitations. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 356.

57. *Id.*

58. *Id.* at 358.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

hibited the conduct alleged.⁶³ The court refused to endorse the idea that professional football players occupied a "safe harbor" when they entered the field of play but proceeded to nonetheless cause injury to their opponents. Instead, the *Hackbart* court reframed the issue as "whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game."⁶⁴ The court decreed that recklessness, defined as the adoption of a course of action either with knowledge of the danger it created or with knowledge of facts which would disclose this danger to a reasonable person,⁶⁵ was the appropriate substantive standard to be applied. According to the court, the magnitude of risk in a case of recklessness was substantially greater than the magnitude of risk in simple negligence.⁶⁶ Recklessness differed from an intentional battery, however, because the actor intended the act but not the specific harm resulting from his actions.⁶⁷ The Tenth Circuit concluded that plaintiff was entitled to a trial on the merits to determine whether defendant's acts were in reckless disregard of plaintiff's safety.⁶⁸

While *Hackbart* is consistent with the evolving recklessness standard for tort claims involving sports participants, it left several important questions unanswered. Although the Tenth Circuit noted that contributory negligence could not be a defense because it was inapplicable where conduct more culpable than mere negligence was alleged,⁶⁹ it conceded the possible application of a defense of "[i]ntentional or reckless contributory fault."⁷⁰ Further, while the court recognized it was unlikely that football players consented to injuries caused by actions not within the rules,⁷¹ even the casual observer would be aware that numerous penalties occur during games and it is quite foreseeable that a participant may incur an injury as a result of an illegal block, blow, or other conduct. *Hackbart* also left unexplained how a trier of fact could distinguish between negligence and recklessness in the context of a game

63. *Id.* at 521.

64. *Id.* at 518.

65. *Id.* at 524.

66. *Id.*

67. *Id.*

68. *Id.* at 525. In so doing, while the court stated that it was not prejudging the issues of fact, it hinted strongly that recklessness had occurred.

69. *Id.* at 520.

70. *Id.*

71. *Id.*

where players are encouraged to play with reckless abandon. There is a fine, often indistinguishable line between legitimate, aggressive play and illegal contact. While recklessness may be a workable standard in purely non-contact sports, whether it can be applied practically to more violent sports is more difficult to resolve. Questions also remain unanswered about the possible application of the doctrine of assumption of risk to reckless action by football players. If assumption of risk principles are deemed relevant to reckless conduct, how would a court in a comparative fault jurisdiction approach the problem?

Other modern decisions follow the *Nabozny* and *Hackbart* rationales and conclude that ordinary negligence will not suffice to impose liability where one sports participant causes injury to another. For example, in *Santiago v. Clark*,⁷² one jockey alleged that another had cut in front of him and caused a fall. The court granted summary judgment for defendant, relying upon the assumption of risk doctrine, and barred recovery absent a specific intent to injure or cause an accident.⁷³ Mere error or carelessness would not suffice.⁷⁴ Similarly, in *Oswald v. Township High School District No. 214*,⁷⁵ a high school basketball player claimed that another player negligently kicked him during a game. The court affirmed the dismissal of the claim because nothing more than ordinary negligence had been alleged.⁷⁶

In *Ross v. Clouser*,⁷⁷ plaintiff alleged that defendant committed a tort by diving head first into plaintiff's knee while running the bases.⁷⁸ The Supreme Court of Missouri rejected negligence as the standard, holding that "a cause of action for personal injuries incurred during athletic competition must be predicated on recklessness, not mere negligence. . . ."⁷⁹ The court recognized a need to balance the legitimate "proper fervor" of competition with the

72. 444 F. Supp. 1077 (N.D. W. Va. 1978).

73. *Id.* at 1079.

74. *Id.* This could imply that recklessness would not suffice and that intent to injure was the key element for a claim to proceed.

75. 84 Ill. App. 3d 723, 406 N.E.2d 157 (1980).

76. *Id.* at 727, 406 N.E.2d at 159-60. The court noted a distinction between contact and non-contact sports, stating that "[b]ecause rule infractions, deliberate or unintentional, are virtually inevitable in contact games, we believe the imposition of a different standard of conduct is justified where injury results from such contact." *Id.* See also *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (N.M. Ct. App. 1983) (voluntary participation in football game competition implied consent; *Hackbart* recklessness rule applied).

77. 637 S.W.2d 11 (Mo. 1982).

78. *Id.* at 13.

79. *Id.* at 13-14.

need for some "reasonable controls."⁸⁰ The *Ross* court decided that a recklessness standard properly balanced these competing interests. Although the opinion rejected the earlier implication in *Niemczyk*⁸¹ that negligence might suffice, it reiterated that decision's list of factors to be considered in determining whether actionable recklessness had occurred.⁸²

A rejection of a negligence standard is also illustrated by *Kabella v. Bouschelle*.⁸³ Plaintiff dislocated his hip during an informal game of tackle football after defendant threw plaintiff to the ground and then fell on him.⁸⁴ Plaintiff alleged that defendant acted negligently because defendant did not stop tackling, even after plaintiff announced that he was down.⁸⁵

The Court of Appeals of New Mexico affirmed summary judgment for defendant,⁸⁶ noting that other jurisdictions allowed recovery upon three divergent legal theories: (1) assault and battery; (2) negligence; and (3) willful or reckless misconduct.⁸⁷ The court recognized that the defense of consent had been used to preclude recovery for assault and battery claims, and that jurisdictions were split regarding the viability of negligence as a proven standard in the sports context.⁸⁸ The *Kabella* court acknowledged that modern cases have upheld the right of a participant to bring suit only in cases where an intentional or willful and reckless infliction of an injury was alleged.⁸⁹ Because plaintiff in *Kabella* was not participating in an organized athletic contest with referees and a definite set of rules, and because no allegation of intentional or reckless contact was made, defendant prevailed.⁹⁰ The court concluded that public policy justified this result in order to avoid chilling vigorous sports participation.⁹¹

80. *Id.* at 14.

81. 538 S.W.2d 737 (Mo. Ct. App. 1976).

82. See *supra* text accompanying note 24. Interestingly, the *Ross* court endorsed the idea that under a recklessness standard, a plaintiff could still assume the risk of injury. *Ross*, 637 S.W.2d at 14. One judge dissented in *Ross*, and suggested that the appropriate threshold for recovery might be specific intent rather than recklessness. *Id.* at 15-16 (Welliver, J., dissenting). That judge also noted the relevance of assumption of risk and consent as possible defenses. *Id.*

83. 100 N.M. 461, 672 P.2d 290 (N.M. Ct. App. 1983).

84. *Id.*

85. *Id.*

86. *Id.* at 462, 672 P.2d at 291.

87. *Id.*

88. *Id.* at 462-63, 672 P.2d at 291-92.

89. *Id.* at 463, 672 P.2d at 292.

90. *Id.* at 464-65, 672 P.2d at 293-94.

91. *Id.* at 465, 672 P.2d at 294. The *Kabella* court recognized that the case involved

3. The Effects of Comparative Fault Principles

Despite contemporary courts' implementation of a recklessness standard for assessing participant liability, the abrogation of the doctrine of assumption of risk creates problems for jurisdictions that employ a comparative fault system. *Segoviano v. Housing Auth.*⁹² provides a good example of the complications of comparative fault principles in participant injury cases.

In *Segoviano*, plaintiff brought a personal injury action after suffering a shoulder separation in a flag football game sponsored by defendant.⁹³ At trial, the court ordered defense counsel to refrain from making any reference to assumption of risk. Instead, the jury was instructed on the issue of contributory negligence.⁹⁴ The California Court of Appeals found this to be reversible error, because plaintiff's decision to play was not unreasonable, and he did not play negligently during the game.⁹⁵

In the course of its legal analysis, the *Segoviano* court held that *reasonable* implied assumption of risk played no role in California's comparative fault system.⁹⁶ More specifically, the assumption of risk concept neither barred a plaintiff's recovery by eliminating a defendant's duty of care nor constituted an aspect of comparative fault by justifying a reduction of otherwise recoverable damages.⁹⁷ Rather, a jury may allocate fault and damages pursuant to a comparative fault system only when a plaintiff's participation in a particular activity was deemed unreasonable.⁹⁸ The *Segoviano* court indicated that it was retaining contributory fault as a partial defense and eliminating reasonable implied assumption of risk as a complete defense because the two were separate and distinct doctrines. While assumption of risk involved a negation of a defendant's duty of care and may constitute entirely reasonable conduct,⁹⁹ contributory negligence was a defense to a defendant's breach of duty.

Segoviano suggests that to the extent a plaintiff unreasonably

minors, who were not necessarily held to the same legal standards as adults. *Id.* See also *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990) (recklessness applied to pickup basketball game).

92. 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

93. Plaintiff was pushed from behind, in violation of flag football rules, and seriously injured his left shoulder. *Id.* at 165, 191 Cal. Rptr. at 580.

94. *Id.* at 166, 191 Cal. Rptr. at 580.

95. *Id.* at 174-75, 191 Cal. Rptr. at 587.

96. *Id.* at 164, 191 Cal. Rptr. at 579.

97. *Id.*

98. *Id.* at 164, 191 Cal. Rptr. at 579-80.

99. *Id.* at 166-67, 191 Cal. Rptr. at 581.

undertakes a specific, known risk, assumption of risk merges with contributory negligence and is considered an aspect of comparative fault.¹⁰⁰ On the other hand, a plaintiff who impliedly consents to a reasonable risk—that is, where the benefits outweigh the potential costs—may recover fully.¹⁰¹ The rationale for this result is that courts should not punish reasonable conduct.¹⁰² If widely followed, *Segoviano* might resurrect negligence as a viable theory of tort liability for sports participants.

In sharp contrast to *Segoviano*, the New York Court of Appeals, in *Turcotte v. Fell*,¹⁰³ required more than a mere negligence standard in sports participant liability cases, and rejected the notion that the adoption of comparative fault principles completely invalidated the assumption of risk doctrine. In *Turcotte*, a jockey suffered severe permanent injury when another jockey allegedly engaged in negligent conduct by riding in a manner that caused his horse to weave into the path of plaintiff's mount.¹⁰⁴ Notwithstanding that New York had adopted a comparative fault rule, the court noted the distinction between unreasonable and reasonable risk assumption, determining that reasonable risk assumption relieved defendant of a duty with respect to the perceived risk.¹⁰⁵ Thus, the reasonable decision of plaintiff to engage in professional horse racing relieved defendant of any duty of care regarding known risks inherent in the activity.¹⁰⁶ Plaintiff implicitly consented to relieve others from any duty to protect him from these dangers, and could sue in the event that defendant's acts amounted to reckless, wanton, or intentional infliction of injury.¹⁰⁷

A somewhat different analytical approach may be attributable to the Supreme Court of Florida. In *Kuehner v. Green*,¹⁰⁸ plaintiff was injured during a karate sparring match when defendant allegedly engaged in a negligent "leg sweep" takedown.¹⁰⁹ At trial, the

100. *Id.* at 167, 191 Cal. Rptr. at 582.

101. *Id.* at 167-70, 191 Cal. Rptr. at 581-84.

102. *Id.* at 170, 191 Cal. Rptr. at 583-84. *See also* *Rutter v. Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981) (court permitted a participant injury case to proceed on a negligent supervision theory without the need to allege recklessness, suggesting that the adoption of a comparative negligence scheme may require that a jury decide these issues as a matter of fact rather than as a matter of law).

103. 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (N.Y. 1986).

104. *Id.* at 436, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

105. *Id.* at 438-39, 502 N.E.2d at 967-68, 510 N.Y.S.2d at 52-53.

106. *Id.* at 441, 502 N.E.2d at 969-70, 510 N.Y.S.2d at 54-55.

107. *Id.*

108. 436 So. 2d 78 (Fla. 1983).

109. *Id.* at 79.

jury found plaintiff and defendant each fifty percent negligent under comparative fault principles, and awarded plaintiff \$55,000.¹¹⁰ However, the jury's answer to a special interrogatory prompted the trial judge to find that plaintiff expressly assumed the risk of injury, and judgment was entered for defendant.¹¹¹

The Supreme Court of Florida framed the dispositive question as whether express assumption of risk absolutely barred a plaintiff's recovery where he engaged in a contact sport with another participant who injured him without deliberate attempt to injure.¹¹² The *Kuehner* court began its analysis with a policy rationale, noting that in order for contact sports to remain a legitimate recreational activity, express assumption of risk by way of covenants not to sue must remain a viable defense.¹¹³ The court acknowledged that application of the express assumption of the risk doctrine required an assessment of plaintiff's voluntary consent or waiver of protection of the usual tort principles.¹¹⁴ Plaintiff must subjectively appreciate the risk and voluntarily expose himself to it.¹¹⁵ If plaintiff does not appreciate the risk and is unreasonable in not doing so, then comparative fault principles apply. If he does not appreciate the risk and is reasonable in not doing so, he may then recover in full.¹¹⁶

Applying this analysis to the facts, the court found that plaintiff expressly assumed the risk and was barred from recovery.¹¹⁷ Interestingly, one justice, concurring on the ground that plaintiff failed to state a cause of action,¹¹⁸ objected vehemently to the majority's implication that mere negligence might suffice to establish tort liability for sports participants.¹¹⁹ Intentional or reckless misconduct, according to the concurrence, was the applicable standard.¹²⁰ Thus, *Kuehner* demonstrated that while recklessness might be an emerging standard, it is by no means uniformly

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 80.

115. *Id.*

116. *Id.*

117. *Id.* at 81.

118. *Id.* at 81 (Boyd, J., concurring).

119. *Id.*

120. *Id.* For a decision based upon intentional tort, see *Overall v. Kadella*, 138 Mich. App. 351, 361 N.W.2d 352 (1984) (hockey fight). See also *Tomjanovich v. California Sports, Inc.*, No. H-78-243 (S.D. Tex. Oct. 10, 1979) (punch to the face during professional basketball game).

accepted.

Several other recent decisions further evidence the emergence of a recklessness standard in sports participant injury cases. However, these cases also reflect a simultaneous failure to resolve key issues regarding comparative fault principles. In *O'Neill v. Daniels*,¹²¹ a New York appellate court considered a claim by a softball player who was injured by another player with a ball thrown during a "warm up" exercise.¹²² The court acknowledged that New York's adoption of comparative fault principles precluded application of assumption of risk as a complete bar to recovery.¹²³ The court focused on the scope of defendant's duty, which necessarily included consideration of risk assumption in terms of qualifying defendant's duty of care.¹²⁴ Plaintiff voluntarily participated in the "warm up," and thereby consented to known, apparent or foreseeable risks.¹²⁵ However, plaintiff did not consent to an injury that was inflicted either recklessly or intentionally.¹²⁶ The court affirmed the dismissal of the complaint, concluding that plaintiff consented to the inherent risks of softball with an understanding of the dangers.¹²⁷ In the view of the *O'Neill* court, the advent of comparative fault did not increase a defendant's liability exposure. While assumption of risk was no longer an absolute bar, the defense of consent and a reduction of defendant's duty of care still precluded recovery.

In *Hanson v. Kynast*,¹²⁸ the Ohio Court of Appeals suggested that recklessness was impermissible as a theory of recovery. In *Hanson*, plaintiff was paralyzed after defendant flipped him over in a lacrosse game. Plaintiff alleged that defendant's conduct was intentional.¹²⁹ The trial court granted summary judgment in favor of defendant, and the appellate court affirmed, finding no intent to injure.¹³⁰

Judge Milligan, concurring, wrote a more elaborate and analytical opinion than did the majority.¹³¹ He initially recognized that a negligence standard was rejected by courts in the sports

121. 135 A.D.2d 1076, 523 N.Y.S.2d 264 (N.Y. App. Div. 1987).

122. *Id.*

123. *Id.* at 1077, 523 N.Y.S.2d at 265.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 38 Ohio App. 3d 58, 526 N.E.2d 327 (1987).

129. *Id.* at 58, 526 N.E.2d at 327-28.

130. *Id.* at 60, 526 N.E.2d at 329.

131. *Id.* at 61-66, 526 N.E.2d at 330-34 (Milligan, J., concurring).

context to prevent unreasonable interference with vigorous sports participation.¹³² Although players are often encouraged to play with reckless abandon, some courts "paradoxically" adopt a recklessness standard for tort liability.¹³³ Focusing upon the critical issue left unaddressed by the majority, Judge Milligan noted that "courts considering this problem have given little consideration to a precise definition of the requisite intent in the context of conduct on the athletic field."¹³⁴ He attempted to distinguish between specific intent to injure and recklessness, referring to them as a "nebulous continuum."¹³⁵ Interestingly, the judge recognized that the various definitions of recklessness provided little guidance to courts in deciding specific cases,¹³⁶ noting also that the concept of recklessness varied depending on the nature of the particular sport.¹³⁷ In contact sports, greater risks were inherent in the activity; defendant's duty was therefore diminished.¹³⁸

Judge Milligan further acknowledged that in a comparative fault jurisdiction, assumption of risk and contributory negligence may merge, with plaintiff assuming only reasonably foreseeable risks.¹³⁹ The defense of consent also remained viable.¹⁴⁰ He argued that a player "consents as a matter of law to assume the risk of injuries resulting from reasonably foreseeable conduct by other players."¹⁴¹ The concurrence thus endorsed a duty for sports participant defendants to avoid recklessness or intentionally injurious conduct.¹⁴²

In *Ordway v. Superior Court*,¹⁴³ the California Court of Appeals rejected a negligence standard and endorsed recklessness as the controlling guidepost.¹⁴⁴ In *Ordway*, a jockey was injured during a race when another jockey violated a safety rule by allowing a horse to cross over without sufficient clearance, thereby causing interference.¹⁴⁵ Plaintiff was thrown from her mount and injured

132. *Id.* at 61-62, 526 N.E.2d at 330-31.

133. *Id.* at 62, 526 N.E.2d at 331.

134. *Id.*

135. *Id.* at 62-63, 526 N.E.2d at 331.

136. *Id.* at 63-65, 526 N.E.2d at 331-33.

137. *Id.* at 64, 526 N.E.2d at 332-33.

138. *Id.* at 64, 526 N.E.2d at 333.

139. *Id.*

140. *Id.* at 65, 526 N.E.2d at 333-34.

141. *Id.*

142. *Id.* at 65, 526 N.E.2d at 333-34.

143. 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988).

144. *Id.* at 108, 243 Cal. Rptr. at 542.

145. *Id.* at 101, 243 Cal. Rptr. at 537.

when the horse rolled over her;¹⁴⁶ she alleged that defendant rode the horse negligently.¹⁴⁷

The *Ordway* court framed the issue as whether reasonable implied assumption of risk remained a viable defense after the adoption of comparative fault. Concluding that it did,¹⁴⁸ the court acknowledged that other courts and scholars traditionally recognize three types of assumption of risk: (1) express assumption of risk; (2) reasonable implied assumption of risk; and (3) unreasonable implied assumption of risk.¹⁴⁹ Express assumption of risk involved a plaintiff's actual agreement to relieve a defendant of a duty to act reasonably.¹⁵⁰ Reasonable implied assumption of risk was an "inferred agreement to relieve a potential defendant of a duty of care based on the potential plaintiff's *reasonable* conduct in encountering a known danger."¹⁵¹ Unlike contributory negligence, which arguably overlaps with unreasonable risk assumption because a plaintiff fails to exercise due care, reasonable assumption of risk involves perfectly reasonable conduct by plaintiff. It presumes that the risk was undertaken with both knowledge and appreciation of the risk.¹⁵²

The difficult question faced by the *Ordway* court was whether California's judicial adoption of comparative fault precluded the application of implied reasonable assumption of risk as an absolute bar to recovery in negligence.¹⁵³ The *Ordway* court recognized that, in *Segoviano v. Housing Auth.*,¹⁵⁴ a California appellate court had rejected reasonable implied assumption of risk, and had concluded that only express assumption of risk remained viable as a complete defense.¹⁵⁵ Nevertheless, the *Ordway* court rejected the reasoning of *Segoviano*,¹⁵⁶ and adopted the position that reasonable implied assumption of risk was "only another way of stating that the defendant's duty of care has been reduced in proportion to the hazards attendant to the event."¹⁵⁷ Plaintiff agreed to reduce de-

146. *Id.*

147. *Id.*

148. *Id.* at 101, 243 Cal. Rptr. at 537.

149. *Id.* at 102, 243 Cal. Rptr. at 538.

150. *Id.*

151. *Id.* (emphasis in original).

152. *Id.*

153. *Id.* at 103, 243 Cal. Rptr. at 538.

154. 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

155. *Ordway*, 198 Cal. App. 3d at 103-04, 243 Cal. Rptr. at 539. See *supra* notes 92-102 and accompanying text for a discussion of the *Segoviano* decision.

156. *Id.*

157. *Id.* at 104, 243 Cal. Rptr. at 539.

fendant's duty of care, so negligence would not suffice to establish a cause of action.¹⁵⁸ Thus, "those who have taken a . . . recreational risk with a conscious awareness of all it entails . . . are on their own."¹⁵⁹ Only unreasonable risk assumption remains an element of comparative fault analysis, resulting in the seemingly anomalous conclusion that the unreasonable may pursue tort claims while the reasonable may not.¹⁶⁰

The *Ordway* court also noted that assumption of risk was not historically a bar to recovery in cases involving intentional or reckless conduct.¹⁶¹ Participants do not generally consent to reckless or intentional injurious acts by others.¹⁶² In *Ordway*, however, the court did not find the facts supportive of any theory other than negligence.¹⁶³ The court further determined that defendant's violation of a safety rule was neither dispositive nor persuasive.¹⁶⁴

In *Nganga v. The College of Wooster*,¹⁶⁵ plaintiff was injured in an intramural soccer game and sued an opposing team member who broke his ankle with a slide tackle.¹⁶⁶ Rejecting plaintiff's claim, the court concluded that soccer was a high contact sport and that plaintiff had assumed the risks of the game.¹⁶⁷ However, intentional or reckless conduct was held to be actionable.¹⁶⁸ Similarly, in *McElhaney v. Monroe*,¹⁶⁹ an Ohio court concluded that injuries sustained by plaintiff during a sandlot game of tackle football were not actionable.¹⁷⁰ Plaintiff claimed that he was negligently tackled by an opposing team member, but the court confined the scope of legally cognizable conduct to intentional or reckless behavior.¹⁷¹ The court found that voluntary participation in football constituted implied consent to normal risks attendant to a contact sport.¹⁷² A finding of recklessness depended on the sport involved and its perceived inherent risks.¹⁷³ The *McElhaney*

158. *Id.*

159. *Id.* at 105, 243 Cal. Rptr. at 540.

160. *Id.*

161. *Id.* at 108, 243 Cal. Rptr. at 542.

162. *Id.*

163. *Id.* at 108-09, 243 Cal. Rptr. at 542-43.

164. *Id.* at 109-112, 243 Cal. Rptr. at 542-43.

165. 52 Ohio App. 3d 70, 557 N.E.2d 152 (1989).

166. *Id.* at 70, 557 N.E.2d at 153.

167. *Id.* at 72, 557 N.E.2d at 154.

168. *Id.*

169. No. 13454 (Ohio Ct. App. Feb. 1, 1989) (LEXIS, States Library, Ohio file).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

court granted defendant summary judgment as a matter of law.¹⁷⁴

In *Gauvin v. Clark*,¹⁷⁵ plaintiff was allegedly hit with the "butt-end" of a hockey stick during the course of play and suffered serious abdominal injury.¹⁷⁶ He lost his spleen and suffered bladder and abdominal pain.¹⁷⁷ The *Gauvin* jury acknowledged that a safety rule was violated, but based an award on a finding of mere negligence.¹⁷⁸ The trial judge, finding negligence to be an insufficient predicate for liability, entered judgment for defendant.¹⁷⁹ The Supreme Judicial Court of Massachusetts affirmed, recognizing that sports participants often consent to contact that would otherwise be an assault and battery.¹⁸⁰ Adopting a recklessness standard, the court focused on defendant's duty rather than plaintiff's assumption of the risk.¹⁸¹ This enabled the court to avoid the pitfalls of comparative fault analysis. The court also found that the violation of a safety rule was not, in itself, enough to establish a violation of its recklessness standard.¹⁸²

The trend in the case law involving participant injuries sustained at the hands of other participants indicates that most courts endorse a recklessness standard as the threshold for liability. Cases in some jurisdictions, however, seem to advance a standard more akin to ordinary negligence. Further, while some courts use reasonable implied assumption of risk, implied consent, or a no-duty concept to insulate defendant from liability for negligence, some cases nevertheless suggest that comparative fault principles preclude use of even reasonable risk assumption as an absolute bar to recovery. Thus, in a comparative negligence jurisdiction, where some courts refuse to preserve reasonable implied assumption of risk as a viable defense, a plaintiff may be able to get to a jury on either a negligence or a recklessness theory. The results vary from jurisdiction to jurisdiction, depending upon the existence or absence of comparative fault principles, the threshold standard of culpability adopted, and the treatment of reasonable implied assumption of the risk.

174. *Id.*

175. 404 Mass. 450, 537 N.E.2d 94 (1989).

176. *Id.* at 452, 537 N.E.2d at 95.

177. *Id.*

178. *Id.* at 453, 537 N.E.2d at 96.

179. *Id.*

180. *Id.* at 454, 537 N.E.2d at 96.

181. *Id.* at 454, 537 N.E.2d at 97.

182. *Id.* at 455, 537 N.E.2d at 97.

III. CRITIQUING THE CASE LAW—SOME UNRESOLVED PROBLEMS

Although recent case law seems to militate in favor of a recklessness standard for sports participant tort liability, these decisions fail to adequately resolve a variety of important questions raised by the application of that standard in the unique context of sports. The use of recklessness as a tort principle may be perfectly sensible in most societal situations. Its adoption as a standard of behavior in most sports, however, brings to mind the proverbial attempt to fit a square peg into a round hole.

A. *Questioning Recklessness as a Workable Standard*

In order for an actor to be deemed reckless, it is generally required that he or she take action with knowledge of a danger or with knowledge of facts that would disclose the danger to a reasonable person. The actor does not specifically intend to harm someone else, but does intend the act and has sufficient information that it may be dangerous.¹⁸³

Applying this standard to non-contact sports such as tennis or bowling poses little analytical difficulty. Its application to contact sports is much more problematic. For example, in boxing, not only are the participants aware of the activity's risks, but they also specifically intend to inflict pain and injury on the other fighter. The sport is intrinsically violent and the ultimate objective is destruction of the opponent's ability to fight back. To be sure, there are rules and regulations that govern the scope of permissible conduct, but the intent to inflict damage is undeniably an essential component of the sport. Thus, the usual limits a traditional recklessness standard imposes on participants make little sense in the context of boxing.

Even in sports where the primary goal is not infliction of bodily injury, a recklessness standard poses significant problems. Football is a game in which the objective is to outscore another team by moving the ball across the opponent's goal line and preventing the opponent from doing the same. Yet the methods by which the ultimate goals are reached necessarily include intentional acts that inflict injury and pain. The players are well aware of the potential for injury, even when wearing protective equipment. To hold a

183. See RESTATEMENT (SECOND) OF TORTS § 500 and accompanying commentary (1965). See also *Hanson v. Kynast*, 38 Ohio App. 3d 58, 62-65, 526 N.E.2d 327, 331-33 (1987) (Milligan, J., concurring) (commenting critically on various "tautological" definitions of recklessness).

football player liable for any conduct that he knows is likely to be harmful would be anomalous and unfair. In fact, given the nature of the training players receive, even intentional infliction of injury appears consistent with accepted rules of participation.

Ice hockey and lacrosse are other examples of sports in which body checking and physical play may foreseeably result in frequent injuries. It would be similarly unjust to predicate participant liability upon the participant's knowledge that a tough check or collision could result in an injury. This type of conduct is inherent in the sport itself. Even baseball and basketball—sports not usually viewed as contact sports on the level of boxing, football, or hockey—involve risks of injury knowingly caused by participants.

It does not appear from the case law that courts intend to predicate civil liability upon conduct inherent in participation in a sport. However, while many cases discuss risks that necessarily accompany sports participation, courts fail to reconcile their acknowledgement of these risks with their adoption of a recklessness standard. If players are permitted by the rules of the game to pursue their goals with reckless abandon, how can they be held legally accountable in a civil action for the inevitably injurious results of their unbounded enthusiasm?

Furthermore, there are some sports, such as golf, tennis, or bowling, in which a participant does not anticipate suffering injury at the hand of a competitor. If injuries do occur, a recklessness standard may be too high a threshold for tort liability. Other sports, such as horse racing, do not neatly fit into a category. In horse racing, the jockey does not expect to be struck by a competitor, but some bumping of the horses often occurs, and jockeys have been injured or even killed as a result of on-track mishaps.

In sum, traditional tort principles are ill-suited to civil liability problem-solving in the context of numerous sports. Violent conduct in one sport may be perfectly reasonable according to the customs and rules of that activity, yet such conduct may be clearly unacceptable and uncustomary in another sport. To expect a football player to avoid reckless behavior in the conventional sense of the term is unreasonable. On the other hand, allowing a golfer to avoid liability for recklessly swinging a club or hitting another golfer is equally unsound as a matter of policy.

B. Assumption of Risk and Consent—Elusive Concepts in the Sports Context

The alleged consent of players to the ordinary risks of a sport,

or the players' alleged assumption of those risks, have often been advanced as rationales for barring tort recovery by injured participants.¹⁸⁴ The proper application of these concepts is not entirely clear. What does it mean to say that participants "consent"? Do they ever consent to rule violations that cause injury? If they do, what is the purpose of so-called "safety" rules? What are the ordinary risks of a particular sport? In essence, the question is whether sports participants share the same reasonable expectations. If they do, perhaps no serious problems are presented. On the other hand, if some accept only one style of play while others accept a more rugged, violent form of play that may violate the internal rules of the sport, where can lines be drawn? Can any generally agreeable standard be articulated if the objective written rules are abandoned or ignored as the limits of acceptable behavior?

Assumption of risk and consent are concepts that presume a voluntary, knowing, and appreciative undertaking of a course of action that may result in personal harm. It is simple enough to conclude that all players are charged with at least constructive knowledge of and consent to the contact permitted by a sport's internal rules and regulations. With respect to injurious behavior that goes beyond the limits of the rules, assumption of risk and consent are less clearly appropriate bases for denying recovery. It is not unreasonable for a sports participant to argue that he or she was unaware that certain dangers inhere in a sport when those dangers are caused by behavior specifically forbidden by rules of play. This may be particularly true for the casual, infrequent participant who lacks intimate knowledge of uncodified customs. If organizers of a sport feel strongly enough about a particular practice to classify it as a rule violation, why should participants not be held accountable when they knowingly fail to comply? If assumption of risk and consent are concepts associated with a subjective appreciation of potential danger, it is not frivolous to suggest that violations of rules are not foreseen by all potential plaintiffs. Further, even if an objective approach is warranted to determine the

184. A number of courts have focused upon the alleged "consent" of participants to risks deemed inherent in the particular sports activity. See, e.g., *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 106, 109, 243 Cal. Rptr. 536, 543 (1988); *Kuehner v. Green*, 436 So. 2d 78, 80 (Fla. 1983); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982); *Kabella v. Bouschelle*, 100 N.M. 461, 463, 672 P.2d 290, 292 (N.M. Ct. App. 1983); *Turcotte v. Fell*, 68 N.Y.2d 432, 439-41, 502 N.E.2d 964, 968-70, 510 N.Y.S.2d 49, 53-55 (N.Y. 1986); *O'Neill v. Daniels*, 135 A.D.2d 1076, 1077, 523 N.Y.S.2d 264, 265 (N.Y. App. Div. 1987); *Hanson v. Kynast*, 38 Ohio App. 3d 58, 65, 526 N.E.2d 327, 333 (1987); *McElhaney v. Monroe*, No. 13454 (Ohio Ct. App. Feb. 1, 1989) (LEXIS, States library, Ohio file).

scope of consent or risk assumption, it is not clear that injuries resulting from rule violations should be deemed an "ordinary" or "inherent" risk. If courts conclude that potential tort plaintiffs have somehow relieved potential defendants of a duty of care, or consented to dangerous conduct, or assumed certain risks, the scope of this "safe harbor" is far from clear.

All sports participants do not engage in their endeavors with uniformly shared values and identical expectations. In hockey, for example, fighting is a frequent occurrence and a clear violation of the sport's rules. Some players would deem it an acceptable form of conduct, while others would condemn it as barbaric and unnecessary. The same might be said for aiming a baseball at a batter. In sum, defining a sports participant's standard of care in terms of generally accepted risks leads to no clear conclusion and fails to provide much guidance to either the participants or the courts.

C. Continuing Problems with Comparative Fault

Given that some jurisdictions have merged assumption of risk into contributory negligence and eliminated it as a complete defense to a negligence action, reasonable implied assumption of risk arguably may no longer serve as a rationale for completely barring sports injury claims predicated upon mere negligence.¹⁸⁵ If the justification for precluding tort actions from proceeding on a negligence theory is that a plaintiff implicitly and reasonably assumes the risk of a defendant's negligent conduct, the adoption of comparative fault principles in some jurisdictions could now require that the case reach the trier of fact for both apportionment of fault and assessment of damages.¹⁸⁶ It is possible that some courts would now go further and conclude that not only is reasonable implied assumption of risk not a total bar to recovery, but it should not even be viewed as an element of comparative fault. Rather, if a plaintiff's conduct is wholly reasonable, there is no bar and no reduction of damage recovery either.¹⁸⁷ This approach could resurrect negligence as a viable theory of recovery in the sports participant context.

On the other hand, some states have circumvented the analytical problems associated with reasonable implied assumption of risk by referring to the concept as "primary" risk assumption, and re-

185. See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (2d ed. 1986) [hereinafter SCHWARTZ]. See *supra* notes 92-182 and accompanying text.

186. SCHWARTZ, *supra* note 185, at 153-80.

187. *Id.* at 168.

casting it under a "duty concept."¹⁸⁸ Despite the adoption of comparative fault principles, these jurisdictions will fully bar a plaintiff's recovery on a negligence theory by concluding that a defendant breached no duty when plaintiff knowingly and reasonably encountered risks inherent in an activity. Two significant problems are raised by this approach. First, it is not at all clear that the risks reasonably assumed are always apparent to sports participants. The players' expectations may vary considerably, and repeated, well-known deviations from the written rules of a sport may cloud any uniform notion of generally recognized and accepted risks. Second, the recasting of reasonable implied risk assumption into a "no-duty" concept creates an anomalous result whereby an "unreasonable" plaintiff may pursue a claim while a "reasonable" plaintiff may not. A plaintiff who "unreasonably" encounters a risk in a manner that appears to be contributorily negligent may have his actions compared to those of defendant under comparative fault principles, while a "reasonable" plaintiff is completely barred from any recovery. This result seems counterintuitive in a system designed to encourage reasonable behavior and punish unreasonable conduct.

An additional problem created by the adoption of comparative fault by statute or case law is the question of the applicability of comparative fault principles when defendant's conduct is deemed more than merely negligent. If a particular jurisdiction has adopted comparative fault as a tort rule, could plaintiff's recovery be diminished even though defendant has acted recklessly or intentionally? What about "gross" negligence? Should plaintiff's recovery be diminished only when his or her level of culpability approximates or equals defendant's? The answers to these questions are unclear and no universal rule has been articulated.

It may be that the trend is towards reducing recovery even when a defendant has acted more culpably than a plaintiff. Yet, how is the reduction to be accomplished? To the extent that courts allow a plaintiff's recovery to be adversely affected even when a defendant has acted recklessly, the recklessness standard may prove to be an ineffective tool for sports injury plaintiffs.

D. Is Overly Aggressive Behavior Tolerated, Encouraged, and Emulated?

Even if agreement could be reached regarding the need to curb

188. *Id.* at 173-74.

overly belligerent and violent sports behavior, many psychologists have recognized that considerable aggression is often inherent in sports activity.¹⁸⁹ This raises another difficult policy question: if the available data indicate that aggressive and even violent behavior is accepted and encouraged, how can society justify predicating individual tort liability upon such behavior? If an athlete has been conditioned to perform in an antisocial fashion, why should that athlete be held personally accountable for responding predictably to the stimuli that evoke such behavior? An answer to this might be that even violent behavior which breaches internal rules and causes injury should be protected from tort liability, because resulting injury is inevitable in the environment created by competitive sports.

Yet without some limits, sports might become a safe haven for even the most outrageous, abusive, and destructive behavior. In

189. For psychological materials dealing with aggressive behavior and violence in sports, see R. COX, SPORTS PSYCHOLOGY 209-42 (1985); PSYCHOLOGICAL FOUNDATIONS OF SPORTS 241-86 (J. Silva & R. Weinberg ed. 1984); Silva, *The Perceived Legitimacy of Rule Violating Behavior in Sports*, 5 J. SPORTS PSYCHOLOGY 438 (1983); Wall & Gruber, *Relevancy of Athletic Aggression Inventory for Use in Women's Intercollegiate Basketball: A Pilot Investigation*, 17 INT'L J. SPORTS PSYCHOLOGY 23 (1986); Widmeyer & Birch, *The Relationship Between Aggression and Performance Outcome in Ice Hockey*, 4 CAN. J. APPL. SPT. SCI. 91 (1979); Smith, *Social Determinants of Violence in Hockey: A Review*, 4 CAN. J. APPL. SPT. SCI. 76 (1979); Russell, *Crowd Size and Density on Relation to Athletic Aggression and Performance*, II SOCIAL BEHAVIOR AND PERSONALITY 9 (1983); Carver, DeGregorio & Gillis, *Challenge and Type A Behavior Among Intercollegiate Football Players*, 3 J. SPORTS PSYCHOLOGY 140 (1981); Harrell, *Aggression by High School Basketball Players: An Observational Study of the Effects of Opponents' Aggression and Frustration-Inducing Factors*, 11 INT'L J. SPORTS PSYCHOLOGY 290 (1980); Russell, *Hero Selection by Canadian Ice Hockey Players: Skill or Aggression?*, 4 CAN. J. APPL. SPT. SCI. 309 (1979); Bredemeier & Shields, *Game Reasoning and International Morality*, 147 J. GENETIC PSYCHOLOGY 257 (1985); Leith, *The Role of Competition in the Elicitation of Aggression in Sports*, 5 J. SPORT BEHAV. 168 (1982); Bredemeier, Cooper, Shields & Weiss, *The Relationship of Sport Involvement with Children's Moral Reasoning and Aggression Tendencies*, 8 J. SPORTS PSYCHOLOGY 304 (1986); Duthie, *Normative Aggression in Non-Athletic Versus Ice Hockey Playing Canadian Boys*, 11 INT'L J. SPORTS PSYCHOLOGY 231 (1980); Worrell & Harris, *The Relationship of Perceived and Observed Aggression of Ice Hockey Players*, 17 INT'L J. SPORTS PSYCHOLOGY 34 (1986); Widmeyer & Birch, *Aggression in Professional Ice Hockey: A Strategy for Success or a Reaction to Failure?*, 117 J. PSYCHOLOGY 77 (1984); Teipel, Gerisch & Busse, *Evaluation of Aggressive Behavior in Football*, 14 INT'L J. SPORTS PSYCHOLOGY 228 (1983); Daino, *Personality Traits of Adolescent Tennis Players*, 16 INT'L J. SPORTS PSYCHOLOGY 120 (1985); Dervin, *A Psychoanalysis of Sports*, 72 PSYCHOANALYTIC REV. 277 (1985); Rainey, *A Gender Difference in Acceptance of Sports Aggression: A Classroom Activity*, 13 TEACHING OF PSYCHOLOGY 138 (1986); Heyman, *Psychological Problem Patterns Found With Athletes*, CLINICAL PSYCHOLOGIST 68 (Summer, 1986); Russell, *Does Sports Violence Increase Box Office Receipts?*, 17 INT'L J. SPORTS PSYCHOLOGY 173 (1986); Russell & Russell, *Sports Penalties: An Alternative Means of Measuring Aggression*, 12 SOC. BEHAV. & PERSONALITY 69 (1984); Frank & Gilovich, *The Dark Side of Self- and Social Perception: Black Uniforms and Aggression in Professional Sports*, 54 J. PERSONALITY & SOC. PSYCHOLOGY 74 (1988).

addition, to the extent professional and college athletes act as role models for younger participants, the sanctioning of unnecessary or excessive violence may encourage similar actions in the sandlot or schoolyard. This raises the question whether tort policy regarding sports participants should be designed not only to provide adequate protection to the immediate parties, but also to redefine the nature of the sport, in order to create a safer environment for all participants. Self-regulation by sports organizations may be the answer; yet there is a perception that self-governance has been inadequate in stemming a rising tide of undesirable injury.¹⁹⁰

Sports have always played a unique role in the lives of many Americans. Participation in athletic activity begins for youngsters at an early and impressionable age. Athletes are often idolized by children and it is not uncommon for those children to emulate their older heroes. If the college and professional players whom these child athletes admire are routinely engaged in violent conduct during the course of play, it is not difficult to foresee how sports violence will increase at all levels of participation.

Sound public policy dictates that the physical and mental well-being of our youth will be enhanced by vigorous and regular sports participation. Enthusiastic play and unnecessary violence, however, are not synonymous. If college and professional athletes persist in violent conduct not central to effective performance, and if this encourages similar behavior among younger participants, perhaps tort principles should be imposed to address this evil. Unless we are prepared as a society to accept relatively high levels of sports violence and consequent injury as the norm, some steps must be taken to prevent unnecessary harm at all levels of participation. If the NCAA or professional sports leagues will not directly and effectively address the problem themselves, it may be appropriate for our courts to fill the vacuum created by their inaction or inadequate sanctions. While there may be an element of unfairness in finding conduct culpable that is encouraged by coaches and fans, a greater social need to protect against unnecessary physical injury may outweigh this unfairness.

The threat of potential liability may result in a greater incentive for sports agencies and authorities to engage in better self-regulation. The increase in the frequency of fights at basketball games and bench-clearing brawls during baseball games suggests that the major sports organizations are doing an inadequate job.

190. See *infra* pp. 225-26.

Fines that are relatively minuscule in proportion to a player's pay, and minor suspensions do not provide sufficient disincentive to violence. As these aggressive actions become more commonplace, reliance on conventional tort approaches may be inadequate because the behavior is seen as foreseeable and inherent in the sport, and therefore protected.

Further, even outside the realm of intentionally violent actions, the threat of tort liability tempers unnecessarily dangerous action in the context of sports. Enthusiasm and intensity need not translate into reckless abandon. It should not be assumed that the ferocity with which some sports are played is a necessary ingredient of quality play. Finesse and skill should not be viewed as antiquated virtues long ago replaced by brute force, intimidation, and violence. Even boxing and football could still appeal to the competitive spirit without elements that unnecessarily threaten life and limb. Yet, existing tort principles, which apparently rely on compliance with a sport's rules as a defense, take no cognizance of the argument that those rules may be too permissive and too tolerant of unnecessarily dangerous behavior.

As professional and college athletes become increasingly larger and faster, perhaps rules must be altered to take into account the heightened risk of serious injury that results from greater masses moving at greater speeds in opposite directions. Even if fans prefer a more violent game, without regard to the consequent injuries to participants, it may be more appropriate to allow more civilized instincts to prevail. Would it be unacceptable if performance in non-contact sports were diminished slightly in the interest of safety? For example, would race track patrons be offended if jockeys were required to exercise a bit more care to avoid disabling harm in exchange for slightly slower winning times?

So long as sports remain competitive, characterized by close contests and enthusiastic participation, the increased focus upon safety will not diminish enjoyment. In Olympic boxing, protective headgear is used and bouts are shorter than professional matches, yet fans have adjusted and enjoy the sport even though knockouts and bloodletting are less frequent. In college hockey, fights rarely occur because of the severity of the penalty, but fans are still enthusiastic. We need not assume that athletics must remain brutal in order to be entertaining.

If the popularity of a sport is adversely affected by reducing injurious play, as a civilized society we should still feel compelled to reduce superfluous violence and bloodshed. This is not to suggest that all contact sports should be banned, but rather that they

can be made safer. At the professional level, the advent of player unions with considerable bargaining power enables participants to engage in self-protection through negotiation. The same may not be true for amateurs. The advantages of sports participation in preparing our youth for life's experiences should not become a blind excuse for failing to protect them from undue violence. Current tort doctrine does not adequately address these concerns because injurious behavior is tolerated if it complies with the rules of the game.

The threat of tort litigation might well serve to temper the violence that pervades American sports. Perhaps the fear of judicial intervention will provide an incentive for the sports themselves, at all levels, to re-evaluate and self-regulate in a manner that will promote the values of competition and sportsmanship without sacrificing civility and respect for the welfare of others. On the other hand, predicated participant tort liability upon damaging conduct that is consistent with a sport's rules and regulations would create an unacceptable choice for players. Failure to play aggressively may result in a highly unfavorable reaction from coaches, fans, and teammates. It may be unreasonable to expect players to restrain themselves beyond the boundaries of the rules. If the sports themselves will not change their rules in order to address these safety concerns, perhaps direct governmental intervention is the appropriate response.¹⁹¹ It is unlikely, however, that defensible tort principles can be articulated that would result in liability, even where participants comply with the internal regulations of their sports. Thus, it does not appear that tort law alone can adequately address the problem.

IV. CONSIDERING ALTERNATIVE APPROACHES

The remainder of this Article focuses on the inability of tort principles to adequately address the problem of excessive aggression and violence in sports, and articulates a tort standard that both recognizes the need to permit intense competition while simultaneously deterring and providing compensation for injuries caused by unacceptable levels of hostile behavior. In light of the foregoing analysis, internal self-regulation and governmental intervention are also suggested as practical means for transforming sports into a less violent and dangerous form of recreation.

191. See *infra* note 193 and accompanying text.

A. *Relying on Internal Rules as an Objective Standard for Tort Liability*

As an alternative to a legal analysis based solely on traditional tort principles, courts could consider the internal rules, regulations and customs of each sport as a standard of conduct for potential liability, and posit compliance with all safety rules as the standard of behavior. For example, in boxing, violating the rules regulating hitting below the belt, rabbit punching, gouging, or hitting during the break could be the basis for tort liability. In hockey, conduct that causes personal injury and which is subject to penalty could give rise to tort liability. In baseball, intentionally aiming a ball at a batter, or running out of the baseline so as to cause a collision could similarly be deemed the basis for a tort action. In short, without regard to any scienter on the part of a particular defendant, sports participants could be held to a strict duty to avoid transgressing the rules of the game. This type of approach, however, presents its own set of problems, as courts are reluctant to predicate liability simply upon a violation of internal sports rules.¹⁹²

One rationale for the hesitation to adopt this approach is the evolution of a "common law" within various sports. Retaliation is not uncommon in baseball when a batter is hit by a pitch. Fights in hockey, although a rule violation, are a common occurrence. Predicating liability upon any safety rule violation, no matter how common its occurrence, may be impractical. At some point, practices that technically violate safety rules become part of the accepted behavior of a sport when they are consistently "winked at" by officials, participants and fans. It would be unfair for a participant who acts in reliance upon these customs to be held liable in tort for adhering to them.

However, problems associated with this "common law" standard are not insurmountable. An objective standard could still be

192. Several courts have refused to find tort liability because of a sports rule violation. See, e.g., *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 109-10, 243 Cal. Rptr. 536, 542-44 (1988) (foul in horseracing that was the "equine equivalent of an unsafe lane change" not sufficient to create liability); *Gauvin v. Clark*, 404 Mass. 450, 455, 537 N.E.2d 94, 97 (1988) (violation of hockey safety rule regarding use of stick insufficient); *Turcotte v. Fell*, 68 N.Y.2d 432, 441, 502 N.E.2d 964, 969-70; 510 N.Y.S.2d 49, 54-55 (N.Y. 1986) (jockey's violation of safety rule did not alone establish tort liability). But see *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 215, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975) (the court indicated that violation of a soccer safety rule may give rise to liability in tort, but strongly implied, however, that the rule violation must be "reckless"). *Id.* at 215, 334 N.E.2d at 261. See also *Overall v. Kadella*, 138 Mich. App. 351, 358, 361 N.W.2d 352, 355 (1984) (hockey fight violated safety rules).

implemented, but a court or jury would have to evaluate evidence regarding the accepted practices that transcend the codified rules and regulations. An additional question of fact is thus added to the proceeding.

A second and more troublesome difficulty with an objective standard predicated solely upon rules violations is that it ignores any consideration of a participant's state of mind during competition. Athletes are not conditioned to exercise caution and reasonable care when pursuing their athletic objectives. Rather, they are trained to react instinctively, quickly, and often with a level of intensity and aggression unparalleled in ordinary human activity. To predicate personal liability upon a rule violation, without regard to a potential defendant's state of mind, is unjust and inconsistent with the nature of the activity.

B. Combining the Internal Rules Approach and the Recklessness Standard

An alternative approach to an objective standard based exclusively on a rule violation is the adoption of a tort standard that combines the traditional recklessness test with the rules and customs violation approach. A sports participant would be liable in tort to another participant if (1) the conduct causing personal injury constituted a violation of the safety rules and "common law" customs of the sport (an objective standard), and (2) such injurious conduct constituted a reckless act (a more subjective standard).

The main benefit of this approach is that sports participants receive some legal protection for injuries resulting from rules and customs violations. To be actionable, however, these violations must occur with the defendant's knowledge that the conduct either was "illegal" or would result in a strong probability of injury to the plaintiff. Defendants would not be protected by ignorance of specific rules so long as the challenged conduct could be deemed reckless.

Sports activity, by its very nature, often cannot be conducted with reasonable care. A requirement of reckless behavior in conjunction with a rules and customs violation protects defendants who are merely negligent. On the other hand, when a defendant knowingly violates a safety rule, or knowingly creates an obvious danger that in fact violates a rule, the rationale for insulation from tort liability disintegrates. Further, the requirement that reckless behavior be combined with an actual rules or customs violation also ensures that participants in contact and collision sports will

not be held civilly liable when their recklessness or intentionally injurious conduct is within a sport's defined limits of acceptable behavior.

Perhaps it is this combination of objective rules and recklessness that is intended by the cases that focus upon a recklessness standard. If so, then the courts are headed in the right direction. If, however, courts are relying upon recklessness without regard to the rules and customs of a sport, they are failing to appreciate the unique framework of sports participant tort litigation.

Further, traditional defenses and comparative fault principles should play no role in mitigating recoveries available under this proposed approach. Concepts such as reasonable or unreasonable implied assumption of risk are of limited utility in this context. If someone is not expected to act reasonably while participating in a sporting event, it seems anomalous to permit a defendant to argue that a plaintiff's recovery should be reduced for acting negligently. This is especially true when a defendant has been reckless. Moreover, if a plaintiff has acted in a wholly reasonable manner, reasonable implied assumption of risk should not be a defense under this proposal.

A more difficult question is what happens when both participants are acting recklessly in violation of a rule? One answer is to apply comparative fault principles to both transgressors. If, however, the deterrence of rule violations is of paramount importance, the doctrine of comparative fault should not be applied. On the other hand, where both parties have engaged in reckless conduct that violates internal rules and customs, the application of comparative fault rules might not be objectionable. Either approach is possible and neither alters the threshold for recovery—a rule or customs violation combined with recklessness.

C. The Unresolved Problems—Dealing With Sports Violence Generally

The high level of aggression and violence in American sports is a major concern. Tort principles can be utilized as an effective tool in deterring knowingly or intentionally dangerous conduct that contravenes a given sport's rules, but they are inappropriate for dealing with the permissible violence of a particular sport.

Despite the impropriety of applying tort sanctions to violent conduct which complies with a sport's internal rules and customs, a civilized society need not necessarily accept the decisions of a sport's sponsors, owners, participants or fans as the final word.

There must be limits to the types of dangers to which we will allow athletes to consent, especially where impressionable youth may emulate the conduct of older sports heroes. Sports cannot be viewed as a safe harbor for malicious, destructive or violent behavior simply because some people agree to accept organized brutality as the norm. The critical question is how a society superimposes its shared values of civility and respect for the physical well-being of all citizens upon sports, which often ignore these same values. A balance can be achieved by greater sports self-regulation and, if necessary, through direct governmental involvement in sports safety regulations.

1. Self-Regulation by Sports Organizations

Given the limits of tort principles to deter excessive sports aggression and violence, sports leagues and other sports-governing organizations are best positioned to address and remedy the problem. As public outcry heightens regarding perceived unnecessary brutality in contact sports, leagues could respond by adopting rule modifications with respect to safety equipment and participant conduct to reduce the frequency of serious injury. For example, the adoption of internal rules requiring hockey and baseball players to wear protective helmets added an element of safety to these sports. Similarly, in boxing, the shortening of championship fights and greater pre-fight screening of the medical condition of fighters helps prevent tragic consequences.

Protecting players at the professional level can also be achieved through collective bargaining. The creation and development of player labor organizations puts professional sports participants in a position to negotiate for their own safety and protection from unnecessary risks and violence. Substantial salaries and other income resulting from professional play enable those athletes to take steps to adequately insure themselves against the risk of career-shortening injuries.

Amateur athletes may not enjoy similar options. Young sports participants from less-than-affluent backgrounds may not be able to afford accident and health care insurance to cover medical expenses and loss of future earnings. Certainly, one alternative for these participants would be to abstain from sports participation. From a policy perspective, however, it is not at all clear that this is a desirable result. Sports should enable people of all backgrounds and circumstances to compete and interact; economic barriers need not prevent or frustrate this valuable participation. It seems unfair

that those who cannot afford to purchase insurance must either refrain from playing or proceed at their own considerable risk. Internal safety regulation is therefore essential.

There is, however, a major problem with reliance upon the sports themselves to implement adequate safeguards. Sports organizations are slow to act, and resistant to adequate safety reform. Because the paying public appreciates the organized mayhem that accompanies contact sports, there may be a reluctance to detract from what is viewed as a key part of the entertainment value of these sports. In economic terms, sports organizations may feel that the cost of decreasing sports violence and avoiding consequent injuries will exceed the economic benefit to be derived from maintaining the status quo. This analysis, however, does not address the fact that America's children often mimic the behavior of their celebrated sports heroes.

2. Governmental Intervention—The Ultimate Weapon in Creating a New Ethos of Sport

If there is agreement that unacceptable levels of violence remain in many sports, and if there is also consensus with respect to the inadequacy of self-regulation as a viable solution, direct federal or state governmental intervention remains a powerful last resort. In its most devastating and preemptive form, Congress or a state legislature could legislate a sport out of existence. Numerous complaints regarding professional boxing, for example, have caused some to call for its outright abolition.¹⁹³ Governmental intervention could take the more limited form of banning certain specific practices, or prohibiting collision sports for certain age groups. Another alternative could be the creation of state or federal sports agencies with investigative and rule making functions to insure that sports remain free from unnecessary amounts of violence and

193. For a critical discussion of the safety problems associated with professional boxing, see H. COSELL, *I NEVER PLAYED THE GAME* 192-217 (1985). For medical journal commentary regarding the dangers of boxing, see Lundberg, *Boxing Should Be Banned In Civilized Countries*, 249 J. A.M.A. 250 (1983); *Brain Injury in Boxing*, 249 J. A.M.A. 254 (1983); Lundberg, *Boxing Should Be Banned In Civilized Countries—Round 2*, 251 J. A.M.A. 2696 (1984); Lundberg, *Boxing Should Be Banned in Civilized Countries—Round 3*, 255 J. A.M.A. 2483 (1986); Maguire and Benson, *Retinal Injury and Detachment in Boxers*, 255 J. A.M.A. 2451 (1986); Sammons, *Why Physicians Should Oppose Boxing: An Interdisciplinary History Perspective*, 261 J. A.M.A. 1484 (1989). For a discussion of the moral dilemma associated with combat sports, see Feinberg, *Harmless Wrongdoing*, in 4 *THE MORAL LIMITS OF THE CRIMINAL LAW* 329 (1988); R. Arneson, *Liberalism, Freedom, and Community*, in 100 *ETHICS* 368, 371-75 (1990); I. Kristol, *Pornography, Obscenity, and the Case for Censorship*, in *PHILOSOPHY OF LAW* 246 (3d ed. 1986).

injury.

In sum, while this Article is devoted primarily to a consideration of tort liability for sports participants, it recognizes the limits of tort principles in cultivating a new sports ethos in this country. If the sports themselves refrain from meaningful reforms that conform to our shared notions of appropriate behavior, our government must intercede. The threat of governmental action should, in theory, create a real incentive for internal self-regulation.

V. CONCLUSION

This Article focuses on the application of tort principles to injuries inflicted upon sports participants by co-participants. The case law was critically evaluated and an alternative standard proposed. In addition, this Article recognizes that the *sui generis* nature of sports creates delicate and difficult policy problems. Sports provide a valuable means of recreation, exercise, and livelihood for many Americans. Children prepare for the challenges of life by athletic participation, as they learn to compete and cooperate with others. Frequently, a sport requires behavior that would be deemed unacceptable and clearly actionable outside the sports context. At the same time, sports should not provide complete insulation from shared societal notions of decency, civility, and non-violence. Striking an appropriate balance is the challenge. Therefore, tort principles, properly applied, can assist in this endeavor. Our judicial process, however, cannot provide a complete solution. Rather, sports organizations and participants must themselves make a significant contribution through internal reform, and governments must remain vigilant and be prepared to take bold action if needed changes are delayed or ignored. Intolerable levels of aggression and violence, and the resulting crippling injuries or deaths, should concern civilized people wherever they occur. While aggression and violence cannot be completely eliminated from sports, there is much room for improvement without detracting from the competitive nature of the activity.