Notes

Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete

" 'There are two great national institutions which simply cannot tolerate . . . external interference: Our Armed Forces and our . . . sports programs.' "[1]

I. Introduction

Organized athletics once enjoyed virtual immunity from litigation and liability. In recent times changes in philosophy concerning intervention in the world of sport[2] have been dramatic.[3] Judicial review has permeated many aspects of organized athletics,[4] yet new frontiers remain to be developed.

Recently, a new chapter in sports litigation began when an Illinois appellate court held that a participant in a contact sport may be found liable in tort for injuries he nonintentionally inflicted upon another participant.[5] The purpose of this Note is threefold: To examine this new chapter of sports litigation in light of the relative historical and legal perspectives surrounding the law and organized athletics, to analyze the rule holding participants in contact sports liable for negligence in the context of the cases which have sought to interpret it, and to explore the possible continued and expanded application of this rule by future courts.

---

[1]Slusher, *Sport: A Philosophical Perspective*, 38 Law & Contemp. Prob. 129, 129 (1973) (quoting Dr. Max Rafferty, former Superintendent of Public Instruction for the State of California) (emphasis added).

[2]"Sport" has been defined as an "element of enjoyment or recreation arising from the development or practice of individual skills, different from those involved in routine daily activities." Newman Importing Co. v. United States, 415 F. Supp. 375, 376 (Cust. Ct. 1976). For the purposes of this Note, only those sports characterized as "organized," in which participants are divided into teams and governed by a recognized set of rules, will be considered.

[3]External interferences in sports programs are no longer considered intolerable. One commentator, speaking of football, has stated that the legal profession is one of the few groups taking steps to stem the flood of injuries in that sport. Underwood, *An Unfolding Tragedy*, Sports Illustrated, Aug. 14, 1972, at 72.

[4]*See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (determining the validity of professional baseball's reserve clause); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (applying the Sherman Act, 15 U.S.C. §§ 1-7 (1976), to professional football); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (applying the Sherman Act to professional basketball).

[5]Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

A. Sports-Related Injuries

"'*If the United States ignored an annual epidemic striking a million and a half youngsters each autumn, Americans would revolt.*' "[6]

Shaping this new chapter of sports law—to an extent rivaled, perhaps, by no other consideration—is the fact that sports-related injuries have reached epidemic proportions. A one-year survey of athletic injuries and deaths in secondary schools and colleges revealed that between 1975 and 1976 over one million injuries occurred in school and college athletic programs.[7] Of these, 111,098 were classified as major injuries, forcing the person to cease the activity for more than twenty days.[8] In addition, the schools and colleges in the sample[9] reported fourteen deaths as a result of sports activities.[10] One example of the impact of athletics-related injuries is provided by the LaPorte (Indiana) High School football team, which, during the 1977 season, suffered the loss of fifteen lettermen due to serious injuries, including four broken backs and four broken legs.[11] The effect of this large number of athletics-related injuries is a public attitude bent on reform *and accountability* not unlike that in 1905 when, due to one of the bloodiest football seasons in history,[12] President Theodore Roosevelt threatened to abolish football by executive order unless the level of violence in the game was dramatically reduced.[13] In that year the presidential threat was sufficient to cause internal changes and thus to avoid possible major legal intervention in the world of athletics, yet today, as one commentator noted: "No Teddy Roosevelts have risen up to protest the slaughter."[14]

B. The Response by the Courts to the Epidemic of Sports-Related Injuries

The courts have already begun to respond to the public sentiment demanding, if not reform, accountability. While many of the

---

[6]Underwood, *supra* note 3, at 71 (quoting Dr. James Barrick, University of Washington Sports Medicine Department).

[7]NATIONAL CENTER FOR EDUCATION STATISTICS, ATHLETIC INJURIES AND DEATHS IN SECONDARY SCHOOLS AND COLLEGES, 1975-76, A REPORT ON THE SURVEY MANDATED BY SECTION 826 OF PUBLIC LAW 93-380, at 22 (1977).

[8]*Id.*

[9]The sample included 1,246 colleges and 2,525 secondary schools. *Id.* at 48-49.

[10]*Id.* at 24. Unlike other figures in the report, the number of deaths listed was the actual number reported by the institutions in the sample, not an estimated national total. *Id.*

[11]Underwood, *supra* note 3, at 71.

[12]In that year 19 college players died of football-related injuries. *Id.* at 72.

[13]Markus, *Sport Safety: On the Offensive*, 8 TRIAL July/Aug. 1972, at 12.

[14]Underwood, *supra* note 3, at 72.

causes of action now available to the injured athlete are not central to the main issues presented in this Note, a brief discussion of two causes of action would be helpful to an understanding of the relationship between sports and the legal system: Products liability for the manufacture or distribution of unsafe athletic equipment and negligence for the failure to provide adequate supervision of sporting events.

1. Products Liability and Athletic Equipment.—The fact that athletic equipment is involved does not change the basic theory under which one recovers for a defective product whose use has resulted in injury to its user.[15] These cases are important because suits of this type are occurring with greater frequency, and with a corresponding increase in the probability that an aggrieved party will either obtain a settlement or will be granted an award by the court. Perhaps most indicative of this trend are actions involving the hard-shell football helmet. While the hard-shell helmet has come under attack for injuries resulting from its use against another player in a manner resembling that of a "battering ram,"[16] litigation stems mainly from injuries sustained by the person wearing it.[17]

---

[15]*See, e.g.*, Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976). In *Byrns*, plaintiff was seeking recovery in a products liability action for injuries he received resulting from his use of an allegedly defective Riddell TK-2 football helmet.

The court, vacating a directed verdict for the manufacturer, said that the theory of recovery for products liability in Arizona was that outlined in the RESTATEMENT (SECOND) OF TORTS § 402A (1965). 113 Ariz. at 266, 550 P.2d at 1067 (citing U.S. Stapley Co. v. Miller, 104 Ariz. 556, 447 P.2d 248 (1968)). The court also adopted the *Restatement* position that plaintiff must establish that the product was "unreasonably dangerous," as defined by Dorsey v. Yoder Co., 311 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973), on the theory that the use of this test effectively limited the strict liability in tort doctrine if the issue was one of the duty of safe design by the manufacturer, or there were serious questions as to the effect to be given harm-producing conduct or misuse on the part of the injured person. 113 Ariz. at 267, 550 P.2d at 1068. *See also* Annot., 54 A.L.R.3d 352 (1973).

The court was careful to point out, however, that, in determining whether a product was unreasonably dangerous, "[e]ach case must be decided on its own merits." 113 Ariz. at 267, 550 P.2d at 1068. "No all-encompassing rule can be stated with respect to the applicability of strict liability in tort to a given set of facts." *Id.*

Finally, plaintiff was also held to have the burden of showing that the defective condition of the injury-producing product existed at the time it left the hands of the seller and that a relationship existed between the defect and the injury. *Id.* at 268, 550 P.2d at 1069.

[16]"[A] five year study of college [football] players by Dr. Carl Blyth at the University of North Carolina . . . found that 29% of football's most serious injuries—brain and spinal cord damage, broken ribs, ruptured spleens, bruised kidneys—came as a direct result of external blows by hard shell helmets." Underwood, *supra* note 3, at 74.

[17]In 1977 a 21 year-old Dade County, Florida youth was awarded $5.3 million in damages against Riddell Incorporated, a major manufacturer of football helmets, for injuries received by him resulting from his use of a negligently designed helmet. Plaintiff, a quadriplegic, settled out of court for a reported three million dollars. *Id.* at 73. *See also* Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976).

"Nationwide, helmet manufacturers now face between $116 million and $150 million"[18] in suits based on defective design, nearly 100 times the annual profit of the industry.[19]

In Indiana, two cases have considered a manufacturer's liability for the production of defective athletic equipment.[20] Each serves as additional evidence of the continued erosion of the so-called de facto immunity from litigation and liability once enjoyed by organized athletics.[21]

2. Liability for Failure to Provide Adequate Supervision of an Athletic Event.—The public's quest for accountability for sports-related injuries has produced well-developed case law holding teachers, coaches, schools, and school districts liable for injuries to student athletes resulting from the failure to provide adequate supervision of sporting events.[22] Inherent in the cases is the question of whether the action is barred by the doctrine of sovereign immunity or a general immunity statute.[23] If these issues are not involved, the theory of recovery is much like that presented in *Carabba v. Anacortes School District No. 103.*[24] *Carabba* involved a student wrestler who became a quadriplegic as a result of an illegal wrestling hold[25] that was applied to him when the referee momentarily diverted his attention from the mat.[26]

The court held[27] that the duty owed by a school district to its pupils was the same as that outlined in *Tardiff v. Shoreline School District:*[28]

---

[18]Underwood, *supra* note 3, at 73.

[19]*Id.*

[20]In the first, a manufacturer was found liable because a pair of baseball sunglasses shattered when struck by a ball, causing the loss of a player's eye. Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970). The second imposed liability on the manufacturer of a baseball pitching machine containing latent defects which resulted in severe facial injuries to a high school student who was able to trigger the machine while it was unplugged. Dudley Sports Co. v. Schmidt, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

[21]*See* 12 GA. L. REV. 380, 382 (1978).

[22]*See* Annot., 35 A.L.R.3d 725 (1971).

[23]*See* Annot., 33 A.L.R.3d 703 (1970).

[24]72 Wash. 2d 939, 435 P.2d 936 (1967).

[25]The hold was described by an eye witness as a "full nelson." *Id.* at 943, 435 P.2d at 939.

[26]*Id.* The plaintiff alleged that the school district had a nondelegable duty to protect students participating in interscholastic wrestling matches on the school premises. The school district contended that it had no part in this wrestling competition; that the matches were sponsored by the associated student bodies, which were separate entities from the school districts; and that the referee, in the performance of his function, occupied the status of an independent contractor. *Id.* at 955, 435 P.2d at 946.

[27]*Id.*

[28]68 Wash. 2d 164, 411 P.2d 889 (1966).

> [The school district is required to] anticipate reasonably foreseeable dangers and to take precautions protecting the children in its custody from such dangers. The child may sue the school district for injuries resulting from its failure to protect the child.
>
> "[A] school district may be liable for injuries sustained as a result of negligent supervision or failure to supervise activities of its students."[29]

In addition, the court held that the same duty applied whether the students were engaged in a voluntary or required activity,[30] that the duty was not limited to situations involving curricular activities,[31] and that the duty could not be satisfied by delegating its performance to another.[32] Therefore, "if the referee was negligent, the school district must, as a matter of law, respond in damages."[33]

It is thus apparent that courts today are becoming increasingly willing to subject organized athletics to judicial scrutiny. Of the many possible reasons given for this shift away from the de facto immunity from legal review once enjoyed by athletics, perhaps the most telling are the aforementioned increases in the number and severity of sports-related injuries,[34] and the violent nature of sports today at all levels of competition.[35]

---

[29]72 Wash. 2d at 955, 435 P.2d at 946 (quoting 68 Wash. 2d at 170, 411 P.2d at 893).

[30]*Id.* at 955-56, 435 P.2d at 947. *See also* Sherwood v. Moxie School Dist. No. 90, 58 Wash. 2d 351, 363 P.2d 138 (1961); Morris v. Union High School Dist. A., 160 Wash. 121, 294 P. 998 (1931).

[31]72 Wash. 2d at 955-56, 435 P.2d at 947.

[32]*Id.* at 957, 435 P.2d at 947-48. The RESTATEMENT (SECOND) OF AGENCY § 214, Comment a (1958), states in part:

> [O]ne may have a duty to see that due care is used in the protection of another, a duty which is not satisfied by using care to delegate its performance to another but is satisfied if, and only if, the person to whom the work of protection is delegated is careful in giving the protection.

[33]72 Wash. 2d at 958, 435 P.2d at 948. The court also considered the question of whether the trial court erred in not submitting the question of plaintiff's assumption of risk to the jury. While the assumption of risk defense will be considered in much greater detail later in this Note, it should be observed at this point that the court held there was no error because one is never held to assume the risk of another's negligence or incompetence. *Id.* For a discussion of the assumption of risk doctrine, see note 49 *infra*.

[34]For example, in Minnesota alone there were 48 eye injuries to hockey players in 1975 and nearly one-fifth of them resulted in blindness. Yeager, *The Savage State of Sports*, PHYSICIAN & SPORTS MED., May, 1977, at 96. In addition, it is estimated that nearly 30 Americans die each year playing amateur football, while serious injuries in the National Football League jumped by 25% from the 1973 to the 1974 season, according to Stanford Research Institute study. *Id.*

[35]There are many explanations given for the increasing use of violence in sports. Some authorities contend that violence has been perceived by athletes as crucial for

II. Participant's Liability in Tort for Injuries Inflicted upon Another Participant During the Course of an Organized Athletic Event

The development of the law in this area has echoed the changes in public and judicial sentiment regarding interferences by the legal system in the athletic arena. These developments have provided the framework for the current status of liability between participants in organized contact sports.

Courts have generally recognized two theories of tort liability in actions involving participants injured at the hands of opposing players: intentional torts and negligence. Early commentators con-

---

success in competitive sports. *See* Yeager, *supra* note 34, at 94. Still others place the blame on coaches who use violence as a compensation for their team's lack of playing ability. *See* TIME, Feb. 24, 1975, at 53. In addition, some authorities contend that violence in professional sports is used as a means of selling tickets. *Id.* at 48, 54.

The effect of athletic violence on sports spectators has also been a topic of major concern. Many authorities contend that the increase in number and severity of violent acts by spectators is a product of the violence displayed by athletes on the playing field. *See, e.g.*, Yeager, *supra* note 34, at 96. An example of spectator violence was provided when hundreds of drunken baseball fans went on a rampage, assaulting players, umpires, and each other at Cleveland's Municipal Stadium in 1974. *Id.*

Concern has also been expressed over the extensive television coverage given to violent acts in sporting events and its effect on children who tend to copy the actions of their athlete-heroes. *See* Kanfer, *Doing Violence to Sport*, TIME, May 31, 1976, at 65. For example, a report by Canada's Royal Commission on Violence in the Communications Industry concluded that televised coverage of violence in professional ice hockey has resulted in the same type of violence being exhibited in youth hockey programs. *Id.*

There have, however, been efforts to control the violent nature of sports. For example, a particularly bloody fight in a professional hockey game where one player repeatedly slammed an opposing player's head to the ice resulted in the first criminal trial of a professional athlete in the United States for injuries inflicted during a game. State v. Forbes, No. 63280 (Minn., Hennepin Dist. Ct., filed Jan. 14, 1975, *judgment of mistrial entered*, Aug. 12, 1975), *noted in Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976); *Violence in Professional Sports*, 1975 WIS. L. REV. 771; *Criminal Law: Consent as a Defense to Criminal Battery—the Problem of Athletic Contests*, 28 OKLA. L. REV. 840 (1975).

Despite efforts to the contrary, violence in sports persists. On September 12, 1976, in a professional football game between the Pittsburgh Steelers and Oakland Raiders, Oakland defensive back George Atkinson rushed up behind Pittsburgh wide receiver Lynn Swann and struck him with a forearm to the base of his helmet, all while the play continued 15 yards away. The blow dropped Swann "as if he were shot," Johnson, *A Walk on the Sordid Side*, SPORTS ILLUSTRATED, Aug. 1, 1977, at 12, resulting in a concussion. Atkinson's actions prompted Pittsburgh head coach Chuch Noll to label Atkinson as part of "a criminal element" in the National Football League, to which Atkinson responded by filing a slander suit against Noll. The suit was eventually decided in Noll's favor. *Id.* at 12-15.

Finally, one commentator has labeled athletic violence as the "most shocking" form of violence, "done merely for sport or fun." Kanfer, *supra* note 35, at 64 (quoting political scientist James Q. Wilson).

sidered recovery for negligence "out of the question,"[36] and judicial intervention focused on intentional torts, particularly assault and battery.[37] Even when a negligence theory of recovery was finally accepted, it was almost exclusively applied in cases involving non-contact sports.[38] Finally, in 1975 an American court held, for the first time, that a plaintiff could recover for injuries sustained as the result of a nonintentional act in a contact sport.[39]

A. Intentional Torts

The earliest theory successfully relied upon by a sports plaintiff was that of intentional tort, that is, assault and battery. A defendant is liable for battery if he acts with intent to cause a harmful or offensive contact upon a person and such contact results from his act.[40] He is liable for assault if, with the same intent, the plaintiff is put in imminent apprehension of a battery.[41] *Griggas v. Clauson*,[42] which involved participants in an amateur basketball game, provides an example of recovery based on assault and battery. A nineteen-year-old plaintiff, while awaiting a pass from a teammate, suffered serious injuries when the defendant, a member of the opposing team, pushed him from behind, struck him in the face with his fist, and struck him again as he fell, knocking him unconscious. The court affirmed a jury verdict in favor of the plaintiff, stating that the evidence showed defendant's actions to be wanton and unprovoked, and established the intent necessary to maintain recovery for an action for assault and battery.[43]

Even this theory was limited in its effect, however, as early cases held that recovery was proscribed under the maxim *volenti non fit injuria*—he who consents cannot receive an injury.[44] Later,

---

[36]26 MICH. L. REV. 322, 322 (1927).

[37]*See, e.g.*, Thomas v. Barlow, 5 N.J. Misc. 764, 138 A. 208 (N.J. 1927).

[38]*See, e.g.*, Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966); Strand v. Conner, 207 Cal. App. 2d 473, 24 Cal. Rptr. 584 (1962); Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955); Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976); Benedetto v. Travelers Ins. Co., 172 So. 2d 354 (La. Ct. App. 1965); Niemczyk v. Burleson, 538 S.W.2d 747 (Mo. Ct. App. 1976). *See also* 12 GA. L. REV. 380, 380-82 (1978).

[39]Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). For the purposes of this Note, "contact sport" will be defined as any sport where more than a casual touching is accepted as part of the game. It is not necessary that the contact be a purpose of the sport, *but see* 45 C.F.R. § 86.41 (1978), as long as it is unavoidable and an accepted element of the game.

[40]RESTATEMENT (SECOND) OF TORTS § 13 (1965).

[41]*Id.* § 21. Sports litigation usually involves either a battery alone or both elements. *See* Note, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 774 n.23.

[42]6 Ill. App. 2d 412, 128 N.E.2d 363 (1955).

[43]*Id.* at 418, 128 N.E.2d at 366.

[44]*See* F. BURDICK, THE LAW OF TORTS § 84, at 112-13 (4th ed. 1926).

the law developed so that a participant in a sport was deemed to consent only to such contacts allowed by the rules and customs of the game, with recovery available for contacts which went beyond the scope of such rules and customs, especially if the rules were designed to protect the players and not merely to promote better playing of the game. The *Restatement (Second) of Torts* states:

> Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.[45]

Therefore, a participant in a contact sport, by the fact of his participation, would be held to consent to those contacts which are inherent in the game itself, but would not consent to an *intentional* violation of a rule designed to protect his safety.

B. Negligence

Retarding the development of recovery for a participant's negligence was the fear that the imposition of liability in such cases would discourage participation in sports-related activities. Some jurisdictions have, in fact, denied recovery to an injured plaintiff partly on the basis of this threat. *Gaspard v. Grain Dealers Mutual Insurance Co.*[46] involved a twelve-year-old participant in a baseball game whose bat had slipped from his hands and struck a fellow player. While it was the plaintiff's contention that the condition of the bat should have alerted the defendant to the possibility that it could slip from his hands and injure someone, the court found the defendant to be not negligent. The court stated that "[t]o impose liability under such circumstances would . . . render the participation of the children of this State in almost any game or sport a practical impossibility . . . ."[47]

In addition, courts have invoked the doctrine of assumption of risk[48] to bar recovery in sports-related cases.[49] Paralleling the

---

[45]RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

[46]131 So. 2d 831 (La. Ct. App. 1961).

[47]*Id.* at 833.

[48]In Indiana, an injured party's right to recovery may be defeated by the doctrine of assumption of risk if a contractual relation exists, or by the doctrine of incurred risk if the relation is noncontractual. Pierce v. Clemens, 113 Ind. App. 65, 76, 46 N.E.2d

decline in the de facto immunity from liability once enjoyed by organized athletics is the increased willingness by the courts to

836, 840 (1943). For the purposes of this Note, the term "assumption of risk" will be used to describe the doctrine's application to both contractual and noncontractual relationships.

[49]In sports litigation, assumption of risk is usually implied rather than expressed. The general rule is stated as follows:

> A voluntary participant in any lawful game, . . . in legal contemplation by the fact of his participation, assumes all risks incidental to the particular game, . . . which are obvious and foreseeable. But he does not assume an extraordinary risk which is not normally incident to the . . . sport . . . unless he knows about it and voluntarily assumes it.

4 AM. JUR. 2d *Amusements and Exhibitions* § 98 (1962) (footnotes omitted). Further, he does not assume the risk of injury from the negligence of others. *Id.*

The relationship between assumption of risk and contributory negligence has been a source of confusion not only in Indiana, but also in the field of sports litigation as a whole. On at least one occasion, a court dealing with a sports-injury case overlooked plaintiff's assumption of risk to hold instead that plaintiff was contributorily negligent. Boynton v. Ryan, 257 F.2d 70 (3d Cir. 1958) (golf). It has been held in Indiana that the two doctrines are separate and distinct. *See* Indiana Natural Gas & Oil Co. v. O'Brien, 160 Ind. 266, 65 N.E. 918 (1903); Fruehauf Trailer Div. v. Thornton, 366 N.E.2d 21 (Ind. Ct. App. 1977). Other Indiana decisions have stated that the doctrine of "incurred risk" is merely a "species of contributory negligence." Rouch v. Bisig, 147 Ind. App. 142, 151, 258 N.E.2d 883, 888 (1970). *See also* Cleveland, C., C. & St. L. Ry. v. Lynn, 177 Ind. 311, 95 N.E. 577 (1911); Emhardt v. Perry Stadium, Inc., 113 Ind. App. 197, 46 N.E.2d 704 (1943).

The confusion in distinguishing the two defenses under Indiana law has been due in large part to two factors. First, there has been an infusion of the objective "reasonable man" test into the "incurred risk" concept. Stallings v. Dick, 139 Ind. App. 118, 210 N.E.2d 82 (1965). *See also* Meadowlark Farms, Inc., v. Warken, 376 N.E.2d 122 (Ind. Ct. App. 1978); Petroski v. Northern Ind. Pub. Serv. Co., 354 N.E.2d 736 (Ind. Ct. App. 1976); Sullivan v. Baylor, 163 Ind. App. 600, 325 N.E.2d 475 (1975); Christmas v. Christmas, 159 Ind. App. 193, 305 N.E.2d 893 (1974); Cornette v. Searjeant Metal Prods., Inc., 147 Ind. App. 46, 258 N.E.2d 652 (1970). Second, courts have erroneously applied the requirement of knowledge and appreciation of a peril for the finding of contributory negligence. Hi-Speed Auto Wash, Inc. v. Simeri, 346 N.E.2d 607 (Ind. Ct. App. 1976). *See also* Rouch v. Bisig, 147 Ind. App. 142, 258 N.E.2d 883 (1970). *But see* Burger v. National Brands, Inc., 342 N.E.2d 870 (Ind. 1976).

The Indiana Court of Appeals in Kroger v. Haun, 379 N.E.2d 1004 (Ind. Ct. App. 1978), deemed it "appropriate and necessary . . . to reconcile the incongruity of these decisions and . . . develop a consistency in the use and application of the defenses." *Id.* at 1008. In *Kroger* the court thus reinstated a subjective standard of knowledge in the assumption of risk defense, stating: "We are of the belief that to hold that one may voluntarily incur a risk of which he had no actual knowledge, yet was required to know in the exercise of ordinary care, is a perversion of the doctrine." *Id.* at 1009. In addition, the court rejected actual knowledge and appreciation of a peril as controlling elements of contributory negligence, stating: "We believe the actual state of the law to be . . . that contributory negligence may be found either where plaintiff has actual knowledge of the danger, *or, in the exercise of reasonable care, should have appreciated or anticipated the danger.*" *Id.* at 1010-11 (emphasis added). By so holding, the Indiana court has placed this state's interpretation of the two defenses in a position more in line with that used by other jurisdictions in their determinations of sports-related injury cases. The decision has also rendered application of these doctrines in Indiana significantly easier in future cases.

limit the defense of assumption of risk to those risks that are an obvious or foreseeable part of the game. In order to determine those risks which are considered an obvious or foreseeable part of the game, the courts have considered each individual game on an ad hoc basis. Therefore, while a second baseman in a baseball game assumes the risk of being spiked by a runner sliding into the base,[50] he does not assume the risk of being struck by the runner at full speed five feet from the base.[51] Other risks which courts have deemed to be assumed include stray golf balls,[52] pitched softballs,[53] and baseball bats thrown after the batter has hit the ball,[54] while generally, those risks which have not been deemed to be obvious or inherent parts of their games, and thus not assumed, are those caused by the negligence of another participant.[55]

Likewise, the standard of conduct owed by participants in athletic contests also seems to vary from case to case. For example, one case[56] held that a participant in an athletic event must not act in a manner that would expose those around him to an unreasonable risk of harm,[57] while another case[58] approached the problem from a duty perspective, stating that the duty owed by one participant to another in a team sport is a function of the customs and rules of that game.[59]

While the standard of conduct which will be applied to participants in organized athletic events is still flexible, emerging from those cases considering whether a participant in an athletic contest may be held liable to a fellow participant for the negligent infliction of an injury is a standard based on the rules and customs of the game. This rationale draws heavily from the limitations on the consent defense; a person is deemed not to consent to those contacts which are prohibited by the rules or usages of the game.[60]

Those cases which have considered recovery for negligence, however, regardless of the precise standard used to define negligent conduct, have dealt primarily with noncontact sports.[61] The inherent

---

[50]Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

[51]Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976).

[52]Strand v. Conner, 207 Cal. App. 2d 473, 24 Cal. Rptr. 584 (1962).

[53]Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955).

[54]Richmond v. Employers' Fire Ins. Co., 298 So. 2d 118 (La. Ct. App. 1974).

[55]*See, e.g.*, Carroll v. Askew, 119 Ga. App. 224, 166 S.E.2d 635 (1969) (golf); Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976) (baseball).

[56]Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955).

[57]*Id.* at 734, 289 P.2d at 285.

[58]Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

[59]*Id.* at 545, 51 Cal. Rptr. at 583. *See also* Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976).

[60]RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965).

[61]*See* note 38 *supra.*

physical nature of contact sports has presented special problems for the courts and, until recently, no American jurisdiction has allowed recovery for injury in a contact sport based upon the negligence of a participant.

C. *Nonintentional Acts by Participants in Contact Sports Resulting in Injuries to Fellow Participants*

In 1975, an Illinois appellate court in *Nabozny v. Barnhill*[62] held that a participant in a contact sport may be liable in tort to a fellow participant for injuries nonintentionally inflicted upon him during the course of the game.[63] *Nabozny* became the self-proclaimed harbinger of "a new field of personal injury litigation."[64] Its holding and application by courts in other jurisdictions merit special attention.

1. Facts of the Case.—Plaintiff's injuries occurred during a high school soccer match between plaintiff's Hansa team and defendant's Winnetka team. During the contest, the ball was kicked over the midfield line in the general direction of the plaintiff. Defendant and one of plaintiff's teammates had pursued the free ball. The Hansa player had reached the ball first and, being closely pursued by defendant, had passed the ball on to plaintiff, his goalkeeper. He then sharply turned away and headed back upfield. Plaintiff, in the meantime, had gone down on his left knee and caught the pass from his teammate. Defendant, however, had not turned away, but had continued to run in the direction of plaintiff, kicking the left side of plaintiff's head, causing permanent skull and brain damage. Plaintiff brought suit to recover for personal injuries alleged to be the result of defendant's negligence.

At the trial, plaintiff's expert witnesses testified that according to the Federation Internationale de Football Association (F.I.F.A.)[65] Official Rules of Soccer, under which the game in question was being played, all players are prohibited from coming into contact with a goalkeeper who is in possession of the ball while in the penalty area.[66] In addition, testimony established that plaintiff at all times

---

[62]31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

[63]*Id.* at 215, 334 N.E.2d at 261.

[64]*Id.* In Moore v. Jones, 120 Ga. App. 521, 171 S.E.2d 390 (1969), the court considered in dictum a question very similar to that in *Nabozny*:

> Assuming, without deciding, that where a sixteen year old boy plays soccer as required in a school physical education period, he assumes the risk of injury from the negligent act of an opposing player which may likely occur during such a game and could recover only for a willful and wanton act of such opposing player causing an injury, as distinguished from ordinary negligence ....

Id. at 521-22, 171 S.E.2d at 391 (citations omitted).

[65]The governing body of soccer. 2 ENCYCLOPAEDIA BRITANNICA 210 (1976).

[66]The "penalty area" is a rectangular area in front of the goal that is 18 yards in length and 44 yards in width. *Id.* at 212.

remained within the penalty area, and that defendant had time to avoid contact with plaintiff.[67]

At the close of plaintiff's evidence, defendant moved for a directed verdict, which the trial court granted on the ground that defendant owed no legal duty of care to the plaintiff.[68] After considering the question of whether the necessary relationship existed between the parties so as to impose a legal duty upon one for the benefit of the other,[69] the appellate court reversed the directed verdict of the trial court.[70]

2. The Opinion.—Important to the analysis of *Nabozny* is the policy consideration that a natural reluctance to compete in a game or sport would arise if the participants were threatened with possible liability for injuries resulting from their participation.[71] The court in *Nabozny*, however, expressed the view that, while great care should be taken to assure the free and active participation in athletics,[72] organized athletics should not be completely free of judicial review. The court stated: "[A]thletic 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."[73]

The court appeared to be balancing the policy consideration set forth above with an equally basic premise of tort law that a person injured through the fault of another should be compensated by requiring the party at fault to pay damages to the injured party. This analysis was reflected in the court's holding, described as "carefully drawn . . . in order to control a new field of personal injury litigation."[74] The court held that if: (1) The teams are trained and coached by knowledgeable personnel, (2) a recognized set of rules governing participation in the game is in force and (3) a safety rule[75] is contained therein which is primarily designed to protect players from serious injury, a player is charged with a legal duty to every other player

---

[67]31 Ill. App. 3d at 214, 334 N.E.2d at 260.

[68]*Id.* at 213, 334 N.E.2d at 259.

[69]The court also considered, and rejected, defendant's contention that plaintiff was contributorily negligent as a matter of law. *Id.* at 215, 334 N.E.2d at 261.

[70]*Id.* at 215-16, 334 N.E.2d at 260-61.

[71]*See* Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831, 833-34 (La. Ct. App. 1961).

[72]"This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth." 31 Ill. App. 3d at 215, 334 N.E.2d at 260.

[73]*Id.*

[74]*Id.*, 334 N.E.2d at 261.

[75]A safety rule is a rule designed, not to secure the more skillful or entertaining performance of the sport, but rather to protect the players from serious injury. *Id.*, at 260.

on the field to refrain from conduct proscribed by such safety rule,[76] and if such a player causes injury through conduct that is either deliberate, willful, or done with a reckless disregard for the safety of another player, the offending participant may be held liable in tort for the injury inflicted.[77]

3. Interpretation.—The wording employed by the court in its holding is, at best, confusing.[78] Based upon this holding, differing standards of conduct—all claiming to be drawn from the precedent set in *Nabozny*—could be applied by future courts to cases involving injuries to participants in contact sports. If *Nabozny* is to function as the narrowly tailored rule that it professed to create, a determination of the standard of conduct the case was intended to establish is important.

The question thus becomes: What standard of conduct did the court in *Nabozny* intend to establish?[79] The language employed by the court in the holding provides, on first impression, a possible answer. *Nabozny* stated: "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."[80] Further, in the second part of the *Nabozny* holding, the court stated that a participant is liable if his conduct is either deliberate, willful, or done with a reckless disregard for the safety of his fellow participants.[81] Language such as this has generally been applied to a standard of conduct lying between ordinary negligence and intentional tort, and has been characterized by a variety of names, including "aggravated negligence," "reckless misconduct," or, merely, "recklessness."[82] Thus, one answer consistent with the language used by the court would be that *Nabozny*

---

[76]*Id.*, 334 N.E.2d at 260-61.

[77]*Id.*, 334 N.E.2d at 261.

[78]The precise language used by the court to express the second part of its holding was: "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 reckless disregard for the safety of the other player so as to cause injury to that player . . . ." *Id.*

[79]Other commentators attempting to provide an answer to this question have produced differing results. *Compare* 42 Mo. L. Rev. 387 (1977) *with* 45 U.M.K.C. L. Rev. 119 (1976).

[80]31 Ill. App. 3d at 215, 334 N.E.2d at 261.

[81]*Id.*

[82]*See, e.g.*, W. Prosser, The Law of Torts § 34, at 184 (4th ed. 1971). *See also* Restatement (Second) of Torts § 500 (1965) which states in part:

> 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 that which is necessary to make his conduct negligent.

Id. Comment g reads as follows:

was intended to enuciate a standard of conduct based upon such an independent standard of review. This answer, however, would not be consistent with the remainder of factors considered by the court in reaching its decision. Implicit in the standard of conduct known as, for want of a better alternative, "reckless misconduct," is the rule that ordinary contributory negligence on the part of the plaintiff is not a defense available to the defendant.[83] While a plaintiff's reckless disregard for his own safety is a defense to reckless misconduct,[84] the court considered the plaintiff's ordinary contributory negligence, with a finding that he had exercised ordinary care for his own safety.[85] By not rejecting the ordinary contributory negligence issue on the ground that it was not a defense to reckless misconduct, it appears extremely doubtful that the court did, in fact, intend to establish a standard of reckless misconduct.

The *Nabozny* language itself, therefore, does not provide a clear indication of the applicable standard of conduct. One commentator,[86] after engaging in an analysis of the *Nabozny* language much like the above, concluded that *Nabozny* expressed a standard of conduct which, in effect, combined the ordinary negligence standard with that of "reckless misconduct," creating an intermediary standard referred to as "excessive negligence."[87] An "excessive negligence" standard means, in effect, that a player who violates a rule of a game designed primarily to protect the safety of another player, and who violates that rule in a willful, wanton, or reckless manner, will be held liable in tort for injuries inflicted as a result of his actions.

> *Negligence and recklessness contrasted.* Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfullness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that 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. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

Id.

[83]W. PROSSER, *supra* note 82, § 34, at 184-85.

[84]RESTATEMENT (SECOND) OF TORTS § 503 (1965).

[85]31 Ill. App. 3d at 215-16, 334 N.E.2d at 261.

[86]53 CHI.-KENT L. REV. 97 (1976).

[87]*Id.* at 106.

The conclusion reached in the discussion above does justice to the considerations of policy expressed by the court in reaching its determination,[88] and is a step closer toward becoming the "carefully drawn . . . rule announced . . . in order to control a new field of personal injury litigation."[89]

The same result could be achieved, however, without resort to the creation of a new, independent, standard of negligence. If one considers ordinary negligence as requiring a showing of duty, breach, causation, and injury,[90] the excessive negligence standard is nothing more than an enhancement of the duty and breach which must be shown before recovery is permitted. As the activity and accompanying considerations of public policy change, so does the duty to which a participant in the activity is held and the nature of the conduct which would constitute a breach of that duty. For example, when the activity involved is driving an automobile, a primary consideration of public policy is to discourage those who are incompetent at that activity from participating in it. Thus, the definitions of "duty" and "breach," as applied to automobile driving, are justifiably designed to further the policy of discouraging the participation of incompetent drivers. When athletic activity is involved, however, a different public policy requires the application of other definitions of "duty" and "breach". In athletics, the public policy is to encourage incompetent participants to build their skills. The definitions of "duty" and "breach" must, therefore, further the policy of encouraging not only those who are competent, but those who are incompetent, to participate in the activity. The *Nabozny* court reached this result. *Nabozny* held that a participant in a contact sport has a duty to refrain from violating a rule of the game designed primarily to protect the safety of another player.[91] Because such violations would be common occurrences among both competent and incompetent participants, *Nabozny* also held that a breach of that duty does not occur unless the act is deliberate, willful, or with reckless disregard for the safety of another player.[92] The court further encouraged participation in athletics by applying the rule only if the participants have been trained and coached by knowledgable personnel, and the games are governed by recognized rules and safety standards.[93]

It thus appears that, despite the confusing language in *Nabozny*, the court enuciated nothing more than an ordinary negligence stan-

---

[88]31 Ill. App. 3d at 215, 334 N.E.2d at 260.
[89]*Id.*, 334 N.E.2d at 261.
[90]W. PROSSER, *supra* note 82, § 30, at 143-44.
[91]31 Ill. App. 3d at 215, 334 N.E.2d at 260-61.
[92]*Id.*, 334 N.E.2d at 261.
[93]*Id.*, 334 N.E.2d at 260.

dard of conduct, narrowly tailored to further the policy considerations unique to the activity to which it is applied.

One final point contributing to the confusion in the *Nabozny* decision is the court's reference to the rules of the game,[94] particularly when dealing with the duty to which a participant in an organized athletic event will be held. The language used by the court might seem to support the argument that a violation of a safety rule would be the sole factor considered in determining liability.[95] It is well settled, however, that safety codes and other forms of objective standards which do not have the force of law, including safety rules in organized athletic events, have only functioned as evidence on the issue of negligence,[96] and should not be held as the sole standard of conduct. This conflict was resolved in *Stewart v. D & R Welding Supply Co.*,[97] decided two years after *Nabozny* by an Illinois appellate court. *Stewart* concerned a suit by a softball umpire against a player for injuries incurred between innings of a game. The injuries resulted from a three-pound weight that had flown off a bat, with which the defendant had been taking practice swings, and had struck the plaintiff. Both sides agreed that the duty of care owed by a player to an umpire during the course of a game was the same as that owed to another player.[98]

In *Stewart*, the defendant contended that *Nabozny* denied recovery for unintentional injuries incurred during the course of a game,[99] unless the injuries arose from the violation of a safety rule of that game. Since the defendant's actions did not violate a safety rule, he contended that his conduct gave rise to no liability.[100] The court dismissed this argument, stating: "[T]he liability of one participant to another is not limited to acts which are violations of safety

---

[94]*Id.*, 334 N.E.2d at 260-61.

[95]The precise language used by the court was:

> [W]hen 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.

Id.

[96]*See* W. PROSSER, *supra* note 82, § 36, at 201. *See also* Annot., 75 A.L.R.2d 778 (1961). In comparison, an unexcused violation of a statute is conclusive evidence of negligence, that is, negligence per se. W. PROSSER, *supra* note 82, § 36, at 200.

[97]51 Ill. App. 3d 597, 366 N.E.2d 1107 (1977).

[98]*Id.* at 598, 366 N.E.2d at 1108. *See* Annot., 10 A.L.R.3d 446 (1966); 65A C.J.S. *Negligence* § 174(b) (1966).

[99]In Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955), the court expressed the opinion that the duty owed between participants is the same regardless of whether they are engaged in a game or warm-up. *Id.* at 733, 289 P.2d at 284.

[100]51 Ill. App. 3d at 598, 366 N.E.2d at 1108.

rules."[101] Instead, the court observed that "the total situation must be examined to determine whether the actor is blameless, negligence, or willful and wanton."[102] *Stewart* did not reject the *Nabozny* application of the role of the safety rules outright, but instead tried to distinguish that case upon its facts. The court said that while *Nabozny* apparently permitted recovery only if the conduct of the defendant constituted a violation of a safety rule, such a standard was appropriate in that instance because the relationship between opposing players in a game such as soccer, in which some contact is permitted, is different from that presented by an umpire in a softball game, in which no contact of the type complained of is permitted.[103]

It would seem that the *Stewart* court approached the problem from the wrong direction. Rather than determining the type of game involved *before* deciding the extent to which the safety rules should be considered, both factors, along with various other considerations, should be considered as a whole in determining the possible liability of a sports participant. If this interpretation were accepted, *Stewart* and *Nabozny* would be consistent with other cases dealing with an athlete's liability in negligence, as exemplified by *Niemczyk v. Burleson*,[104] which lists factors to be considered in determining the duty owed by a participant to his fellow participants:

> [T]he specific game involved, the ages and physical attributes of the participants, their relative skill at the game and their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which inhere in the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, the degree of zest with which the game is played, and doubtless others.[105]

While *Nabozny* represents a milestone in the study of unintentional injuries arising out of athletic events, the ambiguous language lends itself to interpretations contrary to those which appear to be more consistent with the existing case law and better suited to meet the various policy considerations involved.

The value of *Nabozny* can be likened to that of an icebreaker on its first passage through the frozen floes. While the path it cuts is narrow and treacherous, it has nonetheless left a path where one

---

[101] *Id.* at 600, 366 N.E.2d at 1109.
[102] *Id.* at 601, 366 N.E.2d at 1110.
[103] *Id.* at 600, 366 N.E.2d at 1109.
[104] 538 S.W.2d 737 (Mo. Ct. App. 1976).
[105] *Id.* at 741-42. *See also* 53 CHI.-KENT L. REV. 97, 107 (1976).

had not existed before. Likewise, while rigid reliance on the ambiguous language in *Nabozny* may well lead to undesirable results; nevertheless, the case has "cut a path," providing a welcome framework for similar decisions by future courts. Just as subsequent ships must mark their courses carefully, so should future courts take care to avoid the ambiguities of *Nabozny*, basing their holdings instead on precisely defined standards of conduct.

D. The Current Status of Recovery for Injuries Sustained in a Contact Sport: The Rule as Applied to the Professional Athlete

In *Hackbart v. Cincinnati Bengals, Inc.*,[106] the United States Court of Appeals for the Tenth Circuit announced the beginning of another new chapter in sports litigation by holding that the principles of tort law are applicable to the case of a professional athlete injured during the course of a contest.[107]

1. Facts of the Case.—Hackbart was an appeal of a judgment entered by the United States District Court for the District of Colorado for the defendants. The incident giving rise to the action occurred in the course of a professional football game. Named as co-defendant was Charles "Bobby" Clark, who was, at the time of the incident, a rookie fullback. Plaintiff, Dale Hackbart, was a thirteen-year veteran of the National Football League, playing the position of free safety. The incident which gave rise to the lawsuit occurred near the end of the first half of play when defendant-team had attempted a forward pass play during which Clark had run into an area that was the defensive responsibility of plaintiff. The pass had been intercepted by one of plaintiff's teammates, who had then begun to run the ball back upfield. "Acting out of anger and frustration, but without a specific intent to injure,"[108] defendant had stepped forward and struck a blow with his right forearm to the back of plaintiff's head while plaintiff was in a kneeling position watching the play continue upfield. The blow allegedly resulted in injuries for which plaintiff sought recovery.[109]

2. Decision of the District Court.—The court, sitting without a jury and confined to the question of liability, ruled that: "The claim of the plaintiff . . . must be considered in the context of football as a commercial enterprise,"[110] the National Football League having been formed for the purpose of "promoting and fostering the business of

---

[106]No. 77-1812 (10th Cir. June 11, 1979).

[107]*Id.*, slip op. at 14a.

[108]*Id.*, slip op. at 3.

[109]*Id.*

[110]435 F. Supp. 352, 354 (D. Colo. 1977).

its members, the owners of professional football 'clubs' with franchises to operate in designated cities."[111] In addition, the court discussed the aspects of the game itself, stating: "The most obvious characteristics of [the game] is that all of the players engage in violent physical behavior."[112] Moreover, it was deemed that disabling injuries were common occurrences in each contest; professional football players were conditioned, and expected to perform even though they were hurt; and that participants were extremely aggressive in their actions, playing with a reckless abandonment of self-protective instincts.[113] After describing the emotional level of a professional football player at game-time as a "controlled rage,"[114] the court stated: "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."[115]

With this discussion in mind, the court considered the plaintiff's contentions of the defendant's recklessness[116] and negligence. Declaring these two terms different only in degree, the court went on to state: "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."[117] The court then noted:

> 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.[118]

---

[111] *Id.*

[112] *Id.*

[113] *Id.* at 355.

[114] The court stated:

> 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.

Id.

[115] *Id.*

[116] The court defined "reckless misconduct" as that within the principles of the RESTATEMENT (SECOND) OF TORTS § 500 (1965). It is interesting to note that the court cited *Nabozny*, perhaps incorrectly, *see* text accompanying notes 82-85 *supra*, as a case illustrative of a recovery based upon reckless misconduct. 435 F. Supp. at 355.

[117] 435 F. Supp. at 355.

[118] *Id.* at 356. The court incorrectly stated that the theory of "reckless misconduct," as defined by the RESTATEMENT (SECOND) OF TORTS § 500 (1965), was subject to the

Even if a duty to the plaintiff were breached, the court concluded:

> 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 [the plaintiff] must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant . . . . Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence.[119]

Having already stated that the plaintiff's action was, effectively, barred by the assumption of risk defense, the court then considered the applicability of tort principles to professional football. In this discussion the court asked: "What is the interest of the larger community in limiting the violence of professional football?"[120] Choosing not to answer, the court instead asked yet another question, to which it provided a telling response: "Can the courts answer this question? I think not."[121] In effect, the court not only denied recovery to plaintiff in this action, but also stated that future plaintiffs, under similar facts and circumstances, could not obtain relief in the courts unless the legislature acted first; that is to say, the principles of tort law do not apply to professional football unless through legislative action.[122]

3. Decision of the Court of Appeals.—On appeal, the Tenth Circuit was faced with a lower court determination that, in effect, closed the judiciary to professional athletes seeking redress for injuries received during the course of a game. The appellate court said that the justification for the trial court rejection of the claim was based upon the rationale that the extremely violent nature of professional football rendered injuries sustained not actionable, even to the extent that intentional batteries were beyond the scope of the judicial process.[123] By holding that the trial court judgment was not supported by the evidence,[124] the court of appeals re-opened the judicial

---

defense of contributory negligence. The RESTATEMENT (SECOND) OF TORTS § 503(1) (1965), states: "A plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety." *Id.*

The plaintiff submitted several alternative theories of liability, all of which were rejected by the court. In addition, the plaintiff was barred by the applicable statute of limitations from asserting a theory of intentional misconduct. 435 F. Supp. at 355.

[119]435 F. Supp. at 356.

[120]*Id.* at 357.

[121]*Id.*

[122]*Id.* at 357-58. "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." *Id.* at 358. The district court's holding has been the subject of intense criticism. *See* 57 NEB. L. REV. 1128 (1978); 12 GA. L. REV. 380 (1978).

[123]No. 77-1812, slip op. at 2.

[124]*Id.*, slip op. at 6.

process to the professional athlete seeking redress for injuries sustained at the hands of an opposing player.

The question before the circuit court was "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."[125] In reaching its determination, the court considered first whether the rules or customs of the game gave any legal justification for the trial court's answer that the conduct in question was not subject to the constraints of tort law. Finding that neither the game rules,[126] nor the customs of the game, permitted or condoned the type of conduct exhibited by the defendant, the court concluded: "[C]ontrary to the position of the [trial] court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."[127]

Next, and of greatest concern to the court, was the trial court's conclusion that the constraints of public policy dictated that the defendant's conduct, because it occurred in the course of a professional football game, should not be subject to the restraints of the law unless the legislature provided recourse to the injured professional athlete.[128] The court considered this to be a refusal by the district court to try the case on its merits merely because pressures of public policy and the nature of activity involved made resolution of the issues difficult, to which the circuit court said:

> [T]here exists not an independent basis which allows a federal court to, in effect, outlaw a particular activity absent legal evidence that either state policy or state law dictates or allows such action. Absent any such evidence, the trial court cannot turn to public policy in order to support a conclusion that the courts cannot entertain a particular case.[129]

Finding that neither federal nor state law or practice permitted the trial court to refrain from hearing the case on its merits, the court held that to rule that the case had to be dismissed because the injury was inflicted during a professional football game was error.[130]

Finally, having held that redress was available to the injured

---

[125]*Id.*, slip op. at 1.

[126]"A player may not strike with the fists, kick, knee, or strike on the head, neck or face with the heel, back, or side of the hand, wrist, forearm, elbow, or clasped hands." NATIONAL FOOTBALL LEAGUE PROPERTIES, INC., THE NFL'S OFFICIAL ENCYCLOPEDIC HISTORY OF PROFESSIONAL FOOTBALL 468 (1977).

[127]No. 77-1812, slip op. at 7.

[128]*Id.*, slip op. at 9.

[129]*Id.*, slip op. at 12-13.

[130]*Id.*, slip op. at 14a.

professional athlete in the federal courts, the court turned its attention to the standard of conduct to be applied to the defendant's acts. The court determined that the standard of "reckless misconduct," as defined by the *Restatement (Second) of Torts*[131] was fully applicable and that the plaintiff had the right to offer proof of reckless misconduct.[132] The court reached this determination in response to the defendant's argument that if he were guilty of anything at all, it was assault and battery, with that action being barred by a one year statute of limitations.[133] In finding that sufficient evidence existed to support recovery under the reckless misconduct theory, the court used a six year statute of limitations which is applicable in cases involving the reckless disregard of the rights of a plaintiff.[134] The effect of this determination was not to prejudge the defendant's liability, but to consider the evidence in the light most favorable to the appellant in determining the applicable statute of limitations,[135] thus providing the procedure by which plaintiff would have his claim heard.

4. Analysis and Application.—The decision of the court of appeals in *Hackbart*, reversing the judgment of the district court, is a step forward. This statement necessarily implies the belief that the district court's holding was a significant step backward in the field of sports litigation.

The district court would have, effectively, closed the courts to the professional athlete seeking redress for injuries sustained during the course of a contest and caused by a fellow participant. This would have resulted from the trial court's holding that the legislature, and not the courts, must provide the mechanism by which a professional athlete, injured at the hands of an opposing player, might obtain redress;[136] and that a professional athlete assumes the risk of injuries resulting from flagrant violations by fellow participants of the safety rules of the game.[137] The court of appeals responded clearly to only the first of the two issues raised above, holding, in effect, that the court must try the claim on its merits, and that it was error to dismiss the suit merely because it arose out of a professional football game.[138] What remains, therefore, is the district court's holding that a professional athlete assumes the risk of injuries resulting from flagrant violations by fellow participants of the safety rules.

---

[131]RESTATEMENT (SECOND) OF TORTS § 500 (1965).
[132]No. 77-1812, slip op. at 18.
[133]*Id.*, slip op. at 17.
[134]*Id.*, slip op. at 17-18.
[135]*Id.*, slip op. at 18.
[136]435 F. Supp. at 357-58.
[137]*Id.* at 356.
[138]No. 77-1812, slip op. at 14a.

The court of appeals, interestingly, treated that portion of the district court decision dealing with assumption of risk as dicta, despite the following language from the district court opinion: "Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence."[139] Even so, the court of appeals provided some insight into the proper resolution of this issue through *its* dicta regarding the applicability of the consent defense. The court stated: "[I]t is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and there is no evidence which we have seen which shows that. However, the trial court did not answer this question and we are not deciding it."[140]

By not deciding the issue, the court has left open one of the most serious problems raised by the district court. The conduct exhibited by the defendant in *Hackbart* was such a flagrant violation of a safety rule of the game that it cannot reasonably be characterized as a risk incidental to the activity, and must be considered as outside the realm of the assumption of risk defense. By denying recovery for even a flagrant violation of the sport's safety rules, the district court, in effect, would have rendered those rules void. The court of appeals, while not finally resolving these problems, has nonetheless indicated what the correct response should be, and, thus, is a positive step.

The decision of the court of appeals contains one additional bit of significant dicta. While being careful to point out that it was not prejudging the issue,[141] the court made it apparent that the standard of conduct to be applied to this case was "reckless misconduct,"[142] as defined by the *Restatement (Second) of Torts*.[143] The court made it equally clear that ordinary negligence was inapplicable, for as the court stated, "subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent."[144] It appears, therefore, that the court would apply no standard less stringent than reckless misconduct to claims arising out of injuries in professional contact sports.

The applications of *Hackbart* to *Nabozny* are, at best, limited. Both cases discussed extensively the considerations of public policy involved in each of the activities in question. The district court in *Hackbart*, however, considered the public policy to be something quite different from that set forth at the outset of this Note, ignoring

---

[139]435 F. Supp. at 356.

[140]No. 77-1812, slip op. at 7.

[141]*Id.*, slip op. at 18.

[142]*Id.*, slip op. at 15-16.

[143]RESTATEMENT (SECOND) OF TORTS § 500 (1965).

[144]No. 77-1812, slip op. at 7.

the widespread public sentiment demanding that something be done about the epidemic status of sports-related injuries and violence. The district court's determination that public policy precluded a tort action arising from a professional football game was used as justification for refusing to try this type of case, an erroneous holding under the decision of the court of appeals. The appellate court indicated the proper role of game rules in determining liability, but the similarity to *Nabozny* ends there. *Hackbart* involved a factual situation much different from that of *Nabozny*, and as such each case must announce a rule applicable to its own facts: *Hackbart* to professional athletics, and *Nabozny* to amateur athletics.

Hackbart, despite the narrow basis of its holding, has made a significant contribution to the field of sports litigation by opening the doors of the courts to the professional athelte injured at the hands of another participant during the course of a contact sport, and has re-established the threat of tort liability as the impetus for promoting a more effective means of self-regulation on the part of professional contact sports. While *Hackbart* is significant in its dicta, it remains to the wisdom of future courts to apply these statements in a manner beneficial to the athletes, and thus to organized athletics.

III. Conclusion

The key to understanding the state of the law regarding the liability of a participant in an athletic event for injuries he inflicts upon another participant is to understand the considerations of public policy inherent in cases such as these. The dogma that athletics should be free from judicial interference no longer controls. Instead, new thought has arisen that while courts should exercise great caution not to restrict free and active participation in sports, the world of athletics is no longer immune from legal review. Of the various factors giving rise to this change in philosophy, perhaps the single most important is the public sentiment that athletics are not longer capable of policing themselves, as evidenced by the alarming increase in sports-related injuries.

Injured athletes are now finding recourse available to them in areas once considered "out of the question."[145] Professional athletes have now been given legal redress for injuries sustained during the course of a game at the hands of other participants. However, clear standards regarding the professional athlete have yet to be articulated. Thus, the most significant holding at this time is that announced in *Nabozny*, stating that recovery is now available in amateur contact sports against fellow participants whose noninten-

[145] 26 Mich. L. Rev. 322, 322 (1927).

tional acts result in injury. Reflecting the influence of the policy considerations involved—particularly the desire to continue to promote the free and active participation in athletics, the rule behind the *Nabozny* holding is a narrow one, stating that only in situations in which knowledgable personnel coach participants and a set of "rules" governs the play and promotes the safety of the game will a participant be found liable in negligence for injuries caused to another participant, and then only if the player's actions constitute a deliberate, willful or reckless disregard for such "rules."

As public sentiment continues to change, organized athletics will either become internally responsible or face continued interventions by the judiciary. At the same time, courts must be extremely careful in their holdings to assure that free participation in sports is not discouraged or abridged.

As it now stands, the rule governing a participant's liability to a fellow participant for injuries resulting from a nonintentional act has provided the framework for a new field of personal injury litigation. While beset with problems of interpretation, the rule's potential for benefit to injured athletes, and thus to organized athletics, is sufficient to warrant continued and expanded application of the rule.

CHARLES E. SPEVACEK