CHAPTER 2 · TORT LIABILITY FOR INJURIES ARISING OUT OF PARTICIPATION IN SPORTS EVENTS

Section 1: Participant's Liability For Intentional Torts

A. Introduction

Often waiting in line overnight, crowds in the hundreds of thousands surge into stadiums at first light, racing for their seats. Oblivious to the elements, fans spend the day wildly cheering their favorite teams to victory with the most dramatic contests sometimes ending in sudden death or street riots. A description of a recent World Cup or the Super Bowl? No, it was Constanitinople around 500 A.D. under the Roman Empire. On this day the Green team came through in the clutch. Producing daggers and stones smuggled on the field, they murdered 3000 of the Blue team. Although admittedly a bloody day for the Blues, who were to avenge this loss many times over during the reign of Justinian (a stalwart Blues backer), the slaughter represented a relatively mild afternoon at this city's colossal hippodrome, where the ferocity of the contests had only slightly been tamed by Christian influence. *See* INSIGHT, August 3, 1998, p.8. Some people think we are moving back to those times. Rome had its imperial gladiators, and today we have the modern equivalent in our sports super stars.

In 1996 Roberto Alomar of the Baltimore Orioles spit in the face of umpire John Hirschbeck following a disputed called third strike against Alamar. During a 1997 National Basketball Association game, Dennis Rodman of the Chicago Bulls kicked a camera man in the groin after tripping over him at the edge of the court. The Chicago Bulls did not pay Rodman his approximately $1 million in salary during the 11-game suspension imposed by NBA Commissioner David Stern. The photographer settled out of court for $200,000. In July of 1997, Mike Tyson bit off the left ear of Evander Holyfield during a heavyweight boxing match. NEW YORK LAW JOURNAL, vol. 218, no. 3. In a remarkable coincidence, the Professional Boxing Safety Act became effective July, 1, 1997. *See* P.L. 104-272, 110 Stat. 3309 (1996). In December of 1997, Latrell Sprewell of the Golden State Warriors choked his coach P.J. Carlesimo and threatened to kill him. The Warriors terminated the three year contract which called for compensation of $23.7 million dollars. The NBA Commissioner David Stern described the encounter as follows, "First he choked him until forcibly pulled away. Then, after leaving practice, Mr. Sprewell returned and fought his way through others in order to commit a second assault." Sterns continued, "A sports league does not have to accept or condone behavior that would not be tolerated in any other segment of society." The Commissioner then suspended Sprewell for 1 year. Mark Heiser, *Sports; Sports Desk*, L.A. TIMES C1, Dec. 5, 1997. Arbitrator John Feereck ruled the penalties were too harsh. He reinstated the contract and reduced the suspension by 5 months. TELEGRAPH-HERALD, Sports p. B4, March 9, 1998. In a December 15, 1997 game, Bill Romanowski from the Denver Broncos spit in the face of wide receiver J.J. Stokes of the Forty Niners. *See* SALT LAKE TRIBUNE, January 16, 1998, p. D5.

The imposition of tort liability on a participant in a sporting event for injuries caused to a fellow participant poses difficult legal problems for the courts and for society as a whole. The nature of the difficulties can be seen from the two points of view expressed in the following quotes:

> "I am very uninterested in how any people got hurt ... if you play the game ... you might get hurt or might get maimed or your neck broken ... all that is part of the game." Interview with Dwight "Mad Dog" White, defensive end for the Pittsburgh Steelers. 19 CRIM. L.Q. 425.438 (1976)
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> "[A]n assault is an assault whether it occurs in a parking lot, at a country club, or on a hunk of ice owned by the National Hockey League." Gary Flakne, prosecuting attorney in *State v. Forbes*, No. 63280 (D. Minn. *dismissed* August 12, 1975).

The problem of tort liability of co-participants involves consideration of a variety of factors: (1) the fast

moving, aggressive and often dangerous nature of many sports, (2) the need to compensate a wrongfully injured victim, (3) the need to deter tortious conduct and, (4) setting societal standards regarding the nature and degree of sports violence acceptable in our society. The problem is further complicated by the formidable array of legal theories available to a plaintiff (such as assault, battery, recklessness, and negligence) as well as an equal number of defenses (such as self-defense, consent, assumption of risk, contributory fault, comparative fault and self-defense) which can be interposed by the defendant. Finally, the role, if any, that the rules of a particular game should play in determining the standard of liability. For example, should the fact that a participant violated a rule in the process of injuring a fellow player be taken into consideration?

B. Assault and Battery

The RESTATEMENT (SECOND) OF TORTS gives the following definitions for the intentional torts of assault and battery.

§ 18 · Battery: Offensive Contact

1. An actor is subject to liability to another for battery if

   a. he acts intending to cause a harmful or offensive contact with the person of the other or a third person or imminent apprehension of such a contact, and

   b. an offensive contact with the person of the other directly or indirectly results.

2. An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§ 21 · Assault

1. An actor is subject to liability to another for assault if

   a. he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

   b. the other is thereby put in such imminent apprehension.

2. An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Although assault and battery are often discussed together, they are different torts. One may exist without the other. The intent element for assault and battery is the same, and is satisfied if the defendant intends a harmful or offensive contact, or if the defendant intends only to cause apprehension that such contact is imminent. The principal difference between them is physical contact, which is essential for a battery, while the apprehension of imminent contact is sufficient for an assault. Intentionally striking a player from behind with a baseball bat would constitute a battery. Throwing a bat at a player intending only to frighten him, even if it misses, is an assault.

The intent of the tortfeasor in assault and battery cases is usually inferred from the particular acts or statements made by the assailant. For example, if one player runs to second base, in an upright position, at full speed, directly toward the second baseman, a collision between the two players is one of substantial certainty. Such an act may be considered, in light of the relative size and strength of the players, to show a player's intent to cause injury. Also, it may be significant, in showing intent for an assault and battery, that a player's back was to his opponent who delivered a powerful blow to a vulnerable part of the player's body.

Transferred intent also is an important concept in the area of intentional torts. If a player swings a hockey

stick at A intending to strike him, and unforeseeably hits B instead, he is liable to B for battery. *See* PROSSER & KEETON, THE LAW OF TORTS, § 8, p. 37 (5th ed. 1984).

GRIGGAS v. CLAUSON

128 N.E.2d 363 (1955)

EOVALDI, Justice

This is an appeal by defendant from a judgment for $2,000 entered on the verdict of a jury for injuries sustained by plaintiff for an alleged assault and battery during a basketball game.

In his complaint, plaintiff charged that while he and defendant were participating in said game on opposing teams and while plaintiff had his back to defendant, defendant maliciously, wantonly and willfully and without provocation assaulted plaintiff and with his fist repeatedly struck plaintiff violently in the head and knocked plaintiff unconscious to the floor; that by reason and in consequence of said assault and battery by defendant and as a direct and proximate result thereof plaintiff suffered divers lacerations, abrasions, contusions, concussions, and other injuries, both temporary and permanent, including an injury to his face and head and by reason of said injury became sick, sore, lame and disordered and has suffered and will continue to suffer in the future pain by reason of said injuries and has been unable because of his said injuries to go about his affairs and duties and has thereby lost a four-year scholarship of great value and has incurred and become liable for divers sums of money endeavoring to be cured of said injuries and has been compelled to spend divers sums of money in endeavoring to be cured of said injuries.

* * *

On the evening in question, plaintiff, 19 years old, was a member of and playing center for an amateur basketball team known as the Rockford Athletic Club Basketball Team in a basketball game with an amateur team known as Blackhawk Athletic Club Basketball Team, of which defendant was a member. Plaintiff's team was going for the north goal and plaintiff was standing in the free throw area facing south with his back to the north basket, with defendant, on the opposing team, guarding him. Defendant was standing directly in back of plaintiff and the evidence on behalf of the plaintiff is that plaintiff was about to receive a pass of the ball from a teammate when defendant pushed him and then struck him in the face with his fist and, as plaintiff fell, struck him again, knocking him unconscious. Witnesses testified that defendant was swearing profusely; that as plaintiff was on the floor, defendant said, "It served him right and as far as the game was concerned he was going to teach him a lesson, one of those two was going to play in the city and one wasn't." He said, "Get up you blank." He said, "Get up you son-of-a-bitch." The witness stated, "and he said that again. I couldn't say off-hand, how long Griggas was lying on the floor without moving. Fifteen minutes at least he was laying there."

[S]ince the occurrence he has had constant headaches and his eyes, he testified, "are going bad so that he must wear glasses." Prior to the injury, he did not have headaches and never wore glasses. ... At the time of his injury plaintiff was a Freshman at DePaul University under a basketball scholarship which provided room and board, books and tuition and incidental fees. He had to miss four and one-half weeks of school, with the result that he dropped out of school....

If the testimony on behalf of appellee is true, he was subjected to a wanton and unprovoked assault and was struck at a time when he had his back to defendant. The statements of defendant at the time plaintiff was lying on the floor and during part of the time that plaintiff was unconscious, show the true state of his mind, contrary to his testimony that plaintiff was injured as they were jumping for the ball. Considering the injuries sustained by the plaintiff, the time he was in the hospital, the doctor and hospital bills of $362.10, and the fact that the jury was entitled to grant exemplary damages, we cannot say that the verdict is excessive.

* * *

We have examined the record and do not find that the verdict is manifestly against the weight of the

testimony. Under these circumstances we have no right to set aside the jury's finding. The judgment of the circuit court accordingly is affirmed.

Judgment affirmed.

DOVE, P.J., and CROW, J., concur

Questions

1. Was there an assault in the *Griggas* case? Why?

2. Was there a battery? Why?

3. How was the Defendant's intent established?

4. Would it make any difference if a foul had been called on the defendant?

Assault and battery cases are not limited to participants. Problems can arise between spectators and the participants.

MANNING v. GRIMSLEY
643 F.2d 20 (1st Cir. 1981)

WYZANSKI, Senior District Judge

In this diversity action involving the law of Massachusetts the plaintiff, complaining that he as a spectator at a professional baseball game was injured by a ball thrown by a pitcher, sought in a battery count and in a negligence count to recover damages from the pitcher and his employer. The district judge directed a verdict for defendants on the battery count and the jury returned a verdict for defendants on the negligence count. The district court having entered judgment for defendants on both counts, the plaintiff appeals from the judgment on the battery count.

In deciding whether the district court correctly directed a verdict for defendants on the battery count, we are to consider the evidence in the light most favorable to the plaintiff. That evidence was to the following effect.

On September 16, 1975 there was a professional baseball game at Fenway Park in Boston between the defendant, the Baltimore Baseball Club, Inc. playing under the name the Baltimore Orioles, and the Boston Red Sox. The defendant Ross Grimsley was a pitcher employed by the defendant Baltimore Club. Some spectators, including the plaintiff, were seated, behind a wire mesh fence, in bleachers located in right field. In order to be ready to pitch in the game, Grimsley, during the first three innings of play, had been warming up by throwing a ball from a pitcher's mound to a plate in the bullpen located near those right field bleachers. The spectators in the bleachers continuously heckled him. On several occasions immediately following heckling Grimsley looked directly at the hecklers, not just into the stands. At the end of the third inning of the game, Grimsley, after his catcher had left his catching position and was walking over to the bench, faced the bleachers and wound up or stretched as though to pitch in the direction of the plate toward which he had been throwing but the ball traveled from Grimsley's hand at more than 80 miles an hour at an angle of 90 degrees to the path from the pitcher's mound to the plate and directly toward the hecklers in the bleachers. The ball passed through the wire mesh fence and hit the plaintiff.

We, unlike the district judge, are of the view that from the evidence that Grimsley was an expert pitcher,

that on several occasions immediately following heckling he looked directly at the hecklers, not just into the stands, and that the ball traveled at right angle to the direction in which he had been pitching and in the direction of the hecklers, the jury could reasonably have inferred that Grimsley intended (1) to throw the ball in the direction of the hecklers, (2) to cause them imminent apprehension of being hit, and (3) to respond to conduct presently affecting his ability to warm up and, if the opportunity came, to play in the game itself.

The foregoing evidence and inferences would have permitted a jury to conclude that the defendant Grimsley committed a battery against the plaintiff. The case falls within the scope of Restatement Torts 2d Section 13 which provides, *inter alia,* that an actor be subject to liability to another for battery if intending to cause a third person to have an imminent apprehension of a harmful bodily contact, the actor causes the other to suffer a harmful contact. Although we have not found any Massachusetts case which directly supports that aspect of Section 13 which we have just set forth, we have no doubt that it would be followed by the Massachusetts Supreme Judicial Court. Section 13 has common law roots that precede the American Revolution, *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773). It is supported by a substantial body of American cases conveniently noted in PROSSER, TORTS, 4th ed., 1971, pp. 32-34, of which *Singer v. Marx*, 144 Cal. App. 2d 637, 301 P.2d 440, 443 (1956) is the one most clearly relevant to the case at bar. The whole rule and especially that aspect of the rule which permits recovery by a person who was not a target of the defendant embody a strong social policy including obedience to the criminal law by imposing an absolute civil liability to anyone who is physically injured as a result of an intentional harmful contact or a threat thereof directed either at him or a third person. *See* Prosser, *supra*. It, therefore, was error for the district court to have directed a verdict for defendant Grimsley on the battery count.

* * *

[R]ecord does not show that the jury determined as a fact that the defendant Grimsley did not throw the ball intentionally in the direction of the bleachers. As the case was submitted to it, the jury, in order to return a verdict for the plaintiff, would have been required impliedly to find both (1) that Grimsley intended to throw toward the bleachers, and (2) that a ball so thrown involved an unreasonable risk of injuring the plaintiff. Familiar principles or tort law, reflected in the judge's instructions to the jury made the second factor as essential as the first. *Cf.* RESTATEMENT TORTS 2D Section 284(a). *LaClair v. Silberline Mfg. Co.*, Mass., 393 N.E.2d 867, 871 (1979); *Goldstein v. Gontarz*, 364 Mass. 800, 805, 309 N.E.2d 196 (1974); *Kane v. Fields Corner Grille, Inc.*, 341 Mass. 640, 641-643, 171 N.E.2d 287 (1961). In returning a general verdict for the defendants the jury left us uninformed whether the plaintiff failed to persuade them on the first or the second of the issues. So far as we know, the jury may have determined that Grimsley threw the ball intentionally in the direction of the bleachers, but the jury may have been of the view that such a throw presented no unreasonable risk to the plaintiff because he was located behind a net intended to protect him. Since the defendant Grimsley has not borne the burden of proving that the judgment in the negligence action was based on the determination of the factual question whether Grimsley threw the ball intentionally in the direction of the bleachers, that judgment is not conclusive in the battery action. RESTATEMENT JUDGMENTS Section 68 comment 1.

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Vacated and remanded for a new trial on the battery count.

Questions

1. Was there an assault? Why?

2. Was there a battery? Why?

3. What did Grimsley intend to do? How was his intent established?

4. Did Grimsley intend to hit Plaintiff? Did he have to?

C. Defenses to Intentional Torts

There are several affirmative defenses which are available to one charged with committing an intentional tort during an athletic contest. One of the most effective defenses available to a sports participant is self defense. The RESTATEMENT (SECOND) OF TORTS provides as follows:

§ 63 · Self-Defense by Force Not Threatening Death of Serious Bodily Harm

1. An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

2. Self-defense is privileged under the conditions stated in (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

> **a.** by retreating or otherwise giving up a right or privilege, or
>
> **b.** by complying with a command with which that actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

Question

Jock "the Enforcer" Renault points his hockey stick at Wayne Gritty, star center of the Mythigan Blades, and addresses a gross insult to him. Outraged by Jock's conduct, and to deter further outbursts, Gritty delivered a solid right cross to Jock's jaw, knocking him to the ice. Was Wayne privileged to do so? *See* RESTATEMENT (SECOND) TORTS § 63 illustration 2.

§ 65 · Self-Defense by Force Threatening Death or Serious Bodily Harm

1. Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

> **a.** the other is about to inflict upon him an intentional contact or other bodily harm, and that
>
> **b.** he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by such force.

2. The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of defending himself by

> **a.** retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or
>
> **b.** permitting the other to intrude upon or dispossess him of his dwelling place, or
>
> **c.** abandoning an attempt to effect a lawful arrest.

3. The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

> **a.** retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling place of the other, or
>
> **b.** relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

Question

Ed "Mad Dog" Murphy, defenseman for the Calgary Roughnecks, attempts to punch Leroy "The Flash" Yessirman, star center of the Windsor Whales. Leroy delivers a two-handed blow with his hockey stick, which prevents the punch from connecting. Was Leroy privileged to do so? *See* RESTATEMENT (SECOND) OF TORTS § 65 illustration 1.

In order to support his claim of self-defense a player may introduce evidence of the character of his opponent to show that he was the aggressor in the attack. *Mong Ming Club v. Tang*, 77 Ariz 63, 266 P.2d 1091 (1954). For example, the player may introduce evidence of the turbulent, short-fused, vicious character of his opponent.[1]

The second major defense available to participants is consent. Generally, if the plaintiff has consented to an intentional interference with his person or property, the defendant will not be liable for that interference.[2] Consent can also be given when a person manifests a willingness that another engage in conduct.[3] In the context of a sporting event this aspect of consent raises some interesting conceptual problems. For example, in a football game a player may manifest a willingness to being roughly blocked or tackled by another player even though he does not want or desire such conduct.[4]

Among the tests developed to govern the scope of a participant's consent to contact in sporting events is the "Rules of the Game" test advocated in § 50 of Restatement (Second) of Torts (1965) which provides that:

> Taking part in a game manifests a willingness to submit to such bodily contacts ... as are permitted by the rules ... participating in such a game does not manifest consent to contacts which are prohibited by rule ... if such rules ... are designed to protect such participants ... this is true although the player knows that those with or against whom he is playing are habitual violators of such rules.

Others have suggested, however, that a foreseeability test of the conduct and harm caused would be more appropriate in determining consent in violent contact sports such as football and hockey. In hockey, for example, surveys indicate that most players accept fighting as an integral part of the game and that most infractions of the rules are enforced. This suggests that hockey players actually consent to more than just the contact permitted under the rules of the game. Thus, a player consents to acts or harms which are reasonably foreseeable when he or she entered the game.[5] Sometimes consent can be mutual as when one player accepts the challenge of another player to fight.[6]

Silence may manifest consent where a reasonable person would speak if he objected.[7] The consent has been

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[1] *Regina v. Maki*, 14 D.L.R. 3rd 164 (1970)

[2] RESTATEMENT (SECOND) TORTS § 49

[3] PROSSER & KEETON ON TORTS § 18, 113 (5th ed. 1984)

[4] *Id.* at 113

[5] Carrol, *Torts In Sports - I'll See You in Court*, 16 AKRON L. REV. 3 (1983)

[6] *Simth v. Simon*, 69 Mich. 481, 37 N.W. 548 (1888)

[7] PROSSER & KEETON ON TORTS § 18 at 113 (5th ed. 1984)

rejected where the contact was likely to produce serious injury.[8] In one leading case in the area of sports, the court observed that a professional hockey player consented to being struck by a gloved hand, because that practice was common in the game and was not likely to result in serious injury.[9] In a companion case, however, the court rejected the defense of consent on the ground that a professional hockey player did not consent to a blow which fractured his skull.[10] Further, it is axiomatic that the availability of the consent defense depends on whether the injured player had the capacity to consent at the time of the attack on him.

In conclusion, when a player takes part in an athletic contest, he may be deemed to have consented to physical conduct producing some contact and to physical conduct consistent with the rules and the normal practices associated with the game. Rarely, however, will an athlete be found to have consented to contact producing serious injury.

McADAMS v. WINDHAM

6 Ala. App. 577, 94 So. 742

GARDNER, J.

Appellant, as administratrix of the estate of William Curtis McAdams, deceased (her husband), brought this suit against appellee to recover damages for the death of her intestate as the result of an alleged assault and battery, committed upon him by defendant.

There were numerous counts in the complaint — some charging defendant with wrongfully and unlawfully committing the assault and battery on plaintiff's intestate by striking him with his fist, and others alleging, in substance, that plaintiff's intestate and defendant entered into a friendly sparring match, and that defendant negligently or recklessly struck plaintiff's intestate one or more blows with his fist, thus causing his death.

The defendant insisted as a defense to this cause of action, that he and plaintiff's intestate mutually entered into a friendly boxing match with their fists as they had done on numerous occasions, and in the course of this boxing match, and without any unlawful conduct on his part, and without the use of more force than defendant believed in good faith was justifiable in carrying on said friendly contest, one of defendant's blows struck intestate over the heart, which produced his death.

At the conclusion of plaintiff's evidence, the defendant requested in writing the affirmative charge in his favor, which was given; and, from the judgment following in favor of the defendant, the plaintiff has prosecuted this appeal.

It is without dispute that plaintiff's intestate and defendant, at the time intestate received the fatal blow, were engaged in a friendly boxing contest as they had frequently done before. The contest had progressed only a short while at defendant's place of business — several blows having passed, striking one another with their bared fist — when suddenly the plaintiff's intestate was seen to stagger, and was caught by one Waldrop, a spectator, who laid him upon the floor, where he died in a few minutes. There is no controversy about the fact that this sparring match was carried in entire good faith by both parties, in a spirit of play, and there is no contention that their conduct was unlawful. Upon the examination of the body of the deceased, it was found there was a bruised place over the heart, and it is surmised that the blow struck by defendant upon that particular spot proved fatal.

It is a general rule of law that a blow thus inflicted in a friendly, mutual combat — a mere sporting contest — is not unlawfully inflicted, the parties being engaged in the violation of no law. "Harm suffered by consent is

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[8] *Regina v. Maki*, 14 D.L.R. 164 (1970)

[9] *Regina v. Green*, 16 D.L.R. 137 (1970)

[10] *Maki, supra* n. 10

not, in general, the basis of a civil action. This is the meaning of the maxim, '*volenti no fit injuria.*'" 1 JAGGARD ON TORTS, 199. This contest is of course limited by the law as well as impliedly limited by the parties. The latter limitation is illustrated in the foregoing authority, as follows:

> Thus, participants in a violent game have assumed the risk ordinarily incident to their sport, but such ordinary risk does not include wrongful and intentional inflictions of injury. [C]onsent to the performance of a surgical operation for the cure or extirpation of disease will, in the law, justify the use of force; but such consent does not prevent suit by the patient for intentional violence or negligence on the part of the physician to his patient.

* * *

There is nothing in the evidence offered from which reasonable inference could be drawn that the defendant was guilty of any reckless or negligent conduct; but on the contrary it is without dispute that this boxing contest progressed in a manner similar to other contests in which the parties were in the habit of engaging. The fact that the intestate met his death is not alone sufficient, for, as said in *Drum v. Miller, supra*:

> Where an act is itself lawful, liability depends not on the particular consequences or results that may flow from it, but whether a prudent man, in the exercise of ordinary care, would have foreseen the injury or damage that would naturally or probably have resulted from the act.

Under the disputed proof, therefore, we are of the opinion the action of the court in giving the affirmative charge for the defendant was justified. The few remaining questions we consider unnecessary to treat.

It results that the judgment appealed from will be here affirmed.

ANDERSON, C.J., and SAYRE and MILLER, JJ., concur.

Problem

1. Assume that a professional baseball pitcher, Gaylord "Spitball" Perry, is on the mound and pitching against Reginald "Don't Call Me Reggie" or "Mr. October" Jackson. Perry throws a brush back pitch and intentionally tries to move Jackson back and away from home plate. Under which of the following situations would Perry or Jackson be liable for assault or battery?

    a. The ball narrowly misses Jackson's head, causing him great fear and apprehension.

    b. The ball hits and injures Jackson.

    c. The ball narrowly misses Jackson but, in avoiding the pitch, Jackson falls and sprains his ankle.

    d. After the brush-back pitch, Jackson is outraged and has to be restrained from attacking Perry. On the next pitch, Jackson swings and misses and his bat flies out of his hands and hits Perry.

    e. Would it make a difference if Perry was throwing illegal spitballs to Jackson?

    f. What if Jackson and Perry both become so angered that they charge each other and begin an injury-causing brawl halfway between the pitcher's mound and home plate?

Section 2: Negligence and Recklessness

A. Negligence

Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risks of harm.[11] Generally, the standard of care required of an individual is that of an ordinary, reasonable person under similar circumstances.[12] Thus, negligence is failing to do that which an ordinary reasonable person would have done under the circumstances or doing something which an ordinary reasonable person would not have done.[13] In addition, the negligent conduct must be the legal cause of the injury.[14] This last requirement is sometimes referred to in terms of proximate cause or foreseeability and varies greatly from one jurisdiction to another.[15]

There are few recorded negligence actions involving participants in sporting events. This is in part due to the problems courts have had in establishing the appropriate standard of care to apply in violent sports such as football, hockey, and boxing where a player's actions are likely to cause injury, and where such results are an accepted part of the game. Imposing the usual standard of care to avoid conduct which in the ordinary course of events might result in injury to a fellow participant (especially if he or she is an opponent) would lead to irreconcilable difficulties between the law and the rules and objectives of many games. It would, for example, be difficult to expect the opposing linemen of two football teams during a goal line stand in the final seconds of a game to refrain from conduct which in the ordinary course of events might injure each other. Arguably, to impose such a duty would destroy the aggressive nature of the game and the very qualities inherent in such sports which make them attractive to many participants and fans alike.

Recovery under simple negligence theory has also been made difficult because of the numerous defenses available. The most notable of which are contributory negligence, comparative negligence and assumption of risk.

Contributory negligence is conduct by an injured party which falls below the standard that is necessary for his own protection. It may result from the injured party unreasonably exposing himself to the danger created by another's negligence, or from other conduct which falls below that required of a reasonably prudent person.[16] An injured player's contributory negligence would bar recovery against any person whose negli-gence resulted in his injury.[17] Because of the hardship which the doctrine of contributory negligence has caused most jurisdictions have abandoned it in favor of some form of comparative negligence.[18]

There are two major types of comparative fault, pure and modified. In the case of pure comparative fault, an injured player's negligence serves to reduce his recovery in proportion to his fault.[19] There are two sub-categories

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[11] RESTATEMENT (SECOND) TORTS § 282 (1965)

[12] *Id.* at § 282

[13] *Id.* at § 289

[14] *Id.* at §§ 430, 431

[15] PROSSER & KEETON ON TORTS §§ 42, 43 (5th ed. 1984)

[16] RESTATEMENT (SECOND) TORTS §§ 463, 464, 466 (1965)

[17] *Id.* at § 467 (1965)

[18] PROSSER & KEETON ON TORTS § 67, at 471 (5th ed. 1984)

[19] *Id.* § 67, at 472

of modified comparative negligence. Under the equal fault bar approach, the injured player cannot recover anything if his fault is equal to or greater than the defendant's fault.[20] Under the greater fault bar system the injured player is prevented from all recovery only if his fault exceed's the defendant's.[21]

Assumption of risk has been by far the most effective bar to athletes attempting to recover for negligent injuries which have occurred during sporting events.[22] Assumption of risk can take a number of different forms. It can mean that the injured player has given his express consent to relieve the defendant of liability.[23] Secondly, a person may voluntarily enter into some relationship with the defendant which he knows involves some risk, and thus may have tacitly or impliedly assumed the risk.[24] Finally, the injured player may be aware of a risk created by the negligence of the defendant and voluntarily encounter it.[25] In most cases involving injuries to participants, the last form of implied assumption of risk will come into play. In these situations it will be necessary to determine the extent of the assumption of risk. In theory a participant will be deemed to have assumed all of the ordinary and inherent risks associated with the sport. But, which risks are ordinary and inherent? What if the injury occurs as a result of other than good faith competition?

BOURQUE v. DUPLECHIN

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

WATSON, Judge

Plaintiff, Jerome Bourque, Jr., filed this suit to recover damages for personal injuries received in a softball game. Named defendants were Adrien Duplechin, a member of the opposing team who inflicted the injuries, and Duplechin's liability insurer, Allstate Insurance Company. The trial court rendered judgment in favor of plaintiff against both defendants and defendants have appealed. We affirm.

Both Duplechin and Allstate contend that the trial court erred: in not finding that Bourque assumed the risk of injury by participating in the softball game; and in failing to find that Bourque was guilty of contributory negligence. Defendant Duplechin also contends that the trial court erred in finding him negligent and in finding that the injury to plaintiff Bourque occurred four to five feet away from the second base position in the general direction of the pitcher's mound. Allstate further contends that the trial court erred in finding coverage under its policy which excludes injury intended or expected by the insured.

On June 9, 1974, Bourque was playing second base on a softball team fielded by Boo Boo's Lounge. Duplechin, a member of the opposing team sponsored by Murray's Steak House and Lounge, had hit the ball and advanced to first base. A teammate of Duplechin's, Steve Pressler, hit a ground ball and Duplechin started to second. The shortstop caught the ground ball and threw it to Bourque who tagged second base and then stepped away from second base to throw the ball to first and execute a double play. After Bourque had thrown the ball to

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20 *Id.* § 67 at 473

21 *Id.* § 67 at 473

22 WEISTART & LOWELL, THE LAW OF SPORTS § 8.02 (1979)

23 RESTATEMENT (SECOND) TORTS § 496B (1965)

24 *Id.* at § 496C

25 *Id.* at § 496A comment c. The classic example of assumption of risk in a sports setting involves the baseball fan who is unable to find a screened seat at the ball park. Fully aware of the risk, he sits in an unscreened seat and is hit by a batted ball. *See* RESTATEMENT (SECOND) TORTS § 496C illustration 5.

first base, Duplechin ran at full speed into Bourque. As Duplechin ran into Bourque, he brought his left arm up under Bourque's chin. The evidence supports the trial court's factual conclusion that the collision occurred four or five feet away from the second base position in the direction of the pitcher's mound. Duplechin was thrown out of the game by the umpire because of the incident.

Pertinent to the trial court's decision was the following testimony:

Plaintiff Bourque, age 22 at the time of trial, testified that he is 5'7" tall. He was well out of the way when he was hit, standing four or five feet from second base and outside the baseline. He knew there was a possibility of a runner sliding into him but had never imagined what actually happened, which he regarded as unbelievable under the circumstances.

Gregory John Laborde, a student at Tulane Law School, testified that he witnessed the incident from the dugout along the first base line and saw Duplechin turn and run directly toward Bourque who was standing four or five feet from second base toward home plate. Duplechin did not attempt to slide or decrease his speed and his left arm came up under Bourque's chin as they collided. Duplechin had to veer from the base path in order to strike Bourque.

Donald Frank Lockwood, baseball coach at USL, testified as an expert witness that: softball is a noncontact sport; in a forced play to second such as this, the accepted way to break up a double play is by sliding.

Steve Pressler, who hit the ground ball that precipitated the incident, testified that the sides were retired as a result, because the collision was a flagrant violation of the rules of the game.

Duplechin admitted that he ran into Bourque while standing up in an attempt to block Bourque's view of first base and keep him from executing a double play. Duplechin also admitted that he was running it full speed when he collided with Bourque, a much smaller man. Duplechin attributed the accident to Bourque's failure to get out of the way.

There is no question that defendant Duplechin's conduct was the cause in fact of the harm to plaintiff Bourque. Duplechin was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. This duty was breached by Duplechin, whose behavior was, according to the evidence, substandard and negligent. Bourque assumed the risk of being hit by a bat or a ball. Bourque may also have assumed the risk of an injury resulting from standing in the base path and being spiked by someone sliding into second base, a common incident of softball and baseball. However, Bourque did not assume the risk of Duplechin going out of his way to run into him at full speed when Bourque was five feet away from the base. 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. Assumption of risk is an affirmative defense which must be proven by a court's conclusion that Bourque did not assume the risk of Duplechin's negligent act. There is no evidence in the record to indicate contributory negligence on the part of Bourque.

Allstate contends on appeal that there is no coverage under its policy, because its insured, Duplechin, committed an intentional tort and should have expected injury to result. However, while Duplechin's action was negligent and perhaps even constitutes wanton negligence, the evidence is that he did not intend the harm that resulted. The distinction between an intentional tort and one resulting from negligence is summarized in, LAW OF TORTS, 4th ed., by William L. Prosser, at pg. 32, as follows:

> [T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong.

Duplechin was not motivated by a desire to injure Bourque. Duplechin tried to break up a double play with a reckless disregard of the consequences to Bourque. Duplechin's action was negligent but does not present a situation where the injury was expected or intended. There is coverage under Allstate's policy.

The trial court awarded plaintiff Bourque $12,000 for his pain and suffering and $1,496.00 for his special

damages. There is no dispute about the amount awarded. Bourque's jaw was fractured; his chin required plastic surgery; seven teeth were broken and had to be crowned; and one tooth was replaced by a bridge.

There is no manifest error in the trial court's conclusion which we summarize as follows: plaintiff Bourque's injuries resulted from the negligence of defendant Duplechin; Bourque was not guilty of contributory negligence and did not assume the risk of this particular accident; defendant Allstate did not prove that coverage was excluded under the terms of is policy.

For the foregoing reasons, the judgment of the trial court is affirmed at the cost of defendants-appellants.

Affirmed.

CUTRER, Judge (dissenting)

The majority affirms the lower court's judgment against the tortfeasor's liability insurer, concluding that the tortfeasor negligently injured the plaintiff. This writer strongly dissents, basing this disagreement on a finding that the majority opinion has wrongly characterized the tortfeasor's acts as negligent rather than intentional.

As correctly stated in the majority opinion, Duplechin admitted that he ran into the plaintiff in an attempt to prevent a double play. In essence the defendant testified that if the plaintiff did not get out of the way he would run into him in order to prevent the double play. The plaintiff did not get out of the way and Duplechin did run into him. As a result plaintiff received rather severe facial injuries, principally because of the difference in size between the two players; Duplechin was five feet, eleven inches tall and weighed two hundred ten pounds, while the plaintiff was five feet, seven inches tall and weighed one hundred forty pounds.

The majority opinion sets forth the distinction between an intentional tort and one resulting from negligence, as follows: "[T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent."

In the present case the danger of Duplechin colliding with the plaintiff and causing him injury was more than a foreseeable risk which a reasonable man would avoid. The collision and resulting injury were a substantial certainty, particularly in view of the fact that Duplechin was larger than the plaintiff, was running in an upright position at full speed directly at the plaintiff, and knew he would run over the plaintiff if the latter did not get out of his way. Even though Duplechin may not have intended to injure the plaintiff, he intended an unpermitted contact with the plaintiff, and this constitutes an intentional tort, for which the Allstate policy excludes coverage.

Questions

1. Is the dissent correct with its characterization of Defendant's conduct as a battery?

2. Can conduct which constitutes a battery also be negligent?

3. What practical considerations might lead a plaintiff to prefer basing his suit on a negligence theory rather than battery?

4. What result in *Bourque* if plaintiff had been standing on second base at the time of the collision and:

a. The final out had been made just prior to the collision?

b. Plaintiff and defendant had exchanged angry words during the play just prior to the collision?

c. Defendant was a frail young man and Plaintiff was a 250 pound individual?

PICOU v. THE HARTFORD INSURANCE CO.
558 So. 2d 787 (La. 1990)

Opinion by: BOWES

Plaintiffs-appellants, Sandra and Julian Picou, appeal a judgment of the district court in favor of defendant, The Hartford Insurance Company, dismissing their case. We affirm.

Sandra Picou was a member of the Mennonite Church softball team, and, on May 19, 1987, played second base for Mennonite in the "Women's Christian Softball League." Defendant's insured, Marguerite (sometimes called "Meagan" in the proceedings) Mongrue, was a member of the opposing team from Holy Family. On the day in question, Ms. Mongrue was the runner at first base when another member of her team hit the pitched ball to center field. Ms. Picou, attempting to cover second base, caught the ball from the center fielder. As she did so, Ms. Mongrue ran to second base and either collided with Ms. Picou, or slid or dove into second base, causing Ms. Picou to fall off balance and injure her ankle. Ms. Picou underwent surgery and was in a cast for 14 weeks; she has residual physical problems stemming from the injury. This suit for damages alleging negligence or a violation of a duty on the part of Ms. Mongrue followed, after the incident described above.

Trial on the merits was held on March 28, 1989, and, after taking the case under advisement, the trial court rendered judgment in favor of the defendant, stating in her reasons for judgment as follows:

> In order for plaintiff to recover, she must establish by a preponderance of the evidence that defendant acted in an unexpected and unsportsmanlike way with a reckless lack of concern for others' safety. . . .
>
> The standard of care to which the defendant is held is that of a reasonably prudent base runner attempting to gain second base.

None of the various versions of how the accident occurred is sufficient to meet the requirements of establishing defendant's conduct violated the standard of care required of her.

Plaintiffs have perfected the present appeal from that judgment.

On appeal, plaintiffs have averred that the trial court erred in:

1. Finding no duty of a base runner to avoid striking a base player from the rear;
2. Applying a general rule on sports injuries to an injury that occurred when plaintiff was struck from the rear;
3. Failing to give meaningful findings of fact and reasons for judgment;

No matter at Trial or court

. . . (O)ur review of the transcript has revealed additional testimony, which we find relevant, such as the following:

1) Jamie Cortez, witness for the plaintiff and umpire, testified that plaintiff had her back to the runner and that defendant collided with the plaintiff.

2) Meagan Mongrue, the defendant, testified that she had no intention of making contact with the plaintiff.

3) Mickey Falgoust, defense witness and a player for Holy Family, testified that the defendant fell first and that plaintiff fell on top of her.

4) Sandy Voros Johnson, defense witness and a player for Holy Family, testified that defendant slid, feet first, between plaintiff's legs.

Duty Risk

Cases such as the present one, in which plaintiff and defendant have been voluntary participants in sporting activities, have traditionally been decided using the theory of assumption of the risk - did the plaintiff assume the risk encountered in the activity? *See e.g., Bourque v. Duplechin*, 331 So. 2d 40 (La. App. 3 Cir. 1976).

However, our Supreme Court abrogated the defense of assumption of the risk in the relatively recent decision of *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988). There the Court said:

we believe that the courts, lawyers and litigants would best be served by no longer utilizing the term assumption of the risk to refer to plaintiff conduct.

Rather, the Court found that cases involving voluntary participation in certain types of activities will turn on their particular facts and may be analyzed in terms of duty/risk, *id.*, at p. 1135:

> Nor does our decision today mean that the result reached in the sports spectator or amusement park cases (common law's "implied primary" assumption of risk cases) was incorrect. However, rather than relying on the fiction that the plaintiffs in such cases implicitly consented to their injuries, the sounder reasoning is that the defendants were not liable because they did not breach any duty owed to the plaintiffs.
>
> * * *
>
> Even while applying assumption of risk terminology to these types of cases, courts have simultaneously recognized that the defendant was not negligent because his conduct vis-a-vis the plaintiff was not unreasonable.
>
> * * *
>
> The same [duty risk] analysis applies in other cases where it may not be reasonable to require the defendant to protect the plaintiff from all of the risks associated with a particular activity. *See, e.g., Bonanno v. Continental Casualty Co.*, 285 So. 2d [591] at 592 (operator of haunted house provided adequate supervision and space for patrons, and therefore was not negligent).
>
> In *Bourque, supra,* even though the court discussed the facts of that case in terms of what risks were assumed by the plaintiff, it further discussed the duty involved in playing a softball game:
>
> There is no question that defendant Duplechin's conduct was the cause in fact of the harm to plaintiff *Bourque*. Duplechin was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. This duty was breached by Duplechin, whose behavior was, according to the evidence, substandard and negligent.
>
> * * *

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.

Put another way, players have a duty to play with sportsmanlike conduct, according to the rules of the game and with regard for the other participants.

A virtually identical analysis can be found in *Novak v. Lamar Ins. Co.*, 488 So. 2d 739 (La. App. 2 Cir. 1986), in which the Second Circuit determined the case in terms of assumption of the risk:

> 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.

Translated for purposes of our duty/risk analysis, participants have the duty to play the game in a reasonable manner, refraining from acts which are unexpected, unforeseeable, or which evidence reckless disregard for other players.

The latest expression of the duty involved in such cases is *Ginsberg v. Hontas*, 545 So. 2d 1154 (La. App. 4 Cir. 1989), *writ denied* 550 So. 2d 631 (La. 1989), in which the court discussed the duty involved:

> Louisiana jurisprudence dictates that in a tort action courts are to apply a "duty risk" analysis to determine whether a defendant's conduct was the legal cause of the plaintiffs injury. *Hill v. Lundin & Associates, Inc.*, 260 La. 542, 256 So. 2d 620 (1972). Under a duty risk analysis, there are the

following inquiries: (1) What, if any, duty was owed by the defendant to the plaintiff? (2) Was there a breach of the duty? (3) Was that breach a substantial cause in fact of the injury? (4) Was the risk and harm within the scope of the protection afforded by the duty breached? *Jones v. Robbins*, 289 So. 2d 104 (La.1974); *Hill v. Lundin & Associates, Inc., supra.; Annis v. Shapiro*, 517 So. 2d 1237 (La. 4th Cir.1987). Whether a defendant owes a plaintiff a legal duty is a question of law. Whether a defendant has breached a duty owed is a question of fact. *Chavez v. Noble Drilling Corp.*, 567 F.2d 287 (5th Cir.1978).

The duty owed by the defendant in the instant matter is a common duty, the duty to act reasonably under the circumstances. In this softball game defendant owed plaintiff the duty to act reasonably, that is, to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another.

Under a duty risk analysis, plaintiff bears the burden of proving by a preponderance of the evidence that the defendant violated an imposed duty and acted unreasonably causing injury. *Blanchard v. Riley Stoker Corp.*, 492 So. 2d 1236 (La. App. 4th Cir.1986).

The district court used the standards enunciated in *Novak* and *Ginsberg, supra*, in finding that the standard of care to which the defendant was held is "that of a reasonably prudent base runner attempting to gain second base." We agree with her conclusion, based on the evidence adduced at trial, that none of the various versions of the accident established that Ms. Mongrue's conduct violated the standard of care required of her. In so doing, we reiterate and adopt the standard of care discussed above - participants in these (sports) activities have a duty to play in a reasonable and sportsmanlike manner, according to the rules of the game, and to refrain from acts which are unforeseeable and which evidence wanton or reckless disregard for the other participants. Under this standard, we agree that Ms. Mongrue, while an enthusiastic player, did not act in an unreasonable or unsportsmanlike manner. The risk of the type of accident which occurred, whether Ms. Mongrue slid head first, feet first, or ran to second base, is inherent in the game. The Second Circuit quoted from its adoption of the trial court's facts in Novak, and we find it appropriate to recite here:

> A runner must touch the base, and there is nothing illegal or unsportsmanlike in being partially inside the base line at the bag. The closer the play, the more likely a collision; and the runner is not obliged to sacrifice himself or 'surrender' an out by running outside the line to avoid collision with a fielder in close proximity to the base. Accordingly, the closer the play, the more wary and self-protective the fielder must be to catch the ball while in contact with the base so as to remove himself with dispatch, sometimes almost by reflex.
>
> Such a play occurred here; and Fitts was not negligent. The situation was simply an inherent part of the game; . . .

Nothing in the record before us leads us to conclude that Ms. Mongrue played recklessly or that she attempted to knock down the plaintiff. The accident and resultant injury are the unfortunate result of two women who played the softball game competitively and, we find, with diligence. Contrary to appellant's assertions, we find nothing in the rules, designated "Softball Playing Rules", promulgated by the "Amateur Softball Association of America," introduced into evidence, which would support their position that defendant violated the rules. As one of plaintiff's coaches testified, upon referring to the rules, "Contact is allowed . . . If it is deliberate action, then the person is declared out. They can be thrown out of the game if it is definitely deliberate action." Our reading of the rules reinforces this opinion that conduct of the player coming in contact with another player must be deliberate in order to be violative of the rules. The trial judge apparently concluded, as do we, that nothing evidences a deliberate intention on the part of Ms. Mongrue to collide with Ms. Picou.

There was a reasonable factual basis to support the conclusion of the trial court that the defendant did not act negligently during the softball game, and the trial court was not clearly erroneous in so finding.

AFFIRMED

Question

The Court makes several statements about a player's duty. At one point it states, "players have a duty to play with sportsmanlike conduct, according to the rules of the game and with regard for the other participants." The court also states that there is a "duty to play the game in a reasonable manner, refraining from acts which are unexpected, unforeseeable, or which evidence reckless disregard for other players". At another point the Court states, "In this softball game defendant owed plaintiff the duty to act reasonably, that is, to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another." The court states that there was no attempt to knock down the plaintiff, and that the contact was not deliberate. Suppose the following scenario takes place. In a softball game the catcher is blocking home plate trying to tag a baserunner as she attempts to score. The baserunner deliberately runs into the catcher trying to dislodge the ball and score. As a result of the collision the catcher suffers a fractured skull. How should the court decide. Was the conduct permitted by the rules? Was the base runner's conduct likely to result in injury?

NABOZNY v. BARNHILL

311 Ill. App. 3d 212, 334 N.E.2d 258 (1975)

ADESKO, Justice

Plaintiff, Julian Claudio Nabozny, a minor, by Edward J. Nabozny, his father, commenced this action to recover damages for personal injuries allegedly caused by the negligence of defendant, David Barnhill. Trial was before a jury. At the close of plaintiff's case on motion of defendant, the trial court directed a verdict in favor of the defendant. Plaintiff appeals from the order granting the motion.

Plaintiff contends on appeal that the trial judge erred in granting defendant's motion for a directed verdict and that plaintiff's actions as a participant do not prohibit the establishment of a *prima facie* case of negligence. Defendant argues in support of the trial court's ruling that defendant was free from negligence as a matter of law (lacking a duty to plaintiff) and that defendant was contributorily negligent as a matter of law.

* * *

A soccer match began between two amateur teams at Duke Child's Field in Winnetka, Illinois. Plaintiff was playing the position of goalkeeper for the Hansa team. Defendant was playing the position of forward for the Winnetka team. Members of both teams were of high school age. Approximately twenty minutes after play had begun, a Winnetka player kicked the ball over the midfield line. Two players, Jim Gallos (for Hansa) and the defendant (for Winnetka) chased the free ball. Gallos reached for the ball first. Since he was closely pursued by the defendant, Gallos passed the ball to the plaintiff, the Hansa goalkeeper. Gallos then turned away and prepared to receive a pass from the plaintiff. The plaintiff, in the meantime, went down on his left knee, received the pass, and pulled the ball to his chest. The defendant did not turn away when Gallos did, but continued to run in the direction of the plaintiff and kicked the left side of plaintiff's head causing plaintiff severe injuries.

All of the occurrence witnesses agreed that the defendant had time to avoid contact with plaintiff and that the plaintiff remained at all times within the "penalty area," a rectangular area between the eighteenth yard line and the goal. Four witnesses testified that they saw plaintiff in a crouched position on his left knee inside the penalty zone. Plaintiff testified that he actually had possession of the ball when he was struck by defendant. One witness, Marie Shekem, stated that plaintiff had the ball when he was kicked. All other occurrence witnesses stated that they thought plaintiff was in possession of the ball.

Plaintiff called three expert witnesses. Julius Roth, coach of the Hansa team, testified that the game in question was being played under "F.I.F.A." rules. The three experts agreed that those rules prohibited all players from making contact with the goalkeeper when he is in possession of the ball in the penalty area. Possession is defined in the Chicago area as referring to the goalkeeper having his hands on the ball. Under "F.I.F.A." rules,

any contact with a goalkeeper in possession in the penalty area is an infraction of the rules, even if such contact is unintentional. The goalkeeper is the only member of a team who is allowed to touch a ball in play so long as he remains in the penalty area. The only legal contact permitted in soccer is shoulder to shoulder contact between players going for a ball within playing distance. The three experts agreed that the contact in question in this case should not have occurred. Additionally, goalkeeper head injuries are extremely rare in soccer. As a result of being struck, plaintiff suffered permanent damage to his skull and brain.

The initial question presented by this appeal is whether, under the facts in evidence, such a relationship existed between the parties that the court will impose a legal duty upon one for the benefit of the other. "[M]ore simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant." (PROSSER, LAW OF TORTS, 4th ed. 1971, sec. 37, p. 206.)

There is a dearth of case law involving organized athletic competition wherein one of the participants is charged with negligence. There are no such Illinois cases. A number of other jurisdictions prohibit recovery generally for reasons of public policy. (*E.g.*, *Gaspard v. Grain Dealers Mutual Insurance Co.* (La. App. 1961), 131 S.2d 831.) We can find no American cases dealing with the game of soccer.

This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self-control.

Individual sports are advanced and competition enhanced by a comprehensive set of rules. Some rules secure the better playing of the game as a test of skill. Other rules are primarily designed to protect participants from serious injury. (RESTATEMENT (SECOND) OF TORTS, Sec. 50, comment b.)

For these reasons, this court believes that when athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants. We have carefully drawn the rule announced herein in order to control a new field of personal injury litigation. Under the facts presented in the case at bar, we find such a duty clearly arose. Plaintiff was entitled to legal protection at the hands of the defendant. The defendant contends he is immune from tort action for any injury to another player that happens during the course of the game, to which theory we do not subscribe.

It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a 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.

Defendant also asserts that plaintiff was contributorily negligent as a matter of law, and, therefore, the trial court's direction of a verdict in defendant's favor was correct. We do not agree. The evidence presented tended to show that plaintiff was in the exercise of ordinary care for his own safety. While playing his position, he remained in the penalty area and took possession of the ball in a proper manner. Plaintiff had no reason to know of the danger created by defendant. Without this knowledge, it cannot be said that plaintiff unreasonably exposed himself to such danger or failed to discover or appreciate the risk. The facts in evidence revealed that the play in question was of a kind commonly executed in this sport. Frank Longo, one of the plaintiff's expert witnesses, testified that once the goalkeeper gets possession of the ball in the penalty area, "the instinct should be there [in an opposing player pursuing the ball] through training and knowledge of the rules to avoid contact [with the goalkeeper]." All of plaintiff's expert witnesses agreed that a player charging an opposition goaltender under circumstances similar to those which existed during the play in question should be able to avoid all contact. Furthermore, it is a violation of the rules for a player simply to kick at the ball when a goalkeeper has possession in the penalty area even if no contact is made with the goalkeeper.

[W]e conclude that the trial court erred in directing a verdict in favor of defendant. It is a fact question for

the jury.

This cause, therefore, is reversed and remanded to the Circuit Court of Cook County for a new trial consistent with the views expressed in this opinion.

Reversed and remanded.

DIERINGER, P.J., and JOHNSON, J., concur

Questions

1. If the injury occurred as described in *Nabozny*, do you agree with the court that it was properly characterized as negligent? Why?

2. The court states that the defendant violated a safety rule by running into the plaintiff, goalkeeper. In order for plaintiff to prevail must he establish that defendant *knew* of the rule? Would plaintiff have to establish that the referee had called a penalty?

3. In *Nabozny* the court decides that the plaintiff was not contributorily negligent, but had he assumed the risk of such injury?

OSWALD v. TOWNSHIP HIGH SCHOOL DISTRICT NO. 214
84 Ill. App. 3d 723, 406 N.E.2d 157 (1980)

SULLIVAN, Presiding Justice

Plaintiff appeals from an order dismissing Count III of his third amended complaint (the complaint). Sounding in negligence, this count was directed against Michael Hannon (defendant).

The complaint generally alleges that plaintiff was injured when kicked while playing basketball in a required high school gym class. In Count III, it is alleged that at the time of the occurrence, the national Federation of State High School Association rules governing the protection and safety of participants in basketball games were in effect; that defendant knew or should have known of these rules; that defendant owed a duty to play the game in accordance with those rules and to exercise care to avoid causing injury to other participants; that defendant violated, failed to comply with, or failed to conduct himself in a manner consistent with the rules and that, as a proximate result thereof, plaintiff was injured.

The motion to dismiss Count III was granted for failure to state a cause of action, and this appeal followed.

* * *

The sole issue presented on appeal is whether a cause of action was stated in Count III. In this regard, we note that in the consideration of the motion to dismiss the pleading, the allegations of fact in the complaint are taken as true ... and that, in determining the propriety of such a dismissal, we are concerned only with the questions of law presented by the pleadings....

In the instant case, the question of law presented by the parties is whether liability for injuries sustained as a result of the breach of safety rule in a physical education class basketball game may be predicated upon ordinary negligence, as plaintiff argues, or whether wilful and wanton misconduct must be shown to permit recovery, as defendant maintains.

In support of their respective positions, both parties rely upon *Nabozny v Barnhill* (31 Ill. App. 3d 212, 334 N.E.2d 258 (1975)).... In *Nabozny*, plaintiff was a goalkeeper for a high school age amateur soccer team, and

defendant was a forward on the opposing team. The game was played under rules which prohibit all players from making contact with the goalkeeper while he is in possession of the ball in the penalty area, and provides that shoulder to shoulder contact is the only permissible contact between players going for a ball. During the game, the ball was passed to plaintiff who had possession of it in the penalty area when defendant, who had been going for the ball, continued to run toward plaintiff and his foot came in contact with plaintiff's head.

The Nabozny complaint was predicted on ordinary negligence and, at the close of the plaintiff's case, a verdict was directed for defendant and this ruling was reversed on appeal. The reviewing court, after noting that the "law should not place unreasonable burdens on the free and vigorous participation in sports by our youth" and that "some of the restraints of civilization must accompany every athlete onto the playing field" (31 Ill. App. 3d at 215, 334 N.E.2d at 260), concluded that:

> For these reasons, this court believes that when athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from a serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. **A reckless disregard for the safety of other players cannot be excused**. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants.
>
> * * *
>
> It is our opinion that **a player is liable for injury in a tort action if his conduct is such that it is either deliberate wilful or with a reckless disregard for the safety of the other player**.... (31 Ill. App. 3d at 215, 334 N.E.2d at 260-61.) (Emphasis added)

From the emphasized language, defendant takes the position that the predicate of legal liability established in *Nabozny* was willfulness or reckless disregard of safety. However, because the complaint in Nabozny charged only ordinary negligence, plaintiff argues that "although the language from the opinion sounds in intentional tort, the opinion, viewed in the light of the pleadings on which it was predicated [negligence rather than wilful and wanton misconduct] must be interpreted as holding that a rule designed to protect the participants can be employed as indicating the standard of ordinary care, and its breach of being evidence of negligence."

Plaintiff contends that this view is supported by *Stewart v. D.& R. Welding Supply Co.*, in which a baseball umpire sued for injuries received when he was struck by a bat ring which flew from the bat of a player who was taking practice swings. The complaint, which charged only wilful and wanton misconduct, was dismissed as not stating a cause of action. There was no violation of a safety rule involved, as there was in *Nabozny*, and it was argued by defendant on appeal that (1) Plaintiff had no cause of action because *Nabozny* denies recovery for unintentional injuries during a game unless they arose from the violations of a safety rule; and (2) that the complaint was nevertheless insufficient to allege wilful and wanton misconduct.

The court, in finding that a safety rule violation was not the sole basis for recovery, said:

> The safety rules of the game define the limits of the consent given. In the instant case no question of express or implied consent was involved. Plaintiff did not consent to being hit by the bat ring under any circumstances and regardless of whether a safety rule of the game prohibited defendant Tribmy's [player] alleged conduct. In this situation the liability of one participant to another is not limited to acts which are violations of safety rules. (51 Ill. App. 3d at 600, 9 Ill. Dec. at 598, 366 N.E.2d at 1109)

The question as to whether Plaintiff had an action based upon ordinary negligence was not considered in *Stewart*, but in finding that wilful and wanton misconduct was sufficiently alleged in the complaint, the *Stewart* court referred to a statement in *Mann v. Nutrilite, Inc.*, 136 Cal. App. 2d 729, 289 P.2d 282, 285 (1955), that a participant should be accorded "a certain margin of error" and that the *Stewart* court stated:

> Here the complaint alleges that the swinging of the bat took place between innings, a time when

the excitement of play would be temporarily lulled. That the ring would fly off the bat if the ring was too large for the bat was obvious. That the safety of others would be endangered if the ring flew off was equally obvious. If the allegations of the complaint were proved, the jury could believe that the mistake of judgment of defendant went beyond the margin of error extended an athletic participant and constituted a reckless disregard for the safety of those in the position of plaintiff. The complaint property alleged wilful and wanton misconduct. (51 Ill. App. 3d at 601, 9 Ill. Dec. at 599, 366 N.E.2d at 1110)

While *Nabozny* held that a recognized safety rule placed a duty on all players in a soccer game to refrain from conduct proscribed by the rule (31 Ill. App. 3d at 215, 334 N.E.2d at 260-61), we find nothing in that case supportive of plaintiff's contention that the proof of ordinary negligence will sustain an action for injury to a player where the violation of a safety rule is involved in the injury; rather, we see *Nabozny* as establishing the standard of conduct to be willfulness or a reckless disregard of safety where an injury to a player occurs in an athletic competition involving bodily contact. This appears clear from the court's statement that: "[A] player is liable ... if his conduct is such that it is either deliberate, wilful, or with a reckless disregard for the safety of the other player...." (31 Ill. App. 3d at 215, 334 N.E.2d at 26) This view is supported by the statement of the court in *Stewart* that: "Most of the cases [involving tort actions between participants in games] have indicated that recovery would be permitted if the defendant's conduct was wilful and wanton. The *Nabozny* opinion stated at one point that liability occurred if a player injured another with a reckless disregard for his safety." 51 Ill. App. 3d at 600, 9 Ill. Dec. at 599, 366 N.E.2d at 1110; *see also*, *Hackbart v. Cincinnati Bengals, Inc.* (D. Colo. 1977), 435 F.Supp. 352, *rev'd on other grounds* (10th Cir. 1979), 601 F.2d 516, *cert. denied* (1979), 444 U.S. 931, 100 S. Ct. 275, 62 L. Ed. 2d 188.

We find no merit in the suggestion of plaintiff that those cases which hold that golfers owe a duty of ordinary care to other golfers are controlling. He refers us to *Page v. Unterreiner* (Mo. App. 1937), 106 S.W.2d 528, and *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316 (1931). We note, however, that partici-pants in bodily contact games such as basketball assume greater risks than do golfers and others involved in non-physical contact sports. Because rules infractions, deliberate or unintentional, are virtually inevitable in these sports, contact is justified where injury results from such contact.

Count III of plaintiff's complaint was grounded on ordinary negligence and, in the light of the foregoing, the dismissal of Count III is affirmed.

Affirmed.

LORENZ and WILSON, JJ., concur

Problems

1. Plaintiff, an experienced bowler, was standing in an open area behind the alleys, about three feet behind the spectators' seats when he noticed Defendant emerge from the ball room "thumbing" a bowling ball. Defendant took a practice swing with the ball, moving it in an upward motion. The ball slipped out of Defendant's hand striking Plaintiff in the face. Other bowlers have been seen taking practice swings in this area. Is Defendant liable? On what theory? *Kincaid v. Lagen*, 71 Ill. App. 2d 307, 218 N.E.2d 856 (1966).

2. During a high school basketball game, a shot came off the backboard and headed toward the out of bounds line. A and B ran for the loose ball. As A reached for the ball, B, an opposing player, dove for the ball ar.' collided with A, who hit his head on B's hip. Is B liable to A? On what theory? *Albers v. Independent School District of Lewis Co.*, 94 Idaho 343, 487 P.2d 936 (1971).

3. Kelly and Forester were playing golf together. They finished playing the fourth hole and proceeded to the fifth tee. Kelly's drive was down the middle but Forester was not so fortunate. He drove his ball into the rough to the left of the fairway and he and Kelly went to look for it. Kelly found the ball some thirty feet from the left edge of the fairway and farther from the green than was his own. It is the custom in the game of golf that whoever is "away" hits first, so it was Forester's turn to take his swing. Forester took stock of the situation, which was as follows:

The green was eighty yards away, but between Forester's ball and the green stood an oak tree about sixty feet high, twenty-five or thirty feet wide, with branches beginning about fifteen or twenty feet from the ground. This tree was about thirty five feet from Forester's ball, and was a formidable obstacle for a golfer. Forester had to decide whether to attempt to shoot over the tree, under it, through it, around it, with a hook, or out onto the fairway with a short, "safe" shot. While Forester was preparing to shoot, Kelly walked toward his own ball, which was approximately eight-five or ninety degrees to Forester's right. He turned around and watched Forester take his swing, being then about forty feet from Forester. Forester, intent on making his shot successful, did not see Kelly and did not motion him away or call out, "Fore!" the traditional warning signal in golf. Forester decided to attempt a "hook", which is a curve shot. He hoped to so strike the ball that it would go to the right of the tree, past it, and then back to the left and onto the green. But instead he "shanked" the shot. To "shank" is to strike the ball with the shaft of the club instead of its "face." The ball shot to the right and hit Kelly directly in the mouth. Kelly was rushed to the hospital by Forester, where his teeth were reset, his lip sewed up, and his jaw wired. Unfortunately, however, his teeth could not be saved. Because his jawbone was cracked, removal of the loosened teeth was very painful to Kelly, and only one tooth could be extracted at a sitting.

Does Kelly have a cause of action against Forester? *Kelly v. Forester*, 311 S.W.2d 547 (Ky. 1958)

SAVINO v. ROBERTSON

652 N.E.2d 1240 (1995)

JUSTICE McCORMICK delivered the opinion of the court:

Plaintiff John Savino brought a negligence action against defendant Scott Robertson after plaintiff was struck and injured in the eye by a hockey puck shot by defendant. The trial court granted defendant's subsequent motion for summary judgment, but allowed plaintiff to amend the complaint to allege that defendant's conduct was wilful and wanton. Upon another motion by defendant, the trial court granted summary judgment in favor of defendant on the amended complaint. On appeal from both orders, plaintiff raises the following issues for our consideration: (1) whether a plaintiff must plead and prove wilful and wanton conduct in order to recover for injuries incurred during athletic competition; and (2) whether there was a genuine issue of material fact as to whether defendant's conduct was wilful and wanton in injuring plaintiff. We affirm.

Plaintiff and defendant were teammates in an amateur hockey league sponsored by the Northbrook Park District. Plaintiff and defendant also had met in various "pick-up" games prior to playing in the Northbrook league, but they were neither friends nor enemies. On April 20, 1990, plaintiff and defendant were warming up prior to a game. During warm-up, teams skate around and behind their goal on their half of the ice. Plaintiff was on the ice, "to the right of the face off circle in front of the net." Defendant shot a puck that missed the goal and hit plaintiff near the right eye. Plaintiff lost 80% vision in that eye.

On September 11, 1990, plaintiff filed a one-count complaint against defendant alleging that defendant was negligent and failed to exercise ordinary care in shooting the puck. Specifically, plaintiff alleged that defendant (a) failed to warn plaintiff that he was going to shoot the puck toward plaintiff; (b) failed to wait until a goalie was present before shooting the puck; (c) failed to warn others that he was shooting the puck; (d) failed to follow the custom and practice of the Northbrook Men's Summer League which required the presence of a goalie at the net before shooting; and (e) failed to keep an adequate lookout.

Defendant filed his answer to the complaint and, after interrogatories and discovery depositions were taken, defendant moved for summary judgment. Defendant argued that he was entitled to judgment as a matter of law because plaintiff alleged ordinary negligence. To be entitled to relief for injuries incurred during athletic competition, defendant argued, plaintiff had to plead and prove wilful and wanton conduct or conduct done in reckless disregard for the safety of others. The trial court granted defendant's motion for summary judgment and denied plaintiff leave to amend count I of the complaint. Upon reconsideration, the trial court granted plaintiff leave to file an amended complaint to allege a count II based on wilful and wanton conduct.

Defendant filed his answer to plaintiff's subsequent amended complaint and the parties engaged in discovery as to count II of that complaint. Defendant later filed another motion for summary judgment. Defendant argued that, due to plaintiff's admission that his injury was caused by an accident, plaintiff's case presented no genuine issue of material fact with regard to defendant's alleged wilful and wanton conduct. Defendant further argued that plaintiff could not show that defendant's action was anything more than an ordinary practice shot normally taken during warm-up sessions.

Plaintiff, on the other hand, argued in his response to defendant's motion that ordinary negligence should be the standard applied to his case rather than wilful and wanton conduct, because, since the hockey game had not officially begun, he was not a participant at the time of his injury. Plaintiff attached the affidavit of Thomas Czarnik, a hockey coach at Deerfield High School, to his response. According to Czarnik, it was the custom of amateur hockey leagues to wait until the goalie was present in the net before any practice shots were taken.

Defendant also took Czarnik's deposition. In that deposition, Czarnik described himself as a 15-year acquaintance of plaintiff. He and plaintiff grew up in the same neighborhood and his brother had been plaintiff's schoolmate. Plaintiff's brother Mike also was a friend of one of Czarnik's brothers. Czarnik further stated that he had been a hockey player since childhood and had coached various youth hockey organizations. The Northbrook Hockey League played what was known as "non-check" hockey. Non-check meant noncollision. However, there was still bodily contact in non-check hockey and, in Czarnik's opinion, hockey, regardless of the type, is a contact sport. Czarnik had no knowledge of the rules and usages of the Northbrook Hockey League and had no firsthand knowledge of the incident.

Czarnik also stated that he had seen players in adult hockey leagues take shots at open goals, that is, goals without a goalie present, during the warm-up period and that he had taken shots at open goals. According to Czarnik, the warm-up period was a part of the game of hockey even though the players are not technically playing a game. Czarnik considered plaintiff's injury an accident.

Defendant attached excerpts of Czarnik's deposition in support of his reply to plaintiff's response to the motion for summary judgment. Defendant argued that Czarnik's responses demonstrated that plaintiff could not show, as a matter of law, that defendant's conduct was wilful or wanton. Defendant also contended that Czarnik was not a proper expert to render an opinion in this case, given his lack of familiarity with adult hockey leagues and lack of knowledge of the rules and usages of the Northbrook Summer Men's Hockey League. The trial court granted defendant's motion for summary judgment. Plaintiff now appeals from both orders of the trial court granting summary judgment in favor of defendant.

* * *

Plaintiff first argues that he should not have been required to plead wilful and wanton conduct in this case because he was not actually "playing" the game of hockey at the time his injury occurred, but rather was participating in the warm-up practice.

The seminal case on this issue is *Nabozny v. Barnhill* (1975), 31 Ill. App. 3d 212, 334 N.E.2d 258. In *Nabozny*, the plaintiff was the goalkeeper for a teenage soccer league and the defendant was a forward from an opposing team. The game's rules prevented players from making contact with the goalkeeper while he is in possession of the ball in the penalty area. (*Nabozny*, 31 Ill. App. 3d at 214.) During the game, the ball was passed to the plaintiff while he was in the penalty area. The plaintiff fell onto his knee. The defendant, who had been going for the ball, continued to run towards the plaintiff and kicked the plaintiff in the head, causing severe injuries. (*Nabozny*, 31 Ill. App. 3d at 214.) The trial court directed a verdict in favor of the defendant, holding that as a

matter of law the defendant was free from negligence (owed no duty to the plaintiff) and that the plaintiff was contributorily negligent.

In reversing the trial court, the *Nabozny* court held that when athletes engage in organized competition, with a set of rules that guides the conduct and safety of the players, then "a player is charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule." (*Nabozny*, 31 Ill. App. 3d at 215.) The court then announced the following rule:

> It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a 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. *Nabozny*, 31 Ill. App. 3d at 215.

Illinois courts have construed *Nabozny* to hold that a plaintiff-participant injured during a contact sport may recover from another player only if the other's conduct was wilful or wanton. (*Novak v. Virene* (1991), 224 Ill. App. 3d 317, 586 N.E.2d 578, 166 Ill. Dec. 620; *Keller v. Mols* (1987), 156 Ill. App. 3d 235, 509 N.E.2d 584, 108 Ill. Dec. 888; *Oswald v. Township High School District No. 214* (1980), 84 Ill. App. 3d 723, 406 N.E.2d 157, 40 Ill. Dec. 456.) Plaintiff contends, however, that decisions subsequent to *Nabozny* have misconstrued the court's holding in that case. According to plaintiff, *Nabozny* is to be applied only to conduct during a game because *Nabozny* "involved an injury that occurred during a game and therefore, it implicitly recognizes a distinction with pre-game injuries."

Our research has failed to reveal any Illinois case that addresses the precise distinction plaintiff raises here. However, we note that a New York Appellate Court considered a similar argument in *O'Neill v. Daniels* (A.D. 1987), 135 A.D.2d 1076, 523 N.Y.S.2d 264. In *Daniels*, the plaintiff was injured when he was struck in the eye by a softball thrown by the defendant during "warm-up" activities prior to an amateur game. The plaintiff brought a negligence action against the defendant. The trial court granted the defendant's motion for summary judgment and dismissed the plaintiff's complaint. The plaintiff appealed, contending that the trial court erred in not finding the defendant negligent based on its conclusion that the plaintiff assumed the risk of a known or foreseeable injury.

In affirming the trial court, the *Daniels* court began with a statement that assumption of risk was no longer an absolute defense with the enactment of the comparative negligence statute. The defendant's duty of care, the court held, must be evaluated by considering the risks the plaintiff assumed and how those assumed risks qualified the defendant's duty. Turning to the facts, the court found that the plaintiff's participation in the "warm-up" was voluntary and that, in light of this fact, its concern must be solely addressed to the scope of that consent. "The question of whether the consent was an informed one," the court stated, "includes consideration of the participant's general knowledge and experience in the activity." (*Daniels*, 523 N.Y.S.2d at 265.) The court held that the facts demonstrated that the plaintiff understood and accepted the dangers of the sport, "including those resulting from carelessness during 'warm-up' activities." *Daniels*, 523 N.Y.S.2d at 265.

Illinois has enacted a modified comparative fault statute. The enactment of this statute, however, has no effect on express assumption of risk, where a plaintiff expressly assumes the dangers and risks created by the activity or a defendant's negligence, or on primary implied assumption of risk, where a plaintiff knowingly and voluntarily assumes the risks inherent in a particular situation or a defendant's negligence. *Duffy v. Midlothian Country Club* (1985), 135 Ill. App. 3d 429, 435, 481 N.E.2d 1037, 90 Ill. Dec. 237.

In the case at bar, we believe that plaintiff was no less a participant in a team sport merely because he was engaged in "warm-up" activities at the time of his injury. However, assuming arguendo that we were to view plaintiff's action using an ordinary negligence standard, we must find that plaintiff knowingly and voluntarily assumed the risks inherent in playing the game of hockey. Plaintiff's own testimony bears out this fact. Plaintiff was an experienced hockey player, playing from the time he was eight years old. He had played in organized adult leagues for approximately 10 years prior to his accident. Plaintiff testified that while it was "customary" for players to wait for a goalie to be present prior to taking practice shots, in his experience he had seen players take shots at open nets. There was no written rule against taking shots at open nets. Plaintiff was also aware, at the time he

stepped onto the ice, that there was a risk of being hit with a puck during "warm-ups." Indeed, according to plaintiff, that risk "always" existed. Nonetheless, plaintiff chose not to wear a protective face mask, since it was not required, even though in his estimation 65-70% of his teammates were wearing protective masks during "warm-up" and despite the inherent risk of being hit with a puck, irrespective of the goalie's presence at the net. Based on plaintiff's testimony, we believe that plaintiff voluntarily consented, understood and accepted the dangers inherent in the sport or due to a co-participant's negligence.

As we have stated, we believe that the distinction plaintiff raises, between the "warm-up" and the actual commencement of the game, to be illusory. Hockey is a contact sport. (*Keller*, 156 Ill. App. 3d at 237.) It is not made less so merely because the participants are "warming up" prior to the commencement of the game. Proof of ordinary negligence will not sustain an action against defendant in this case, merely because plaintiff alleges a violation of a rule. (*Oswald*, 84 Ill. App. 3d at 727.) Moreover, the evidence suggests that defendant here did not violate the customs and rules of the league. In addition to plaintiff's testimony, plaintiff's witness Czarnik and teammate Steve Marcordes testified that players may be hit by pucks during "warm-up" and during the game. Czarnik testified that he had often seen players hit and injured by pucks. Marcordes testified that he himself had been hit by hockey pucks during warm-up periods. Marcordes, unlike Czarnik, was familiar with the customs and usages of the Northbrook league, so much so that plaintiff testified that he considered Marcordes a "player-coach." Marcordes also testified that it was common for players to take shots at an open net during warm-up.

We find no reason to abandon the well-established precedent of this court, and that of a majority of jurisdictions, that a participant in a contact sport may recover for injury only where the other's conduct is wilful or wanton or in reckless disregard to safety. There are a number of reasons justifying the application of this standard to sports-related injury cases. First, the risk of injury accompanies many informal contact sports. Thus, wilful and wanton or reckless conduct allows the court to gauge what is and is not permissible conduct under the circumstances. Second, as the court recognized in *Nabozny*, courts must strike a balance between "the free and vigorous participation in sports" and the protection of the individual from reckless or intentional conduct. (*Nabozny*, 31 Ill. App. 3d at 215.) Third, we believe that the practical effect of applying an ordinary negligence standard would be to open a legal pandora's box, allowing virtually every participant in a contact sport, injured by another during a "warm-up" or practice, to bring an action based on the risks inherent in virtually every contact sport. This is exactly the type of result the courts have sought to avoid. *See Oswald*, 84 Ill. App. 3d at 727 .... (W)e see *Nabozny* as establishing the standard of conduct to be willfulness or a reckless disregard of safety where an injury to a player occurs in an athletic competition involving bodily contact").

Plaintiff further relies on *Pfister v. Shusta* (1994), 256 Ill. App. 3d 186, 627 N.E.2d 1260, 194 Ill. Dec. 618, appeal allowed, 156 Ill. 2d 566, 638 N.E.2d 1124, in support of his contention that the wilful and wanton standard is inapplicable to this case. In *Pfister*, the plaintiff and the defendant, college students at Illinois State University, were attending a party in a dormitory. While waiting in the dormitory lobby for friends, the plaintiff, the defendant and others began to kick around a crushed aluminum can. They established teams at opposite ends of the hallway, "'kind of like hockey.'" (*Pfister*, 256 Ill. App. 3d at 187.) During the "game," the plaintiff pushed the defendant and the defendant then pushed the plaintiff, causing the plaintiff to fall backward against a wall on which there was a glass door encasing a fire hose. The plaintiff's hand went through the glass door, causing injury. (*Pfister*, 256 Ill. App. 3d at 187.) The trial court entered summary judgment in favor of the defendant, finding that the can-kicking activity was a contact sport. The court held, therefore, that the plaintiff was required to plead and prove wilful or wanton conduct, not mere negligence, against the defendant. *Pfister*, 256 Ill. App. 3d at 186.

The appellate court reversed and remanded the action. In reversing, the court made the following observations:

> The rule of the Restatement of Torts is that one who consents to conduct 'cannot recover in an action of tort for the conduct or for harm resulting from it.' [Citation.] A plaintiff who has entered voluntarily into some relation with defendant which he knows to involve a risk is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility. [Citation.] The Restatement makes it clear there cannot be recovery for either intentional

> or negligent conduct sanctioned by game rules. The key question under the Restatement is whether the contact is permitted by the rules or usages of the game.
>
> ***
>
> Under the Restatement, intentional conduct which is within the rules or usages of the game might not result in liability; on the other hand, negligent conduct not within the rules or usages of the game may result in liability.... Injection of the wilful and wanton concept into these cases does not add clarity or aid analysis. The focus should be on whether the conduct was within the rules and usages of the game, not whether the conduct falls within the imprecise definition of wilful and wanton. (*Pfister*, 256 Ill. App. 3d at 188-89.)

The *Pfister* court also stated that the advantage of formality is that it is easier to determine whether the particular conduct was authorized by the rules and usages of the game. We note that in *Pfister*, it was precisely the lack of formality which led to the court's determination that the wilful and wanton standard was unhelpful. The factual issues of concern to the *Pfister* court were whether (1) the parties were engaged in a "game"; (2) the "game" was being played in an appropriate area; (3) the game had rules or customs; (4) the game permitted bodily contact; and (5) the plaintiff's injury was derived from bodily contact permitted by the rules of the game. The *Pfister* court further noted that the Restatement of Torts rule of effective consent (RESTATEMENT (SECOND) OF TORTS sec. 892(A)(1), at 364 (1979)) is not limited to formally organized sporting activities. For example, the court observed that whether children are playing "floor hockey" on a neighbor's patio (*see Keller*, 156 Ill. App. 3d at 237) or baseball in a backyard, there will be rules and usages as in professional or formalized leagues, but with differences. *Pfister*, 256 Ill. App. 3d at 190.

Here, plaintiff argues that what should guide this court's analysis, as he contends guided the court's analysis in *Pfister*, is whether defendant's conduct was within the rules and usages of the game. We need not engage in the queries troubling the *Pfister* court. It is undisputed that plaintiff and defendant were teammates in an organized hockey league. There were rules and usages. Reviewing the evidence in a light most favorable to plaintiff, there appears to be no genuine issue of material fact that practice shots were often taken at an open net and such was the custom of the team.

For the foregoing reasons, we affirm both orders of the circuit court granting summary judgment in defendant's favor.

Affirmed.

ZURLA v. HYDEL

289 Ill. App. 3d 215; 681 N.E.2d 148 (1997)

JUSTICE ZWICK delivered the opinion of the court

Plaintiff, Gerald Zurla, alleged in a single-count complaint that defendant, Victor Hydel, negligently hit a golf ball which struck him in the head as the two men played a round of golf during a weekend trip to Florida. Defendant filed a summary judgment motion alleging that plaintiff's allegation of simple negligence should be insufficient under Illinois law which holds participants in "contact sports" to a duty to refrain only from wilful and wanton conduct. The trial court denied defendant's summary judgment motion, but certified the question for our review under Supreme Court Rule 308. 134 Ill. 2d R. 308. We accepted the defendant's petition for leave to appeal and now address as the single issue of whether a golfer, struck and injured by a golf ball hit by another golfer, must plead and prove wilful and wanton misconduct.

The record demonstrates that plaintiff and defendant went from Chicago to Florida with Edward Vrdolyak for a weekend of recreation that included fishing and golf. Plaintiff and Vrdolyak were experienced golfers, but defendant was a novice. The three had played one round of golf at the Lely Resort in Naples, Florida, prior to the

occurrence at issue.

During the course of their second game on March 29, 1992, plaintiff, defendant and Vrdolyak teed off on the fourth hole. The fourth hole is a straight par four and defendant's ball was 100 to 130 yards from the tee down the right side of the fairway. Defendant's experience that day indicated his shots had the natural tendency to slice, *i.e.*, to drift from left to right. Both Vrdolyak's shot and plaintiff's shot landed approximately 225 yards from the tee.

The threesome first drove their carts from the tee to defendant's ball. Defendant got out of his cart. Plaintiff and Vrdolyak went on to look for their tee shots. Plaintiff and Vrdolyak told Hydel to take a club and wait until they returned before he hit his second shot. Vrdolyak and plaintiff then drove their carts to the location of their tee shots. Plaintiff parked his cart next to his ball.

A slow-moving foursome was on the green ahead. Defendant observed them as they left the green. As plaintiff was watching the foursome move on to the fifth hole, he walked up to the ridge of the bunker to get a clear view of the fourth green. At this moment, defendant hit his shot thinking plaintiff and Vrdolyak were safely positioned away from the green. Defendant's shot, however, did not go from left to right; instead, it flew directly at plaintiff. Plaintiff simultaneously turned his back to the green and began walking back to his cart. Defendant's shot then struck plaintiff on the right temple causing injury.

* * *

The issue of the proper duty of care as between golfers is one of first impression in Illinois. Defendant argues that Illinois law should require that a golfer hit by a stray ball plead and prove wilful and wanton misconduct against the defendant. He argues that an allegation of simple negligence should be insufficient to support a cause of action in cases involving golf ball injuries because the public policy of Illinois is to promote athletic endeavors such as golf. Plaintiff responds that the proper standard of care should be the same here as in any ordinary negligence case, i.e., to exercise reasonable and ordinary care for the safety of other golfers.

An Illinois court of review first examined the standard of care owed between participants in athletic competitions in *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). In *Nabozny*, the plaintiff was a goalie in a soccer match. During play plaintiff caught the ball and held it to his chest while on one knee in the penalty area in front of the goal. As plaintiff held the ball, the defendant kicked plaintiff in the head. Plaintiff pleaded and went to jury trial on a simple negligence theory. At the close of the plaintiff's case, however, the trial court directed a verdict for the defendant, apparently finding that the parties owed no duty toward one another because of their participation at the time of injury in an athletic competition. *Nabozny*, 31 Ill. App. 3d at 213. Plaintiff appealed, arguing that the entry of the directed verdict was improper because the evidence presented at trial showed defendant had breached his duty to refrain from negligent conduct. The appellate court noted that a number of other jurisdictions prohibited recovery for an injury sustained in an athletic competition for reasons of public policy. *Nabozny*, 31 Ill. App. 3d at 214-15. After reviewing the need "to control a new field of personal injury litigation" involving "athletes engaged in an athletic competition," the appellate court adopted neither the plaintiff's negligence theory nor defendant's no-duty claim. Instead, the court stated:

> It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player." *Nabozny*, 31 Ill. App. 3d at 215.

The appellate court reversed and remanded the case for a new trial consistent with the "deliberate, wilful and with reckless disregard" standard of care.

Since *Nabozny*, Illinois courts have recognized a distinction between "contact" and "non-contact" sports, with only the former requiring the plaintiff to prove a violation of the elevated standard of care. Thus, in *Novak v. Virene*, 224 Ill. App. 3d 317, 586 N.E.2d 578, 166 Ill. Dec. 620 (1991), this court determined that ordinary negligence principles should be applied to a case in which the plaintiff was injured while he and the defendant collided while downhill skiing because skiing was not a "contact sport" for purposes of the *Nabozny* rule. The court's analysis in *Novak* establishes that, for purposes of considering the proper standard of care under the *Nabozny*

rule, an "athletic competition" may be broadly construed to include any athletic or recreational endeavor. The case also establishes that the type of physical contact participants reasonably expect to encounter in such activities is the determining factor as to whether a negligence or higher-than-negligence standard properly applies. Because downhill skiers do not voluntarily submit to physical contact with other skiers when they proceed onto the slopes, skiers were found by the *Novak* court to owe one another a duty of ordinary care. *Novak,* 224 Ill. App. 3d at 321.

In *Landrum v. Gonzalez,* 257 Ill. App. 3d 942, 629 N.E.2d 710, 196 Ill. Dec. 165 (1994), in a case involving a collision between a baserunner and a fielder during a recreational softball game, the court reviewed the evolution of the *Nabozny* rule and noted that the rule had been widely applied to a variety of situations. The court observed that whether a player violates the rules of the game during the competition is not dispositive of the question of whether he has violated his duty of care. This is because rule infractions, both deliberate and unintentional, are inevitable in "contact games." The court also rejected the idea that whether the participants are engaged in a formal or informal competition is relevant to the question of the proper duty of care. *Landrum,* 257 Ill. App. 3d at 947, citing *Keller v. Mols,* 156 Ill. App. 3d 235, 509 N.E.2d 584, 108 Ill. Dec. 888 (1987). Finally, the court recognized that the basis of the *Nabozny* rule is whether physical contact in a particular athletic endeavor is "inevitable" and whether participants in such events can therefore fairly expect contact. *Landrum,* 257 Ill. App. 3d at 947, citing *Novak v. Virene,* 224 Ill. App. 3d 317, 586 N.E.2d 578, 166 Ill. Dec. 620. The court in *Landrum* concluded that the proper test under the *Nabozny* rule looks not to what the particular participants in the activity subjectively knew or should have known about the dangers of the game, but rather, at "the objective factors surrounding the game itself." *Landrum,* 257 Ill. App. 3d at 947. Because participants in an informal softball game "necessarily" come into contact with one another and the ball during the course of play (*Landrum,* 257 Ill. App. 3d at 948), the court determined that a violation of the higher *Nabozny* standard of care was properly required.

In *Pfister v. Shusta,* 167 Ill. 2d 417, 657 N.E.2d 1013, 212 Ill. Dec. 668 (1995), our supreme court adopted the analytical framework first stated in *Nabozny,* finding it to offer a "practical approach that is also supported by common sense." *Pfister,* 167 Ill. 2d at 425. In finding that an informal, indoor can-kicking game resembling soccer resulted in "inherent" and "virtually inevitable" physical contact among the participants (*Pfister,* 167 Ill. 2d at 425), the court determined that the defendant's violation of at least a wilful and wanton standard of care was required before liability could be imposed (*Pfister,* 167 Ill. 2d at 427).

Defendant argues that an analysis of the danger of being struck by an object used to play a sport or game should be treated no differently than the danger of being hit by another person's body during play for purposes of the contact-sport rule. He argues that there is always a danger of being struck by an errant shot while playing golf, as there is in many sports. He notes, for example, that in *Savino v. Robertson,* 273 Ill. App. 3d 811, 652 N.E.2d 1240, 210 Ill. Dec. 264 (1995), this court determined that a player who was struck by a hockey puck which had been shot by another player was required to plead and prove an elevated standard of care. He also relies heavily upon an out-of-state opinion to support his position, *Thompson v. McNeill,* 53 Ohio St. 3d 102, 559 N.E.2d 705 (Ohio 1990).

In *Thompson,* the Ohio Supreme Court considered the case of a golfer who had been struck in the head by an errant ball. The golfer sought to recover damages from the defendant based upon standard negligence principles. The Ohio Supreme Court determined, however, that it was necessary to fashion a special rule for sporting events because "playing fields, golf courses, and boxing rings are places in which behavior that would give rise to tort liability under ordinary circumstances is accepted and indeed encouraged." *Thompson,* 559 N.E.2d at 707. The court stated:

> Acts that would give rise to tort liability for negligence on a city street or in a backyard are not negligent in the context of a game where such an act is foreseeable and within the rules. For instance, a golfer who hits practice balls in his backyard and inadvertently hits a neighbor who is gardening or mowing the lawn next door must be held to a different standard than a golfer whose drive hits anothe· golfer on a golf course. A principal difference is the golfer's duty to the one he hit. The neighbor, unlike the other golfer or spectator on the course, has not agreed to participate or watch and cannot be expected to foresee or accept the attendant risk of injury. Conversely, the

spectator or participant must accept from a participant conduct associated with that sport. Thus a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct. Were we to find such a duty between co-participants in a sport, we might well stifle the rewards of athletic competition." *Thompson*, 559 N.E.2d at 707.

The Ohio Supreme Court specifically rejected the "contact/no contact" distinction which our supreme court subsequently adopted in *Pfister*:

> The contact-non-contact distinction does not sufficiently take into account that we are dealing with a spectrum of duties and risks rather than an either-or distinction. Is golf a contact sport? Obviously, a golfer accepts the risk of coming in contact with wayward golf shots on the links, so golf is more dangerous than table tennis, for instance, but certainly not as dangerous as kickboxing." *Thompson*, 559 N.E.2d at 709.

Thus, in the *Thompson* court's view, the risk of participating or watching a golfer on a golf course necessarily carries with it the reasonable expectation by the person watching or participating that injury may occur. The court therefore required the defendant to be shown to have breached an elevated standard of care, beyond negligence, before the plaintiff could recover for his injury.

We conclude the distinction between the types of games to which the *Nabozny* rule is properly applied and those to which it is not is more subtle than defendant or the Ohio Supreme Court's opinion in *Thompson* suggests. Simply because there is an inherent risk that players may accidentally touch one another is not particularly relevant to the "contact sport" inquiry. In all of the Illinois cases in which an elevated standard has been applied, the participants were engaged in an activity in which physical contact with one another, or with some physical component of the game, is part and parcel of the sport. The decision to apply an elevated standard, excusing ordinary negligence, is not only supported by the fact that the parties are aware of the inherent dangers of injury, but also because the competitive nature of contact sports leads the participants to be more physically aggressive and less careful than they otherwise would be.

In our view, golf is simply not the type of game in which participants are inherently, inevitably or customarily struck by the ball. Unlike the contact sports recognized by the cases, the only defense of the target in golf is made by the principles of Sir Issac Newton, the natural obstacles of Mother Nature and the cunning of those who have designed the course. There is never a need for players to touch one another. Rather, golf is a sport which is contemplative and careful, with emphasis placed on control and finesse, rather than speed or raw strength. Although the game of golf certainly presents significant dangers, these dangers are more psychological than physical. Moreover, the physical dangers that exist are diminished by long-standing traditions in which courtesy between the players prevails. In such an environment, players have the time to consider the consequences of their actions and to guard against injury to those who may be in harms way. As the supreme court of North Carolina has stated:

> A golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation." *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316, 318 (1931), *quoting Schlenger v. Weinberg*, 107 N.J.L. 130, 150 A. 434, 435, 69 A. L. R. 741.

We specifically reject the notion found in some of the recent opinions from other jurisdictions that physical contact with another player's ball is simply "part of the sport" of golf. *See Thompson*, 559 N.E.2d at 707. Accord *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591 (Cal. App. 1 Dist., May 15, 1997); *Campbell v. Picceri*, 5 Mass. L. Rptr. 449 (Mass. Super., 1996); *Hill v. Bosma*, 1993 Mass. App. Div. 128 (1993). Adopting such a view undermines the reasonable incentive golfers have to guard against injuries to one another, ultimately becoming a self-fulfilling

prophesy. Instead, we adopt the traditional "zone of danger" analysis which has historically governed golf course injury cases. *See Alexander v. Wrenn*, 158 Va. 486, 164 S.E. 715 (1932); *Everett v. Goodwin*, 201 N.C. 734, 161 S.E. 316 (1931); David M. Holliday, Annotation, *Liability to One Struck by a Golf Ball*, 53 A.L.R.4th 282, 289 (1987) ("It is established that ... a golfer is only required to exercise ordinary care for the safety of persons reasonably within the range of danger of being struck by the ball").

In sum, we find that the game of golf is not properly characterized as a "contact sport" for purposes of the *Nabozny* rule. Accordingly, a golfer injured by a golf ball need only allege and prove traditional negligence in order to recover damages, rather than wilful and wanton conduct.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed and the case is remanded for further proceedings.

Affirmed and remanded.

Questions

1. Can you reconcile *Savino* and *Zurla*? Does a different standard for contact and non-contact sports make any sense? Why should someone shooting a hockey puck or hitting a baseball be held to a different standard than someone hitting a golf ball? What happened to the *Savino* Court's concern when it said "we believe that the practical effect of applying an ordinary negligence standard would be to open a legal Pandora's Box, allowing virtually every participant in a contact sport, injured by another during a "warm-up" or practice, to bring an action based on the risks inherent in virtually every contact sport."

2. In a case involving a collision between a goalie and a forward in a men's over-30 soccer game, the Wisconsin Supreme Court adopted a negligence standard stating:

> To determine whether a player's conduct constitutes actionable negligence . . . the fact finder should consider such material factors as the sport involved; the rules and regulations governing the sport (including the types of conduct and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment; and the fact and circumstances of the particular case, including the ages and physical attributes of the participants, the participants' respective skills at the game, and the participants' knowledge of the rules and customs.

B. Waivers and Sports Activities

Today there is an ever increasing segment of the population that engages in activities which by their very nature are hazardous or ultra-hazardous. The danger produces the thrill and is the motivation for the undertaking. Bungee jumping, parachuting, river rafting, scuba diving, ski racing, hang gliding are all activities involving varying degrees of risk. With this increase has come an increase in injuries and deaths and of course a corresponding increase in litigation. In an attempt to avoid this litigation operators of businesses offering these activities and owners of the lands or chattels that are used to facilitate these activities have required participants to waive, in writing, any claims that might arise because of the operator's or owner's negligence. Should they be permitted to allocate the risk of harm. In short, should operators of an activity which is generally not thought to be suitable for public regulation, or a service of great importance to the public, or a matter of practical necessity for any member of the public be permitted to exculpate themselves for the consequences of their own negligence? *See* Restatement (Second) Contracts 1979 sec. 195.

FRANZEK v. CALSPAN CORPORATION
434 N.Y.S.2d 288, (N.Y. 1980)

CARDAMONE, Judge

Before embarking on a hazardous trip with defendant, plaintiff signed a release waiving all claims caused by defendant's negligence which he might have against defendant. We hold that release to be valid. The more difficult question is -- does the release insulate this defendant from the claims for contribution made by the other defendants involved. In our view it does not.

This litigation arises as a result of an attempt to traverse the "white water" of the lower Niagara River on a rubber raft. Twenty-nine persons were aboard on this experimental trip to determine the feasibility of offering regular passenger trips to the general public. During the journey the raft capsized. Three persons died and a number including plaintiff Michael J. Franzek, were injured. Franzek sued Niagara Gorge River Trips, Inc. (Niagara) and its president, George Butterfield, who were the raft trip operators. He also sued Calspan Corporation (Calspan) an engineering firm located in Buffalo which allegedly designed, tested and evaluated the raft.

In the first and third causes of action asserted in his complaint, Franzek alleges that Niagara and Butterfield negligently caused the accident; specifically that Butterfield was negligent in offering the ride to the public, and plaintiff in particular, when he knew or should have known that the raft was unsafe and unsuitable as a means to carry passengers upon the lower Niagara River. The second cause of action, asserted against Calspan, alleges that Calspan failed to test the raft properly and negligently recommended to Niagara and Butterfield that it was suitable for use on the Niagara River.

Both defendants raised as affirmative defenses plaintiff's assumption of the risk and his waiver of liability....

At this pleading stage of the litigation Niagara and Butterfield moved for summary judgment dismissing plaintiff's complaint on the ground that the release signed by plaintiff bars him from instituting an action against them. Special Term agreed with this contention and granted the motion. The evidence before Special Term consisted of depositions of the various parties and a copy of the release containing the waiver. These reveal that plaintiff, who has a B.A. in journalism, learned of the raft ride from the local newspaper. He claims that he was given no instructions prior to boarding the raft and only after he boarded was he handed the waiver, which he signed without reading. According to the deposition of George Butterfield, all persons boarding the raft were required to sign the release in order to go on the trip; and that in the substantial interval of time while passengers were on the dock prior to embarkation each was required to execute the release before boarding. The release, after reciting the dangerous nature of the trip and representations as to the undersigned's age, condition and state of mind, provides:

> THE UNDERSIGNED UNDERSTANDS & EXPRESSLY ASSUMES ALL THE DANGERS OF THE TRIP.
>
> The undersigned waives all claims arising out of the Trip, whether caused by negligence, breach of contract or otherwise, and whether for bodily injury, property damage or loss or otherwise, which he may ever have against Niagara Gorge River Trips, Inc., its successors and assigns, and its officers, directors, shareholders, employees and agents, and their heirs, executors and administrators.

Agreements exculpating a party from the consequences of its own negligence are disfavored and subject to close judicial scrutiny. Although such agreements are enforceable, their validity is measured by an exacting standard. Unless the intention of the parties is expressed in clear and "unequivocal terms" a negligent party will not be relieved of liability (*Gross v Sweet*, 49 NY2d 102, 107, 110; *Van Dyke Prods. v Eastman Kodak Co.*, 12 NY2d 301, 305; *Ciofalo v Vic Tanney Gyms*, 10 NY2d 294, 297). Broad exculpatory provisions which do not specifically refer to the negligence of a party, do not insulate that party from liability (*Gross v Sweet, supra*, pp 107-109; *Kaufman v American Youth Hostels*, 5 NY2d 1016). Where the waiver extends to claims arising out of the negligence of a party, whether by use of the term "negligence" or by words of similar import, it provides the negligent party with a valid defense (*Ciofalo v Vic Tanney Gyms, supra*, p 297; *Solodar v Watkins Glen Grand Prix*

Corp., 36 AD2d 552; *Theroux v Kedenburg Racing Assn.*, 50 Misc 2d 97, affd 28 AD2d 960, mot for lv to app den 20 NY2d 648; *see Gross v Sweet, supra*, p 108). The agreement here extends specifically to claims based upon the negligence of Niagara and Butterfield, its officer and agent, and bars, therefore, plaintiff Franzek's claim against them.

Further, plaintiff's claim that he neither read nor understood the waiver does not raise an issue of fact which might relieve him of its effect. The signer of an instrument is conclusively bound by it and it is immaterial whether he read it or subjectively assented to its terms (*Pimpinello v Swift & Co.*, 253 NY 159, 162-163). There is no allegation of fraud or misrepresentation or that a special relationship existed between the parties which would render this rule inapplicable.

[T]he release bars plaintiff's suit against Niagara and Butterfield. [In a part of the opinion omitted the court concludes that the same release did not insulate Niagara and Butterfield from the imposition of cross claims for contribution by Calspan and Zodiac.]

SPENCER v. KILLINGTON, LTD.

702 A.2d 35 (Vt. 1997)

OPINION BY: JOHNSON

Plaintiff, who was injured when he collided with a post during an amateur ski race, appeals the superior court's order granting summary judgment to defendants, the ski area and its agents, based on releases he signed. We conclude that the releases were void as contrary to public policy, and reverse.

Plaintiff, an experienced skier, purchased a pass at Killington Ski Area for the 1990-1991 season, as he had for several previous seasons. To obtain the pass, plaintiff signed a document that released Killington and its employees and agents from all liability for any injuries resulting from the ski area's negligence. Similar release language was included on the back of the season pass signed and worn by pass holders, including plaintiff.

During the 1990-91 season, plaintiff also participated in an amateur "Ski Bum" race series held at Killington Ski Area, The recreational races were open to persons of all skiing abilities, except that skiers with collegiate or professional racing experience were barred from the competition. On January 16, 1991, after completing the second race in the competition, plaintiff signed an entry form for the race series and paid an entry fee to Killington Ski Club.

The back of the entry form included language releasing Killington and its employees and agents from any liability for personal injury resulting from Killington's usual activities.

On March 6, 1991, as he was completing another race in the series, plaintiff was seriously injured when he struck a wooden post marking the finish line of the race course. Plaintiff sued Killington, Ltd., its employee Steven Miller, and the Killington Ski Club, alleging that defendants negligently designed and erected the race course by (1) installing permanent posts at the finish line, (2) laying out the course so that competitors were guided into one of the posts, (3) setting the last gate too close to the posts, and (4) failing to provide adequate padding for the posts. Following the parties' submission of various motions, memoranda, and affidavits, the superior court granted summary judgment to defendants, ruling that the agreements plaintiff signed unambiguously released defendants from liability for injuries resulting from their negligence. Further, the court ruled that no special relationship existed between the parties, and that public policy did not require invalidation of the releases.

In his original brief on appeal, plaintiff argued that the superior court erred by granting defendants summary judgment because there were material facts in dispute as to (1) whether the language of the releases and the circumstances surrounding plaintiff's signing of the releases apprized plaintiff that he was releasing defendants from liability for any injuries caused by their negligence, and (2) whether the documents released Miller or the Killington Ski Club from liability. On September 8, 1995, the same day Killington filed its responsive brief, this Court issued *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 330, 670 A.2d 795, 796 (1995), in which we held that an exculpatory agreement

signed by season pass holders and relieving a ski area of all liability for injuries resulting from the ski area's negligence was void as contrary to public policy. The parties then filed supplemental briefs concerning the applicability of *Dalury* to this appeal.

* * *

We now turn to the merits of the public policy issue, which is dispositive of the appeal. Acknowledging our holding in *Dalury*, Killington concedes that its season pass releases are void, but contends that *Dalury* does not preclude enforcement of the race registration release plaintiff signed. According to defendants, *Dalury* does not control here because this case, like *Douglass v. Skiing Standards, Inc.*, 142 Vt. 634, 459 A.2d 97 (1983), involves ski racing rather than recreational skiing.

The plaintiff in Douglass was a professional skier injured during a professional skiing competition. As a condition to entry into the competition, the plaintiff had been required to sign an agreement releasing the defendants from liability for any injuries he might sustain as the result of his participation in the competition. We held that notwithstanding the absence of the word "negligence" in the release, the terms of the exculpatory agreement unambiguously demonstrated the parties' intent that the defendants were to be held harmless for injuries to the plaintiff caused by the defendants' negligence. *Id.* at 636-37, 459 A.2d at 98-99. The issue of whether the release violated public policy was neither raised by the parties on appeal nor addressed by this Court. *See Dalury*, 164 Vt. at 331 n.1, 670 A.2d at 797 n.1 (noting that Douglass upheld release signed by participant in freestyle skiing competition based on clarity of language rather than public policy, and declining to address whether such releases are void as contrary to public policy).

Public policy was at issue in *Dalury*, however, In that case, notwithstanding our acknowledgment that the ski industry does not provide an "essential public service," we struck down as contrary to public policy exculpatory agreements requiring season pass holders to release ski areas from liability for injuries caused by the ski areas' negligence. *See Dalury*, 164 Vt. at 330, 335, 670 A.2d at 796, 799. In arriving at this decision, we considered, among other factors, that (1) the ski area operated a facility open to the general public, (2) the ski area advertised and invited persons of every level of skiing ability onto its premises, (3) the ski area, and not recreational skiers, had the expertise and opportunity to foresee and control hazards and to guard against the negligence of its employees and agents, (4) the ski area was in a better position to insure against the risks of its own negligence and spread the cost of the insurance among its customers, and (5) if ski areas were permitted to obtain broad waivers of their liability, incentives for them to manage risks would be removed, with the public bearing the cost.

Killington argues that setting courses for local "Ski Bum" races is neither a service of great importance to the public nor a matter of practical necessity for any members of the public. Addressing the various factors set forth in *Dalury*, Killington states that there is no evidence in the summary judgment record that (1) defendants invited the general public to participate in the "Ski Bum" race series, (2) a substantial number of people participate in the event, (3) the racers cannot inspect or influence the course layout, (4) Killington is able to obtain liability insurance to cover such events, (5) members of the public cannot obtain insurance that would cover them for injuries incurred while participating in amateur ski racing, or (6) safety of these events would improve if racers were told that the ski area would assume responsibility for its own negligence.

The Killington Ski Club adds that *Dalury*'s public policy concerns are far less compelling here because (1) plaintiff had the opportunity to view the layout of the course, which was obvious and open, (2) ski racing is not a necessity, (3) the race series is not a business suitable for public regulation, and (4) persons entering competitions know that they will be pushing themselves to the limit, thereby creating greater risks than if they were merely participating in recreational skiing. In the Club's view, if we were to invalidate the ski competition release based on public policy, we would discourage citizen participation in amateur competitions by dissuading people from organizing or administering such events for fear of incurring liability for the inevitable injuries that would result.

We conclude hat the public policy concerns that formed the basis for our holding in *Dalury* apply with equal force under the facts and circumstances of this case. 164 Vt. at 333-34, 670 A.2d at 798 (ultimately, determination of what constitutes public interest must be made considering totality of circumstances in any given case against backdrop of societal expectations). The Club's arguments concerning the nature of recreational ski racing are similar

to the arguments we rejected in *Dalury*. Moreover, the factual distinctions between *Dalury* and this case cited by defendants are minor compared to the obvious similarities.

For instance, it is undisputed that the recreational race series in this case was open to the general public, particularly persons with limited or no experience in competitive skiing; indeed, skiers with collegiate or professional racing experience were barred from the races, Cf. *id.* at 334, 670 A.2d at 799 (pointing out that ski area was open to members of public with every level of skiing ability). As in *Dalury*, defendants, not the recreational skiers participating in the races, had the expertise and opportunity to maintain and inspect their premises, to foresee and control hazards, to train their employees in risk management, to guard against the negligence of their agents and employees, and to insure against the risks and spread the increased cost of insurance among race participants or all skiing customers. *See id* at 335, 670 A.2d at 799. Our statement in *Dalury* that "if defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed, with the public bearing the cost of the resulting injuries" is no less true here, *Id.*

Like other ski areas, Killington has a race course open to members of the general public who ski at its facility. Given our analysis in *Dalury*, Killington could not require recreational skiers to sign releases barring them from suing Killington for injuries incurred on the public race course as the result of Killington's negligence. Such exculpatory agreements are void, whether the ski area uses them to avert suits by recreational skiers testing themselves on the ski area's public race course, or, as here, by recreational skiers participating in an amateur race controlled by and held at the ski area. In short, we see no salient distinctions between this case and *Dalury*.

The dissent, on the other hand, does find a significant distinction between recreational skiers competing in a ski area's amateur race series and recreational skiers skiing the ski area's trails or public race courses outside a competition. But in making this distinction, the dissent overstates the scope of our holding. We have not, as the dissent suggests, required race promoters to eliminate all the hazards inherent to ski racing or otherwise face liability for any injuries that result from those inherent risks. To the contrary, "a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary." 12 V.S.A. sec.1037. Assumption of risk remains as a defense.

Rather than requiring race promoters to eliminate all inherent hazards, we are simply allowing plaintiffs the opportunity to show that a ski area's negligence caused their injuries. The dissent would allow ski areas to escape liability by requiring recreational skiers to waive their right to sue for injuries resulting from the ski areas' negligence, not from risks inherent to the sport. Thus, for example, if a racer were injured upon striking a shovel accidently left on the course by race promoters, the release signed by the racer would bar suit against the promoters. Our opinion does not suggest that defendants were negligent or even that plaintiff has made out a prima facie case of their negligence; rather, we hold only that the releases plaintiff signed are void as contrary to public policy, and thus the trial court erred by granting defendants summary judgment based on the releases.

Reversed and remanded.

Note

Colorado has legislatively taken a more protective approach to its ski industry. Consider the following statute:

> Notwithstanding any judicial decision or any other law or statute to the contrary, including but not limited to sections 13-21-111 and 13-21-111.7, C.R.S., no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing. C.R.S. 33-44-112 (1997).

Which approach do you favor? Is it possible some ventures will be forced to close if they can't protect themselves from runniness law suits?

C. Recklessness

As can be seen from the prior case, some courts feel that recklessness is a more suitable standard for determining liability among co-participants in sporting events, since imposing liability for ordinary negligence would discourage participation in sports. *See* Carrol, *Torts in Sports — I'll See You in Court*, Vol. 16:3 AKRON L.R. (1983).

Reckless disregard of safety is defined as follows:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than which is necessary to make his conduct negligent.[26]

Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended, notwithstanding that the actor knows of facts which would lead any reasonable man to realize the extreme risk to which it subjects the safety of others. In theory there is a difference, not always honored in practice, between intentional misconduct and recklessness. For an act to be considered reckless, it must be intended by the actor, however the actor will not intend to cause the harm which results from it. It is enough that the actor realizes or should realize that there is a strong probability that harm may result.[27] One should be aware of the differences between negligence and recklessness. Recklessness differs from negligence which consists of inadvertence, incompetence and unskillfulness. Reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. Recklessness also differs from negligence which consists of intentionally doing an act with knowledge that it entails a risk of harm to others.[28] In order for the actor to be reckless, he must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent.

Most courts have held that where defendant's conduct is reckless, as opposed to merely negligent, contributory negligence of the plaintiff will not bar recovery since there is a difference in both the degree and kind of fault on the part of the defendant.[29] On the other hand, with the growing adoption of comparative negligence some courts are permitting this defense to be asserted in response to a charge of recklessness. Assumption of risk is also considered a defense to a defendant's reckless conduct.[30]

The standard of recklessness is discussed in the following cases. Note the different philosophies and approaches taken by the trial court and the appellate court in the following case.

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[26] RESTATEMENT (SECOND) TORTS § 500 (1965)

[27] *Id.* at § 500 comment f

[28] *Id.* at § 500 comment g

[29] W. PAGE KEETON, PROSSER & KEETON ON TORTS, 462 (5th ed. 1984)

[30] RESTATEMENT (SECOND) TORTS § 496A (1965)

HACKBART v. CINCINNATI BENGALS, INC.

435 F. Supp. 352 (D. Colo. 1977)

The Professional Football Industry

The incident which gave rise to this lawsuit occurred near the end of the first half of the game at a time when the Denver team was leading by a score of 21 to 3. Dale Hackbart was playing a free safety position on the Broncos' defensive team and Charles Clark was playing fullback on the Bengals' offensive team. The Cincinnati team attempted a forward pass play during which Charles Clark ran into a corner of the north end zone as a prospective receiver. That took him into an area which was the defensive responsibility of Mr. Hackbart. The thrown pass was intercepted near the goal line by a Denver linebacker who then began to run the ball upfield. The interception reversed the offensive and defensive roles of the two teams. As a result of an attempt to block Charles Clark in the end zone, Dale Hackbart fell to the ground. He then turned and, with one knee on the ground and the other leg extended, watched the play continue upfield. Acting out of anger and frustration, but without a specific intent to injure, Charles Clark stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head with sufficient force to cause both players to fall forward to the ground. Both players arose and, without comment, went to their respective teams along the sidelines. They both returned to play during the second half of the game.

Because no official observed it, no foul was called on the disputed play and Dale Hackbart made no report of this incident to his coaches or to anyone else during the game. Mr. Hackbart experienced pain and soreness to the extent that he was unable to play golf as he had planned on the day after the game, he did not seek any medical attention and, although he continued to feel pain, he played on specialty team assignments for the Denver Broncos in games against the Chicago Bears and the San Francisco Forty-Niners on successive Sundays. The Denver Broncos then released Mr. Hackbart on waivers and he was not claimed by any other team. After losing his employment, Mr. Hackbart sought medical assistance, at which time it was discovered that he had a neck injury. When that information was given to the Denver Broncos Football Club, Mr. Hackbart received his full payment for the 1973 season pursuant to an injury clause in his contract.

Football is a recognized game which is widely played as a sport. Commonly, teams are organized by high schools and colleges and games are played according to rules provided by associations of such schools.

* * *

The basic design of the game is the same at the high school, college and professional levels. The differences are largely reflective of the fact that at each level the players have increased physical abilities, improved skills and differing motivations.

Football is a contest for territory. The objective of the offensive team is to move the ball through the defending team's area and across the vertical plane of the goal line. The defensive players seek to prevent that movement with their bodies. Each attempted movement involves collisions between the bodies of offensive and defensive players with considerable force and with differing areas of contact. The most obvious characteristic of the game is that all of the players engage in violent physical behavior.

The rules of play which govern the method and style by which the NFL teams compete include limitations on the manner in which players may strike or otherwise physically contact opposing players. During 1973, the rules were enforced by six officials on the playing field. The primary sanction for a violation was territorial with the amounts of yardage lost being dependent upon the particular infraction. Players were also subject to expulsion from the game and to monetary penalties imposed by the league commissioner.

The written rules are difficult to understand and, because of the speed and violence of the game, their application is often a matter of subjective evaluation of the circumstances. Officials differ with each other in their rulings. The players are not specifically instructed in the interpretation of the rules, and they acquire their working knowledge of them only from the actual experience of enforcement by the game officials during contests.

Many violations of the rules do occur during each game. Ordinarily each team receives several yardage penalties, but many fouls go undetected or undeclared by the officials.

Disabling injuries are also common occurrences in each contest. Hospitalization and surgery are frequently

required for repairs. Protective clothing is worn by all players, but it is often inadequate to prevent bodily damage. Professional football players are conditioned to "play with pain" and they are expected to perform even though they are hurt. The standard player contract imposes an obligation to play when the club physician determines that an injured player has the requisite physical ability.

The violence of professional football is carefully orchestrated. Both offensive and defensive players must be extremely aggressive in their actions and they must play with a reckless abandonment of self-protective instincts. The coaches make studied and deliberate efforts to build the emotional levels of their players to what some call a "controlled rage."

John Ralston, the 1973 Broncos coach, testified that the pre-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.

The large and noisy crowds in attendance at the games contribute to the emotional levels of the players. Quick changes in the fortunes of the teams, the shock of violent collisions and the intensity of the competition make behavioral control extremely difficult, and it is not uncommon for players to "flare up" and begin fighting. The record made at this trial indicates that such incidents as that which gave rise to this action are not so unusual as to be unexpected in any NFL game.

The end product of all of the organization and effort involved in the professional football industry is an exhibition of highly developed individual skills in coordinated team competition for the benefit of large numbers of paying spectators, together with radio and television audiences. It is appropriate to infer that while some of those persons are attracted by the individual skills and precision performances of the teams, the appeal to others is the spectacle of savagery.

Plaintiff's Theories of Liability

This case is controlled by the law of Colorado. While a theory of intentional misconduct is barred by the applicable statute of limitations, the plaintiff contends that Charles Clark's foul was so far outside of the rules of play and accepted practices of professional football that it should be characterized as a reckless misconduct within the principles of Section 500 of the Restatement of Torts, 2d. Those principles have been recognized in Colorado in *Fanstiel v. Wright*, 122 Colo. 451, 222 P.2d 1001 (1950) and *Coffman v. Godsoe*, 142 Colo. 575, 351 P.2d 808 (1960). A reckless disregard for the safety of a goalkeeper in a schoolboy soccer game was the basis for recovery in *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

Alternatively, the plaintiff claims that his injury was at least the result of a negligent act by the defendant. The difference in these contentions is but a difference in degree. Both theories are dependent upon a definition of a duty to the plaintiff and an objective standard of conduct based upon the hypothetical reasonably prudent person. Thus, the question is what would a reasonably prudent professional football player be expected to do under the circumstances confronting Charles Clark in this incident?

Two coaches testified at the trial of this case. Paul Brown has had 40 years of experience at all levels of organized football, with 20 years of coaching professional football. Both Mr. Brown and Mr. Ralston emphasized that the coaching and instructing of professional football players did not include any training with respect to a responsibility or even any regard for the safety of opposing players. They both said that aggressiveness was the primary attribute which they sought in the selection of players. Both emphasized the importance of emotional preparation of the teams. Mr. Brown said that flare-up fighting often occurred even in practice sessions of his teams.

It is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself. The character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness.

Both theories of liability are also subject to the recognized defense of consent and assumption of the risk.

Here the question is what would a professional football player in the plaintiff's circumstances reasonably expect to encounter in a professional contest?

All of the witnesses with playing or coaching experience in the NFL agreed that players are urged to avoid penalties. The emphasis, however, is on the unfavorable effects of the loss of yardage, not the safety of the players. It is undisputed that no game is without penalties and that players frequently lose control in surges of emotion.

The conflict in the testimony is the difference in the witnesses' opinions as to whether Mr. Clark's act of striking the plaintiff on the back of the head in reaction to anger and frustration can be considered as "a part of the game." Several former players denounced this incident was clearly shown on the Denver Broncos' defensive game films, which were routinely reviewed by the defensive players and coaching staff, none of them made it a matter of special attention or concern.

Upon all of the evidence, my finding is that the level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant Clark on September 16, 1973. Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence. Therefore, even if the defendant breached a duty which he owed to the plaintiff, there can be no recovery because of assumption of the risk.

* * *

The Application of Tort Principles to Professional Football — A Question of Social Policy

> The business of the law of torts is to fix the dividing line between those cases in which a man is liable for harm which he has done, and those in which he is not. JUSTICE O.W. HOLMES, THE COMMON LAW (1881).

While the foregoing findings of fact and conclusions of law are determinative of the claim made by Dale Hackbart against Charles Clark and his employer, this case raises the larger question of whether playing field action in the business of professional football should become a subject for the business of the courts.

To compensate the injured at the expense of the wrongdoer, the courts have been compelled to construct principles of social policy. Through the processes of trial and error the judicial branch of government has historically evolved the common law principles which necessarily affect behavior in many contexts. The potential threat of liability for damages can have a significant deterrent effect and private civil actions are an important mechanism for societal control of human conduct. In recent years the pace of technical progress has accelerated and human conflicts have intensified.

To this time professional football has been a self regulated industry. The only protection which NFL contract players have beyond self-defense and real or threatened retaliation is that which is provided by the league rules and sanctions. It may well be true that what has been provided is inadequate and that these young athletes have been exploited and subjected to risks which should be unacceptable in our social order. In this respect, it is interesting to compare football with boxing. Because of the essential brutality of the contest, prize fighting has been held to be unlawful unless conducted under the sanction and authority of a governmental commission. *Antlers Athletic Association v. Hartung*, 85 Colo. 125, 129, 274 P. 831 (1929). *See* Colo. Rev. Stat. §§ 12-10-101 *et seq* (1973).

Football has been presumed to be lawful and, indeed, professional football has received the implicit approval of government because these contests take place in arenas owned by local governments and the revenues are subject to taxation. Like coal mining and railroading, professional football is hazardous to the health and welfare of those who are employed as players.

What is the interest of the larger community in limiting the violence of professional football? That question concerns not only the protection of the participants, but also the effects of such violence on those who observe it. Can the courts answer this question? I think not. An ordinary citizen is entitled to protection according to the usages of the society in which he lives, and in the context of common community standards there can be no question but that Mr. Clark's blow here would generate civil liability. It would involve a criminal sanction if the requisite intent

were present. The difference here is that his blow was delivered on the field of play during the course of action in a regularly scheduled professional football game. The Illinois court was concerned with the safety of high school athletes in *Nabozny v. Barnhill, supra*, 31 Ill. App. 3d at 215, 334 N.E.2d at 260 and said:

> This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control.

The difficulty with that view as applied to professional football is that to decide which restraints should be made applicable is a task for which the courts are not well suited. There is no discernible code of conduct for NFL players. The dictionary definition of a sportsman is one who abides by the rules of a contest and accepts victory or defeat graciously. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, p. 2206 (1971). That is not the prevalent attitude in professional football. There are no Athenian virtues in this form of athletics. The NFL has substituted the morality of the battlefield for that of the playing field, and the "restraints of civilization" have been left on the sidelines.

Mr. Justice Holmes' simple statement of the function of tort law and the evidentiary record now before me clearly reveal the density of the thicket in which the courts would become entangled if they undertook the task of allocation of fault in professional football games. The NFL rules of play are so legalistic in their statements and so difficult of application because of the speed and violence of the play that the differences between violations which could fairly be called deliberate, reckless or outrageous and those which are "fair play" would be so small and subjective as to be incapable of articulation. The question of causation would be extremely difficult in view of the frequency of forceful collisions. The volume of such litigation would be enormous and it is reasonable to expect that the court systems of the many states in which NFL games are played would develop differing and conflicting principles of law. It is highly unlikely that the NFL could continue to produce anything like the present games under such multiple systems of overview by judges and juries. If there is to be any governmental involvement in this industry, it is a matter which can be best considered by the legislative branch.

My conclusion that the civil courts cannot be expected to control the violence in professional football is limited by the facts of the case before me. I have considered only a claim for an injury resulting from a blow, without weaponry, delivered emotionally without a specific intent to injure, in the course of regular play in a league-approved game involving adult, contract players. Football as a commercial enterprise is something quite different from athletics as an extension of the academic experience and what I have said here may have no applicability in other areas of physical competition.

Upon the foregoing findings of fact and conclusions of law, it is **ordered** that judgments shall enter for the defendants, with costs to be taxed.

HACKBART v. CINCINNATI BENGALS, INC.

601 F.2d 516 (10th Cir. 1978) *cert. denied* 444 U.S. 931

William E. DOYLE, Circuit Judge

The question in this case is 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.

The injury occurred in the course of a game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Broncos' defensive back, Dale Hackbart, was the recipient of the injury and the Bengals' offensive back, Charles "Booby" Clark, inflicted the blow which produced it.

By agreement the liability question was determined by the United States District Court for the District of Colorado without a jury. The judge resolved the liability issue in favor of the Cincinnati team and Charles Clark. Consistent with this result, final judgment was entered for Cincinnati and the appeal challenges this judgment. In essence the trial court's reasons for rejecting plaintiff's claim were that professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable in court; that even intentional batteries are beyond the scope of the judicial process.

Clark was an offensive back and just before the injury he had run a pass pattern to the right side of the Denver Broncos' end zone. The injury flowed indirectly from this play. The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to mid-field. The subject injury occurred as an aftermath of the pass play.

As a consequence of the interception, the roles of Hackbart and Clark suddenly changed. Hackbart, who had been defending, instantaneously became an offensive player. Clark, on the other hand, became a defensive player. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. He thereafter remained on the ground. He turned, and with one knee on the ground, watched the play following the interception.

The trial court's finding was that Charles Clark, "acting out of anger and frustration, but without a specific intent to injury ... stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game.

Due to the failure of the officials to view the incident, a foul was not called. However, the game film showed very clearly what had occurred. Plaintiff did not at the time report the happening to his coaches or to anyone else during the game. However, because of the pain which he experienced he was unable to play golf the next day. He did not seek medical attention, but the continued pain caused him to report this fact and the incident to the Bronco trainer who gave him treatment. Apparently he played on the specialty teams for two successive Sundays, but after that the Broncos released him on waivers. (He was in his thirteenth year as a player.) He sought medical help and it was then that it was discovered by the physician that he had a serious neck fracture injury.

Despite the fact that the defendant Charles Clark admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. Notice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not usual.

The trial court spoke as well of the unreasonableness of applying the laws and rules which are a part of injury law to the game of professional football, noting the unreasonableness of holding that one player has a duty of care for the safety of others. He also talked about the concept of assumption of risk and contributory fault as applying an concluded that Hackbart had to recognize that he accepted the risk that he would be injured by such an act.

I. The Issues and Contentions

Whether the trial court erred in ruling that as a matter of policy the principles of law governing the infliction of injuries should be entirely refused where the injury took place in the court of the game.

* * *

Whether it was in error to receive in evidence numerous episodes of violence which were unrelated to the case at bar, that is incidents of intentional infliction of injury which occurred in other games.

* * *

[W]hether the evidence justifies consideration by the court of the issue of reckless conduct as it is defined in A.L.I. Restatement of the Law of Torts Second, 500, because (admittedly) the assault and battery theory is not

available because that tort is governed by a one-year statute of limitations.

II. Whether the Evidence Supported the Judgment

The evidence at the trial uniformly supported the proposition that the intentional striking of a player in the head from the rear is not an accepted part of either the playing rules or the general customs of the game of professional football. The trial court, however, believed that the usual nature of the case called for the consideration of underlying policy which it defined as common law principles which have evolved as a result of the case to case process and which necessarily affect behavior in various contexts. From these considerations the belief was expressed that even intentional injuries incurred in football games should be outside the framework of the law. The court recognized that the potential threat of legal liability has a significant deterrent effect, and further said that private civil actions constitute an important mechanism for societal control of human conduct. Due to the increase

business," and plaintiff sued said defendants for both compensatory and punitive damages.

Defendants separately filed pleas of general issue and numerous special pleas denying liability.

At the conclusion of plaintiff's proof motions for directed verdicts made on behalf of both defendants were overruled, and the Nashville Baseball Club electing to stand on its motion did not introduce any evidence. The trial resulted in a jury verdict for the plaintiff against both defendants for $5,000, and motions for a new trial having been made and overruled, only the defendant Nashville Basketball Club has appealed. No questions are made regarding the extent of plaintiff's injuries or the amount of the verdict.

By assignments of error it is urged on behalf of the Nashville Baseball Club that the trial court should have sustained its motion for a directed verdict made at the conclusion of plaintiff's proof, because plaintiff introduced no evidence that the assault committed by Averill was within the scope of his employment, or in the prosecution and furtherance of the business of this defendant.

According to the undisputed proof the assault occurred during the 6th inning of the game while the plaintiff, who played the position of shortstop for the Chattanooga Lookouts, was batting for his team. Pitching for the Nashville Vols was Gerry Lane, a resident of Chattanooga, and catching was the defendant Averill. The contest between the teams was keen and the players as well as the fans were tense with excitement, some of which was probably due to Lane's pitching against his home town team. Lane had made three pitches known as curves or sliders, called by the Umpire as "balls," and on each Luttrell had stepped forward to meet the ball before the break or curve started. These balls barely missed Luttrell, who had to dodge, and his teammates and the crowd got the impression that he was being, in baseball parlance, "dusted off" by Lane, who on his fourth pitch hit Luttrell on the seat of his pants.

The incidents leading up to the assault were described by Luttrell as follows:

> I had been at bat once before this happened, and I stand in the back of the batter's box usually when I am hitting. The batter's box is six feet long and four feet wide, and the first time at bat Lane threw me curved balls and sliders outside which it is hard to hit if you are standing back in the batter's box, so I don't know whether he struck me out or what, but he made me look bad, anyway, by swinging and reaching, so I thought within myself before I got up the next time that I'd get up there and I'd take a step forward in the box to try to hit the pitch before it broke, put it to right field. So I got in the box as I always did, in the back of the box, and Averill gave his sign and Lane took his windup before he threw the ball and just before he released the ball I stepped a step forward and he threw the ball, and I don't know what Averill called, what sign he called or anything, but the ball came at me and I had to dodge. Well, after he got the ball back from Averill he told me in exactly these words from the mound, he says, "Nobody does that to me. If you do it again I'll stick it in your ear."
>
> So, I had been hit in Little Rock with a pitched ball right here (indicating) and ... I was in the hospital and I had my jaw wired and I was out of the lineup for some time. So when he told me that I knew he was throwing at me, at my head. So I got back in the box the same way as I had. I never said a word to him or Averill, but I just looked Lane right in the eye. I got back in the box the same way and I took a step forward again and he threw at me, again I had to dodge. The third pitch was the same way, I dodged three of them. The fourth pitch, he brushed me right here (indicating), come right across this area (indicating) and nicked me, never hurt me a bit but I was entitled to my base because he hit me. I don't know where the ball went, to the catcher, to the screen or what, I never seen the ball. But after the ball hit me I, in disgust, I knew that he was throwing at me because he told me he was, and ... I wanted to show that I didn't appreciate it, which I didn't because I was making my living playing baseball. When a guy says he's throwing at my head he can kill you if he hits you in the right place. So, I started to throw the bat towards him and I don't know yet, I don't know to this day what made me hold up, but I held up, the bat went loose and I don't know where it went because I never seen it. I was faced toward the pitcher and that's all I remember.

It appears that immediately after Luttrell threw his bat in the direction of the pitcher's mound that Averill, without any warning whatsoever, stepped up behind Luttrell and struck him a hard blow on the side or back of the head with his fist. The force of the blow rendered Luttrell unconscious, and on falling face first to the ground he sustained a fractured jaw. Thereafter the players and the fans generally, who rushed out upon the field, engaged in what was described as a "free for all" until the police arrived in sufficient force to restore order, after which the game was continued. Meantime, Luttrell was removed by ambulance to the hospital, and Averill, who was put out of the game by the umpire, was arrested.

It was undisputed that there was no previous "animosity or malice" between Averill and Luttrell, who testified that when they spoke "it was on friendly terms." Nor was there any proof showing that Averill had ever committed a similar act, or that his employer should have anticipated his unwarranted assault.

It was conceded that the assault made by Averill "was no part of the ordinary risks expected to be encountered in sportsmanlike play." Nor was there any proof showing that the assault was other than a wilful independent act on Averill's part, entirely outside the scope of his duties. The assault was neither incident to nor is the furtherance of his employer's business, and under the circumstances we think that the Nashville Baseball Club would not be liable, under the doctrine of respondent superior, and that the learned trial judge should have sustained the defendant's motion for a directed verdict made at the conclusion of the plaintiff's proof.

It seems to be the rule generally that a master is not liable for the wilful acts of his servant who steps aside his master's business and commits an act wholly independent and foreign to the scope of his employment. *Goff v. St. Bernard Coal Co.*, 174 Tenn. 558, 129 S.W.2d 209; *Terrett v. Wray*, 171 Tenn. 448, 105 S.W.2d 93; *Standard Tire & Battery Co. v. Sherrill*, 170 Tenn. 418, 95 S.W.2d 915; *Hoover Motor Express Co. v. Thomas*, 16 Tenn. App. 664, 65 S.W.2d 621; *Hunt-Berlin Coal Co. v. Paton*, 139 Tenn. 611, 202 S.W. 935; *Woody v. Ball*, 5 Tenn. App. 303; *Druffenbroch v. Lawrence*, 7 Tenn. Cir. App. 405; 35 Am. Jur. Sec. 552, p. 981; 57 C.J.S. *Master and Servant* §§ 570, 572, 574, 575, pp. 313, 322, 323, 341; Annotation 34 A.L.R.2d 402, *et seq.*

The applicable rule is stated in 57 C.J.S. as follows:

> It is not ordinarily within the scope of a servant's authority to commit an assault on a third person, and, in the absence of a nondelegable duty, such as that imposed by the relationship of carrier and passenger, or hotel and guest, if the assault committed by the servant was outside the scope of his employment and was made in a spirit of vindictiveness of his own, the master is not liable, unless the servant's conduct is ratified by the master. § 575, p. 341.

In support of the above rule, there are numerous cases cited in the footnotes, including *Hoover Motor Express Co. v. Thomas*, *supra*, and *Atlanta Baseball Co. v. Lawrence*, 38 Ga. App. 497, 144 S.E. 31, 352, in which the Court said:

> The conduct of McLaughlin, the pitcher, in leaving his place upon the grounds and coming into the grandstand, and assaulting the plaintiff, was not within the scope of his employment, nor in the prosecution of his master's business, but was his own personal affair in resenting a real or fancied insult. "If a servant steps aside from his master's business, for however short a time, to do an act entirely disconnected from it, and injury results to another from such independent voluntary act, the servant may be liable; but the master is not liable." *Savannah Electric Co. v. Hodges*, 6 Ga. App. 470, 65 S.E. 322. Under the circumstances described in the petition, McLaughlin's acts were not the acts of his master, and the latter cannot be held liable under the doctrine of *respondeat superior*, or the master and servant theory. (Citing cases)

Accordingly, for reasons indicated, the judgment against the Nashville Baseball Club will be reversed, and the suit as to this defendant will be dismissed at plaintiff's costs.

McAMIS, P.J. and HALE, J., concur

Problems

1. Under the facts of *Hackbart* should the Cincinnati Bengals be held liable for the reckless conduct of "Booby" Clark under any theories of vicarious liability?

Section 228 of the Restatement (Second) of Agency provides a scope of employment test emphasizing that in order to hold an employer for the acts of an employee, the employee must have been acting in some way to further the interest of the employer.

2. Would the Bengals be liable for Hackbart's actions under the Restatement position?

But see the holding in *Tomjanovich v. California Sports, Inc.*, No. H 78-243 (S.D. Tex. Oct. 10, 1979), 4 SPORTS LAW REP. 6 June 198_). In *Tomjanovich*, the court applied California agency law using the test that if the injury resulted from actions "arising out of the employment" as opposed to an "in the scope of employment" test. Under this test the Los Angeles Lakers were held vicariously liable for a blow delivered by Los Angeles player Kermit Washington during fight between Washington and Houston player Kevin Kinnert. During the fight, Tomjanovich was struck by Washington as Tomjanovich approached the fight to help break it up.

A jury awarded Tomjanovich over $3.2 million dollars from the Los Angeles Lakers on theories of vicarious liability and negligent supervision of its players. (Note, a later undisclosed settlement was reached in the case just before the case was to be heard upon appeal).

3. Would the Bengals be held liable under California's agency test? Should they be?