TORTS IN SPORTS — "I'LL SEE YOU IN COURT!"

I. INTRODUCTION

As Roseboro moved toward him, Marichal took three overhead swings at his head before Roseboro tackled him and Koufax moved in to grab the bat . . . . [A]t least one blow had landed . . . 'There was nothing but blood where his left eye should have been. A man might as well have a gun as use a bat like that.'

Professional athletic leagues once handled virtually all of their excessively violent acts by their own internal control measures. In recent years, however, athletes have begun to seek judicial redress for personal injuries suffered as a result of sports violence. The fact that a certain amount of contact is allowed in hockey, football, basketball, and baseball should not preclude recovery for all personal injuries sustained in sports. As one attorney said while prosecuting a hockey violence case: "[A]n assault is an assault whether it occurs in a parking lot, at a country club, or on a hunk of ice rented by the NHL." On the other hand, several professional sports executives and other critics have argued that sports should be free of judicial scrutiny. It is their contention that the rules of the various leagues can adequately police any infractions.

This comment analyzes violence in the major professional sports of foot-

1Mann, The Battle of San Francisco, SPORTS ILLUSTRATED, August 30, 1965, at 12. This violent incident took place in 1965 between the San Francisco Giants pitcher Juan Marichal and the Los Angeles Dodgers catcher John Roseboro.

2Kennedy, A Nondecision Begs the Question, SPORTS ILLUSTRATED, July 28, 1975, at 13. Gary Flakne, a Minnesota attorney, gave this argument while prosecuting a 1975 case against David Forbes, a member of the Boston Bruins. Forbes had hit Henry Boucha, a member of the Minnesota North Stars, in the area of his right eye with his hockey stick in a spearing type motion. After Boucha fell to the ice clutching his eye, Forbes leaped on his back and struck Boucha several times. Boucha's injury "required twenty five stitches and remedial surgery for a small fracture of the eye socket." This gory incident occurred after an earlier altercation between the two players. After both players served penalties, and while play was stopped, Boucha skated toward his bench with Forbes trailing behind. Without provocation or warning Forbes skated out of his way and began this sudden attack. Id. at 12-15. The case ended with a hung jury and was not appealed as the jury was unable to agree that Forbes had intended to inflict bodily harm. State v. Forbes, No. 63280 (D. Minn. dismissed Aug. 12, 1975).

3Clarence Campbell, a former president of the National Hockey League, indicated in 1975 that there was no need for judicial intervention in hockey as the NHL could effectively respond to the types of violence that periodically occur in hockey. Gronberg, The Violent Game 189-90 (1975). Another former NHL President, John Ziegler, indicated in his testimony before the Subcommittee on Crime in 1980 that there was no need for legislation regulating violence in hockey. Excessive Violence In Professional Sports: Hearings on H.R. 7903 before the Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives, 96th Cong., 2d Sess. 137 (1981) [hereinafter Hearings, Violence in Sports].

ball, hockey, basketball, and baseball and the inability of the internal control systems of the various sports leagues to adequately control incidents of excessive violence. Judicial redress should be available for injuries resulting from acts committed outside of the rules of the game. The possible theories of recovery and applicable defenses to liability will be analyzed. Criminal liability also will be considered along with recently proposed congressional bills\(^5\) which advocate civil and criminal penalties for excessively violent acts in professional sports.

II. THE SCOPE OF SPORTS VIOLENCE AND LEAGUE SUPERVISION

There has been considerable difficulty in defining what constitutes excessive violence in sports. Courts and commentators have struggled with the problem of deciding what acts athletes assume the risk of during the course of play and what acts should be actionable in a court of law.\(^6\) As the Ontario Court in Regina v. Green\(^7\) recognized in dicta, there are incidents in sports which would normally be considered an assault that are accepted as part of the game rules. A certain amount of contact in sports is consented to varying with the nature of the game.\(^8\) However, participants do not consent to all acts which occur during sporting events. The Restatement (Second) of Torts\(^9\) has set out a test regulating acts committed during sporting events. The test provides that the rules of the game govern the consent of participants within the sport. As a general yardstick, the test serves as a good tool in deciding what acts constitute excessive violence in sports.

A. Hockey

The National Hockey League (NHL) has been severely criticized for its lack of enforcement of its rules which has led to numerous brawls among participants.\(^10\) Hockey violence and the need to control excessive violence in

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\(^5\)The three bills which have been proposed in Congress are H.R. 7903, 96th Cong., 2d Sess. (1980); H.R. 2263, 97th Cong., 1st Sess. (1981); H.R. 5079, 97th Cong., 1st Sess. (1981).

\(^6\)For a good summary of what constitutes excessive violence in sports and the extent of a participant's consent to contact in sports see R. Horrow, Sports Violence: The Interaction Between Private Lawmaking and the Criminal Law 167-76 (1980).

\(^7\)16 D.L.R.3d 137, 141 (1970). This criminal action was brought subsequent to a violent incident on September 21, 1969 between Edward Green, member of the Boston Bruins and Wayne Maki, a member of the St. Louis Blues. After Mr. Green slapped or pushed Mr. Maki in the face with his glove during play in the first period, a delayed penalty was called. Shortly thereafter and before play was stopped, one of the most violent stick swinging brawls in hockey history took place. While scuffling for the puck behind the Bruins' net, Maki retaliated to Green's slap in the face by ramming his hockey stick in Green's abdomen. Then in front of Bruins net, Green made a move and hit Maki with his stick near his shoulder or neck. Maki then swung his stick back and smashed it across the side of Green's head. Green slumped to the ice bleeding profusely from near the right temple. As a result of this blow Green had to undergo three brain operations and his playing career was over. G. Ronberg, supra note 3, at 32-35. Criminal actions were brought against both Maki and Green for assault but both cases were dismissed. Maki was acquitted on the ground of self defense. Regina v. Maki, 14 D.L.R.3d 164, 167 (1970). On the other hand, Green was acquitted on the ground that hockey players consent to such acts as gloves to the head. 16 D.L.R.3d at 143.

\(^8\)R. Horrow, supra note 6, at 167-70.

\(^9\)Restatement (Second) of Torts 50b (1965).

\(^10\)For the most recent article criticizing NHL officiating see Swift, Earning Their Stripes, Sports Illustrated, October 11, 1982, at 43.
the sport has been the subject of much commentary.\textsuperscript{11} Criminal actions have been initiated against players both in Canada\textsuperscript{12} and the United States.\textsuperscript{13} There have also been civil actions filed for excessive violence on both professional\textsuperscript{14} and amateur hockey\textsuperscript{15} and cases for negligent treatment of hockey injuries.\textsuperscript{16}

The most notable civil action involving hockey players is Polonich v. A-P-A Sports Inc.\textsuperscript{17} This action resulted from a stick-swinging brawl involving Dennis Polonich of the Detroit Red Wings and Wilf Paiement of the Colorado Rockies in a game on October 27, 1978. Polonich attempted to clear the puck away from the Red Wings net and in so doing his stick hit Paiement in the face. Paiement quickly reacted by swinging “his stick like a baseball bat and struck Polonich on the bridge of his nose” causing facial injuries.\textsuperscript{18}

Fighting in hockey has been condoned by National Hockey League executives as a good outlet for pent-up emotions. National Hockey League President John Ziegler has condoned fighting that arises from spontaneous outbursts in the course of play.\textsuperscript{19} It has also become evident that some coaches

\textsuperscript{11}See, generally, Kennedy, supra note 2, at 12; Kennedy, Wanted: An End to Mayhem, \textit{Sports Illustrated}, November 17, 1975, at 17; Krishenbaum, \textit{It's Time for the NHL to Stop the Hooliganism}, \textit{Sports Illustrated}, March 9, 1981, at 9; Reed, \textit{Week of Disgrace on the Ice}, \textit{Sports Illustrated}, April 26, 1976, at 22; Swift, supra note 10, at 43. Violence in hockey also has been the subject of at least one book, G. Ronberg, \textit{ supra} note 3.

\textsuperscript{12}See, Green, 16 D.L.R. 3d at 137; Maki, 14 D.L.R. 3d at 167; Regina v. Maloney, 28 C.C.C.2d 323 (Ont. 1976). In another case Bob Taylor, a member of the Philadelphia Flyers, was fined $500 by a Vancouver judge after being found guilty of assaulting a policeman during a 1973 scuffle between fans and players in the course of a hockey game. See, Kennedy, \textit{Wanted: An End to Mayhem, supra} note 11, at 21.

\textsuperscript{13}Forbes, No. 63280 (D. Minn. dismissed Aug. 12, 1979).

\textsuperscript{14}Polonich v. A-P-A Sports Inc., No. 74635 (E.D. Mich. filed Nov. 12, 1982) see \textit{infra} note 17; Guttenplan v. Boston Professional Hockey Association, Inc., No. 80 Civ. 415 (S.D. N.Y. 1981) reported in 3 \textit{Sports L. Rep.} 2 (Jan. 1981). In \textit{Guttenplan} several New York Ranger fans brought a $7 million personal injury and civil rights suit against the Boston Bruins and several Bruin hockey players subsequent to an alleged fighting incident after a game with the Rangers. The fans claimed their civil rights guaranteed by the Civil Rights Act of 1871 had been violated and they also brought additional tort claims. The case was dismissed without prejudice on January 19, 1981 for lack of jurisdiction. The court found the Civil Rights claims of no merit and the tort claims lacked diversity of citizenship. In another recent case, an out of court settlement was reached in early 1982 between New York Ranger Greg Polis and David Brown, a fan for a reported $27,500. Brown had alleged that Polis had hit him in the head with his hockey stick after Brown had shouted obscenities at Polis during a 1978 New York Ranger, Pittsburgh Penguin game. \textit{See, Kennedy, Wanted: An End to Mayhem, supra} note 11, at 21.

\textsuperscript{15}Polonich, No. 74635 (E.D. Mich. filed Nov. 10, 1982). In this case Dennis Polonich sued Wilf Paiement and the owner of Paiement's team, A-P-A Sports, Inc. The Eastern District Court of Michigan, the honorable Judge Horace W. Gilmore residing, ruled in favor of the plaintiff, Dennis Polonich. Damages were awarded "in the amount of Five Hundred Thousand ($500,000.00) Dollars for actual damages and Three Hundred Fifty Thousand ($350,000.00) Dollars as exemplary damages." \textit{Id.} at 1. The case is now on appeal to the Sixth Circuit.

\textsuperscript{16}R. Horrow, \textit{ supra} note 6, at 214-17.

\textsuperscript{17}Hearings, \textit{Violence in Sports, supra} note 3, at 154 (testimony of John Ziegler, President of the National Hockey Association).
encourage fighting and that, according to one sports agent, NHL management considers fighting ability in assessing player talent.

The league’s refusal to enforce its rulebook has led to the brawling, rough style of play for which the NHL is known. Several commentators have suggested that the league promotes violence as a spectator attraction. A certain amount of violence is inherent in the fast paced nature of the game. However, the officials’ inconsistent enforcement of the rules and management’s approval of physical hockey, has led to players ignoring the rules. Furthermore, the rough style of play has resulted in the emergence of team enforcers whose job it is to intimidate opposing players. The combination of internal pressures on the players has led most players to believe “that fighting is ‘just part of the game.’ ”

In recent years the NHL has enacted rules in an effort to curb excessive violence. Rule 54(e) is designed to prohibit opposing players from pairing off offer an altercation has already started between two participants. Two new rules have been enacted for the 1982-83 season to curb excessive violence. One of the rules allows the linesmen to call major infractions committed “behind the referee’s back.” The other new rule “calls for an automatic 20-game suspension for any player who intentionally strikes an official.” These rules are a step in the right direction to curb excessive violence. However, it remains to be seen whether officials will consistently enforce these rules. Past history and the attitude of current league President John Ziegler, indicate otherwise.

20 Coach Don Perry of the Los Angeles Kings hockey team was fined and suspended by the league after it found out Perry had ordered Paul Mulvey to join a fight in progress during the 1981-82 season. Mulvey refused to fight and later claimed this was the basis for his demotion to the minor leagues. See 4 SPORTS L. REP. 7 (Feb. 1982). For other incidents of coaches urging players to fight, see R. HORROW, supra note 6, at 32-34.

21 In an interview sports agent Bob Woolf said: “The premium the NHL puts on fighting was reestablished every time I talked to a team on behalf of a draft choice. Invariably, the interview would get around to how well my client could fight. . . .” Sprotzer, Violence in Professional Sports: A Need for Federal Regulation, 86 CASE & COM. 3, 6 (May/June 1981).

22 See R. HORROW, supra note 6, at 42-44; see also G. RONBERG, supra note 3, at 78-118.

23 See Swift, supra note 10, at 43.

24 See G. RONBERG, supra note 3, at 145-79. Ronberg contends that “[s]o long as violent fouling remains an acceptable means of intimidation, the bad guy will be in demand. Clubs will want him in their lineup to provoke opponents, to protect teammates, and, most degrading of all to him, to hype a sagging gate.” Id. at 177.

25 R. HORROW, supra note 6, at 14. In 1974 a full-scale investigation of violence in hockey was conducted by William McMurty on behalf of the Province of Ontario, Canada. McMurty found that the internal pressures of hockey, including peer pressure, encourages fighting in the game. Id. at 30-32.

26 Hearings, Violence in Sports, supra note 3, at 145 (statement of John Ziegler, President of the National Hockey League).

27 Swift, supra note 10, at 48. In the past NHL rules have allowed only the referee to call major and minor penalties.

28 Id. at 44.

29 In a taped television interview during the Stanley Cup finals, Ziegler appeared to accept only a partial enforcement of the rules. Ziegler said: “A foul is a foul only if the referee decides it is, based on the flow of the game, based on how he sees it and his position of view.” Id. at 46, 48. According to Wally Harris, a referee in the NHL for eighteen seasons, most penalties are not called. Only a select few are enforced. Id. at 43.
B. Football

Football, like hockey, is known as a violent and aggressive sport. In the last decade the media has increasingly publicized the violent nature of football while calling for changes in the rules structure. Several professional football players past and present have spoken out on the need to change the game and make it less violent. The National Football League (NFL) has made some rule changes to alleviate excessive violence. Commissioner Pete Rozelle has spoken out against violence beyond that which is inherent in the game. However, it has been noted that "violent physical contact is an integral part of the game." This factor, together with the expectancy that players will perform while hurt, has led to an increasing number of injuries. The average professional football career spans only 4.6 years and there is some evidence that participation in football shortens the life span of players.

Aggressiveness is a desired factor in a player's makeup and intimidation of opposing players is a strategic weapon. Intimidation is often accomplished by delivering shattering blows to one's opponent and is considered to be part of the game by most players. Drawing a line between aggressive football and an illegal blow is sometimes difficult to accomplish. It is the occasional illegal block or late tackle resulting in personal injury which may be a viable cause of action.

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19There has been at least one book devoted to revealing the brutality of football and the need for change. See J. UNDERWOOD, THE DEATH OF AN AMERICAN GAME (1979).

20For example, Jon Morris, a former center for the Chicago Bears and New England Patriots, was quoted as saying: "I think the league is in serious trouble unless something is done. But I realize violence is what the NFL sells. They say they don't, but they do." J. UNDERWOOD, supra note 30, at 42. Pettis Norman formerly of the Dallas Cowboys and San Diego Chargers in an interview with a sports writer said that he would no longer want to play in the NFL, that violence had intensified greatly due to the coaches emphasis on it. Id. at 57.

21Several rule changes designed to reduce injuries have been implemented by the NFL including making the crack-back block illegal, limiting contact with receivers to one block within five yards of the line of scrimmage, and several rules designed to protect the quarterback from injury. Hearings, Violence in Sports, supra note 3, at 164-65 (testimony of Pete Rozelle, Commissioner of the National Football League).

22Id. at 163-67.

23Note, supra note 4, at 430.

24Id.

25R. HORROW, supra note 6, at 9.

26According to Dr. Ronnie Sue Stangler "[f]ootball is so physically devastating that studies have found a pro's life span is significantly shorter than [that of] most males. . . ." Note, The "Booby" Trap: Does the Violent Nature of Professional Football Vitiate the Doctrine of Due Care in Participant Tort Litigation? 10 CONN. L. REV. 365, 372 n.38 (1978).

27R. HORROW, supra note 6, at 16-17.

28Id. at 17. The Jack Tatum, Darryl Stingley incident on August 12, 1978, is a good example of a violent hit for the purpose of intimidating one's opponent. On a play over the middle of the field, Tatum, a safety for the Oakland Raiders, delivered a solid hit to Stingley, a receiver for the New England Patriots, even though a pass intended for Stingley was clearly over his head. Stingley's neck was broken in two places on the play and he was partially paralyzed from the vicious tackle. No penalty was called on the play as the hit was within the rules. See J. TATUM, THE CALL ME ASSASSIN, 170-71 (1979); see also J. UNDERWOOD, supra note 30, at 45-46.

29Different courts have set out different standards of care to measure tortious activity in athletics (see nn.76-104). A standard of recklessness is more suitable to sports than negligence as some commentators have indicated (see nn.97-99).
Few actions for excessive violence resulting in injury have been filed both in professional and amateur football. There have also been actions filed against a coach for his violent behavior toward a player and for negligent supervision resulting in player injury.

C. Basketball

Professional basketball is more physical than collegiate or high school basketball. As Pete Newell, former Los Angeles Laker general manager said: "Basketball is not a non-contact sport." Several players have gained a reputation as enforcers, whose job it is to "keep things in order on the court, in whatever way works best for his team."

Many fights have occurred in the National Basketball Association (NBA) between players. The most notable incident was a fight between Kermit Washington of the Lakers and Kevin Kunnert, a member of the Houston Rockets. During the fight, Rudy Tomjanovich of the Rockets was seriously injured. Subsequently, he filed suit against Washington's employer, California Sports Incorporated (the Los Angeles Lakers). Other fights have led to

4 Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977), rev'd, 601 F. 2d 516 (10th Cir.), cert. denied, 444 U.S. 931 (1979). In this case Dale Hackbart, former safety for the Denver Broncos, sued the Cincinnati Bengals and Booby Clark, running back for the Bengals, for a broken neck sustained in the course of a game. Clark forearmed Hackbart in the back of the head while Hackbart was on the ground. The blow was struck out of frustration and anger after a Bengal pass was intercepted. The District Court dismissed the case on the basis that the defense of assumption of the risk applied and that no duty was owed Hackbart due to the nature of football. On appeal, the Tenth Circuit reversed and remanded the case for a new trial ruling that professional sports are not immune from judicial intervention. The court held that Clark and the Bengals could be held liable and that reckless misconduct was the proper standard for determining liability.

5 People v. Freer, 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976). In this case the defendant was convicted of assault in the third degree for punching a player in the eye while he was lying on the ground after a tackle. The player suffered a severe laceration requiring plastic surgery.

6 Rutledge v. Arizona Board of Regents, 660 F. 2d 1345 (9th Cir. 1981), cert. granted, 102 Sup. Ct. 3508 (1982). Kevin Rutledge, a former punter for Arizona State University, sued against the school, its board of regents, its former athletic director, and former coaches of the school. Rutledge claimed that head coach Frank Kush, presently coach of the Baltimore Colts, punched him in the mouth after a bad punt, that he was harrassed and ridiculed and forced to give up his athletic scholarship. The Court of Appeals barred the claims against Arizona State, its board of regents, based on the Eleventh Amendment and remanded the remaining claims. The claims against Kush and the assistant coaches are still pending.

7 "The most recent suit filed for negligent supervision leading to a football player's injury is Thompson v. Seattle School District. In this case Christopher Thompson, a former high school football player, sued his school district claiming improper instruction led to his suffering a crushed spinal cord in a 1975 game. On February 12, 1982 the Superior Court for King County handed down a jury verdict for $6,316,000. The school district is appealing the verdict. See 4 SPORTS L. REP. 7 (Feb. 1982).

8 "Papanek, The Enforcers, SPORTS ILLUSTRATED, October 31, 1977, at 43.

"Id. Jack Ramsay, coach of the Portland Trailblazers, emphasized the importance of having an enforcer type player to keep order saying: "You need a rugged, we're-not-going-to-take-any-nonsense personality on a team... It's important for your team to let it be known that you will not be pushed around, will not be intimidated."

9 "For example, during the 1976-77 NBA season there were 41 fights among players. Id.

"Tomjanovich v. California Sports Inc., No. H-78-243 (S.D. Texas August 17, 1979). The Tomjanovich case arose from an incident on December 9, 1977, in a game between the Lakers and Rockets. When Kermit Washington and Kevin Kunnert began to fight, Tomjanovich ran up to try and mediate the confrontation. Without looking to see who it was, Washington whirled around and punched Tomjanovich in the face. "Tomjanovich suffered fractures of the face and skull, a broken nose, and separated upper jaw, a cerebral
suits both in professional and amateur basketball.

The NBA has instituted a rule calling for fines up to $10,000 and/or suspension of players who fight. In many cases, however, the Commissioner has elected to hand out fines for less than the maximum amount and suspension is not mandatory. Considering the escalating player salaries, the internal sanctions are not a sufficient deterrent.

D. Baseball

Baseball has the least amount of physical contact of the four major professional sports. However, baseball has perhaps the most lethal weapon of all sports, the beanball. A beanball is a pitch thrown intentionally at a batter's head. One player has died as a result of a thrown pitch and several other players have had their baseball career's shortened or ended. As Dave Cash, former infielder of the Philadelphia Phillies, Montreal Expos and Pittsburgh Pirates said: "It's dangerous every time you step in the batter's box . . . . Your life is on the line. You're subject to getting killed."

Curiously, there have been no reported cases involving pitcher-batter confrontations. The bareness of caselaw is in part certainly due to the difficulty in proving intent. However, several pitchers have admitted to throwing at

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49 Id.
at 36.


51 In August 1980, Richard Rhodes, former player for the Chicago Bulls won $125,000 in damages from the Kansas City Kings and Lucius Allen. Allen had broken Rhodes' jaw with a punch during an exhibition game. This is an unreported case cited in Ranii, Sports Lawsuit Erupts, NAT'L L.J., Feb. 9, 1981, at 30, col. 1.


54 For example, Bill Willoughby, former player for the Buffalo Braves, was only fined $225 for punching Detroit Piston's Gus Gerard during the 1977-78 season. See Kirkpatrick, supra note 48, at 46.

55 Kram, Their Lives are on the Line, SPORTS ILLUSTRATED, August 18, 1975, at 32. The major reasons a pitcher throws a ball at a batter are: the pitcher wants to back the batter away from the plate, "he wants to set him up for a certain pitch," retaliation for the opposing pitcher throwing at batter, "or he is just plain mean." Id. at 36.

56 R. Horrow, supra note 6, at 10.

57 Cleveland's Ray Chapman was hit and killed by a pitch thrown by New York Yankees' Carl Mays in 1920. Kram, supra note 53, at 34-35.

58 Perhaps the most well known incident of a hit batsman which resulted in shortening a player's career involved Tony Conigliaro, former outfielder for the Boston Red Sox. On August 18, 1967, a fastball thrown by Jack Hamilton of the California Angels hit Conigliaro in the head. "Two inches higher, his doctor said, and Conigliaro would have been dead." Conigliaro suffered a fractured cheekbone, dislocated jaw, and his vision was impaired from the incident. Two years later he made a comeback in baseball and enjoyed one more big year. However, his vision blurred again, and the career of one of baseball's brightest young stars ended. McCallum, Faith, Hope and Tony C. SPORTS ILLUSTRATED, July 5, 1982, at 58.

59 Kram, supra note 53, at 35. Considering that some major league pitchers throw over 90 mile-an-hour fastballs, Cash's statement is very accurate.
batters. There have been at least two confrontations in professional baseball between catchers and batters leading to suits being filed, and another recent case has been filed alleging player violence against spectators.

The Official Rules Committee for Major League Baseball has responded to the hit-batsman problem by enacting a rule which gives the umpire discretion, within certain guidelines, to eject a pitcher for intentionally throwing at a batter. This rule appears to be an effective deterrent in minimizing retaliatory battles between opposing teams, however, it cannot put an end to the beanball.

E. The Overall Effect of Internal Control Systems

"The Commissioner of each league is vested with broad powers including the powers to fine and suspend players for violent conduct. Professional sports' overall purpose in carrying out its disciplinary system is to maintain order while establishing a consistent method of imposing sanctions. Unfortunately, the leagues have been unable to sufficiently deter violence using their internal controls.

Considering the high salaries of today's players, the fines which have been imposed have been too lenient. There is little if any deterrent in fining a player a small fraction of his salary. Furthermore, "some players claim that the team pays the player's fine."
Long term suspensions might have a significant deterrent value on player violence. Suspended players are not paid during the duration of their suspension, and they may be blacklisted by the sports establishment. However, the leagues have rarely been willing to assess lengthy suspensions. Apparently sports management believes that the potential deterrent value to violence in assessing long suspensions is outweighed by the harm to a player's team and the sport. Suspending a player for long periods might significantly effect spectator attendance.

III. Application of Tort Law to Sports

A. The Status of Civil Liability in Sports

The primary purpose of tort law is to compensate for injuries "sustained by one person as the result of the conduct of another." Traditionally, professional athletes refrained from utilizing judicial remedies as a means of obtaining compensation for their injuries. Pressures from sports management as well as teammates and opposing players operate to discourage the injured athlete from suing his assailant or his employer. In recent years, however, players have begun to seek judicial redress for injuries sustained. This trend is likely to continue for several reasons. First, with the establishment of legal precedent allowing recovery to injured athletes by traditional tort theories, players are beginning to recognize the benefits of judicial remedies. Second, higher player salaries and wealthy team owners arguably provide deep pockets for recovery and serve as incentives in bringing legal actions.

There have been only a small number of civil cases filed concerning professional sports violence, and several of these cases have been settled out of court. The small amount of case law that exists has been pursued under a variety of tort law theories. Courts have allowed professional athletes to recover damages from other participants for injuries sustained under the theories of...
battery and reckless misconduct. In amateur athletics participants also have been liable for injuries under a theory of negligence. Furthermore, team owners have been liable for the violent conduct of their players; in two cases, under the theory of respondeat superior and in another, under the theory of negligent supervision.

B. Participant Liability for Sports Violence

1. Intentional Torts

Athletes who choose to sue under a cause of action based on a theory as assault and battery will be confronted with several problems. In order to recover damages for a battery, the injured athlete must prove that the defendant intended to cause a harm and that the defendant committed the act which injured the plaintiff.

The requirement of proving intent in a sports case may be too difficult to overcome in many circumstances. The nature of the game, including the contact incident to playing the sport, makes it quite difficult to prove the defendant intended to cause injury. Many sports related injuries are merely a result of the contact inherent in the sport and not the result of someone intending to cause physical harm to another. Furthermore, juries have been reluctant to find that the defendant intended to cause harm to the injured athlete.

There are also affirmative defenses available to a defendant athlete who is sued under a theory of battery. The most important of these defenses is that one consents to all contact incident to a game by his participation in the game.

14Averill, 4 Tenn. App. 56, 311 S.W.2d 812 (1957). This case involved minor league baseball. There are also at least two battery cases in amateur athletics. Canning, 54 W.W.R. 302, aff'd 55 W.W.R. 384 (1966). See also Griggs, 6 Ill. App.2d 412, 128 N.E.2d 363 (1955). In Polonich, No. 74635 (E.D. Mich. filed Nov. 10, 1982) the District Court of Michigan found the defendant liable under the legal theory of assault and battery or recklessness or both. The case is unreported and the court's judgment did not set out the exact theory of recovery in granting the plaintiff relief.

15Hackbart, 601 F.2d at 516.


19Battery requires physical contact while assault entails the mere apprehension of contact. In sports violence cases athletes should not be able to recover damages for assault alone due to the inherent contact in all sports. W. Prosser, supra note 68, § 10 at 41 (4th ed. 1971).

20Restatement (Second) of Torts § 18 (1965).

21Kram, supra note 53, at 38. For example, proving that a pitcher intended to hit a batter would be particularly difficult. Baseball pitchers often throw balls near batters by mistake, or a pitcher may just intend to brush back a hitter. The difficulty in assessing intent is the major reason why umpires rarely utilize rule 802(d). This rule provides for a warning of ejection for pitchers who repeat throwing at a batter.

22See Forbes v. Boucha No. 76-603398 (Circuit Ct. Wayne Mich.) (the only criminal assault and battery case prosecuted in the United States).

23The affirmative defenses of provocation and self defense may be available to mitigate or avoid damages depending on the jurisdiction. W. Prosser, supra note 68, § 19 at 108-12 (4th ed. 1971).

Several tests have been offered by commentators to govern the scope of a participant’s consent to contact in sports. The most noted of these is the “rules of the game test” set out in the Restatement (Second) of Torts. This test 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 rules . . . 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.

Under this test, participants would be held to consent to those contacts “inherent in the game itself,” but not to intentional violation of the rules “designed to protect his safety.” Forseeability of contact outside of the rules has no bearing. Some commentators and at least one case have suggested this test should be the standard of defining an athlete’s consent in sports. As a general rule, this test is both practical and equitable, especially in traditionally non-contact sports such as baseball.

In contact sports such as hockey and football, however, several problems are presented. Surveys show that most hockey players accept fighting as part of the game. The fact that most infractions of the rules are not enforced in hockey also suggests that athletes consent to more than just the rules of the game. In football and hockey the forseeability test of the conduct and the harm may be a more appropriate standard of consent. “This approach suggests that the injured player consents only to those acts or harms which were reasonably forseeable when he entered the game.” Both the Model Penal Code and the proposed Federal Criminal Code support this test.

2. Negligence and Recklessness

The difficulty in proving intent in sports violence cases makes an action based on reckless disregard of the safety of another athlete a more viable theory of recovery. The Restatement (Second) of Torts defines recklessness as con-

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1. A good summary of the suggested tests of an athlete’s consent to contact in sports is set out in R. Horrow, supra note 6, at 167-90.
3. Comment, supra note 84, at 96.
4. Id.
5. Id.
6. Comment, supra note 84, at 96.
7. Id.
8. Id.
9. See B. Horrow, supra note 6, at 14.
10. See Swift, supra note 10, at 43.
11. See B. Horrow, supra note 6, at 180-81.
12. Id. at 181.
duct which the actor knows or that a reasonable man would realize will create "an unreasonable risk of physical harm to another." 96 Recklessness also requires a substantially greater degree of risk than negligence. There is no requirement that the defendant caused the harm which results. 97

This standard of care is more suitable to sports than an ordinary negligence standard and has been followed in both professional 98 and amateur 99 sports cases. Applying an ordinary negligence standard to sports would discourage participation. 100 At least one commentator has suggested a difference in the standard of care appropriate for professional and amateur sports. This commentator advocates that in amateur sports a negligence standard is appropriate while in professional sports recklessness is the better standard. 101 Applying different standards of care fails to take into consideration that amateur athletics has become a business in many instances or that amateur athletes often utilize professional tactics. 102

In Hackbart v. Cincinnati Bengals, Inc., 103 the United States Court of Appeals for the Tenth Circuit ruled that recklessness was the appropriate standard of care with respect to tortious activity in a football game. After finding that Booby Clark, the defendant running back, had recklessly injured the plaintiff, the court remanded the case for a trial on the merits. 104 This case is the only professional sports case applying a recklessness standard of care.

The defendant has available to him the affirmative defense of assumption of the risk in actions based on negligence 105 or recklessness. This defense has been defined by the Restatement (Second) of Torts as follows: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm." 106 One who "knowingly and voluntarily enters into an area of risk should not be able to recover for injuries sustained. . . ." 107 Under the Restatement view, knowledge itself is not sufficient to establish the defense. The plaintiff must know of the risk

96ReSTATEMENT (SECOND) OF TORTS § 500 (1965).
97Id.
98Hackbart, 601 F.2d at 524-25.
99Id.
100Bourque, 331 So.2d at 43; See also Nabozny, 31 Ill. App.3d at 215, 334 N.E.2d at 260-61.
102R. Horrow, supra note 6, at 25-28.
104Id. 601 F.2d at 524-25.
105The defense of contributory negligence is also available in negligence actions.
106ReSTATEMENT (SECOND) OF TORTS § 496A (1965).
and appreciate its character. This defense has been eroded in many states by statute.

The District Court in Hackbart recognized the defense of assumption or risk. However, the Court of Appeals in reversing and remanding the case failed to address the issue. Two other cases have held that this defense was inapplicable. There are no civil professional sports cases which have finally answered the question of whether the doctrine of assumption of risk applies, thus leaving the question open for future debate.

C. Owner Liability for Torts by Athletes

1. Vicarious Liability and Negligent Supervision

Two courts have recently held that an owner can be held liable for the violent acts of one player against another. These two decisions, together with pending actions alleging player violence against spectators, represent a trend by injured athletes and spectators to seek damages from team management for player torts. Owners may be susceptible to liability for player assault against others under a theory of vicarious liability or negligent supervision.

Under the doctrine of vicarious liability or respondeat superior as it is sometimes called, there are two basic requirements for liability to be found. First, there must be a master/servant relationship between the owner and the athlete who committed the tort. Second, the act must have been "committed within the scope of the athlete's employment."

In order to find a master/servant relationship, the servant must be subject to the control of the employer during the course of performance. The relationship between a professional athlete and the employer for whom he works fits the requirements of a master/servant relationship. Professional athletes are subject to a significant degree of control under the standard player contract and this factor has led courts to find a master/servant relationship in both football and basketball.

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108 Id.
109 Restatement (Second) of Torts § 496 A comment e (1965).
112 See Bourque, 331 So.2d at 42; see also Carey v. Toles, 7 Mich. App. 195, 151 N.W.2d 396 (1967). In Carey the court ruled the defense of assumption of the risk is inapplicable in any sports injury case. See Hackbart, 601 F.2d at 528; see also Tomjanovich, H-78-243 (S.D. Texas, Aug. 17, 1979) an unreported case reprinted in 4 Sports L. Rep. 6 (June 1981).
114 Note, supra note 72, at 569.
115 See e.g., W. Prosser, supra note 68, § 70 at 460; Restatement (Second) of Agency § 220 (1958).
116 Note, supra note 72, at 571. The author of this note discusses the control an owner has over a professional
The second factor in finding an employer liability for a player’s tort is making a determination that the athlete acted within the scope of his employment. Jurisdictions vary in assessing the scope of employment. In *Tomjanovich*, the court, applying California law, adopted a broad scope of employment in finding the owner liable for the player’s tort. This view provides that “an act is committed in the course and scope of employment if the act is committed during the employee’s performance of duties which he was employed, ordered, or empowered to perform.” The specific act does not have to advance the employer’s interest under this test.

Other courts have adopted a more narrow scope of recovery. These courts allow vicarious liability to attach “only if the employee was acting in furtherance of his employer’s interest.” Since Kermit Washington’s act of punching Rudy Tomjanovich was not in furtherance of his employer’s interest, under this limited view, Tomjanovich could not have recovered damages from the Los Angeles Lakers under the doctrine of vicarious liability. Participants who are attacked in the stands after a game should not be able to recover under either of these two tests of scope of employment.

Another basis under which the injured athlete may be able to recover from a team owner is negligent supervision. This doctrine “focuses on the employer’s own negligence” and “requires proof that an employer breached a duty of reasonable care toward an injured third party.” An employer under this doctrine may be held liable to an injured third party if it is negligent or reckless in hiring or supervising its employees. Employers are held to a duty of reasonable care in hiring, training, and supervising its employees.

Applying this doctrine to athletic violence, an employer is liable for negligent supervision if it inadequately supervises its employees, and subsequently, an unlawful act of violence is committed against a third party. An employer is also liable if it “knew, or by the exercise of an ordinary care should have known, that the athlete had violent or dangerous propensities which were likely to result in harm to other players.”

The only professional sports violence case which has considered the doctrine of negligent supervision is *Tomjanovich*. In *Tomjanovich*, the plaintiffs argued that the Los Angeles Lakers were liable under a theory of negligent supervision since they were negligent in supervising Kermit Washington. Washington had a reputation as an enforcer and had been involved in seven fights in three years as a Laker prior to hitting Tomjanovich in the head. The jury in the district court must have considered this factor important as they awarded over $500,000 more than the plaintiffs had requested in finding the employer liable under theories of vicarious liability and negligent supervision. The Lakers had direct knowledge of Washington’s reputation as a fighter.

IV. CRIMINAL LAW

Professional athletes who commit excessively violent acts also may be subject to criminal sanctions. There have been few criminal prosecutions of professional and amateur athletes both in Canada and the United States. For two major reasons, however, the criminal sanction is unwarranted as a mechanism to deter violence in sports except in the most egregious instances.

First, most violent acts in professional sports are not intended to injure a player. Participants often attempt to intimidate their opponents by engaging in conduct designed to frighten them. Under the typical battery statute, the state must prove the defendant intended to “inflict bodily harm upon another” and that an act occurred. Since the requisite mens rea is often lacking, the defendant athlete cannot be convicted of battery. The difficulty in proving intent and assembling the evidence in criminal sports cases has made it difficult for prosecutors to convict professional athletes.

Second, criminal sanctions would often be of little or no deterrent value in professional sports. In both hockey and football most players accept a certain amount of violence as part of the game. Surveys have revealed that most hockey players accept fighting as part of the game. Football players also have indicated they believe violence and intimidation play a role in their sport. The fact that players accept a certain amount of violence as part of their game indicates that criminal sanctions may not have much of a deterrent effect in curtailing excessively violent acts.

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129 For a summary of the facts see supra note 48.
130 Id.
131 Green, 16 D.L.R. 3d 137 (1970); Maki, 14 D.L.R. 3d 164 (1970); Maloney, 28 C.C.C. 2d 323 (Ont. 1976).
133 See Note, supra note 63, at 405-06.
134 See id. at 406.
135 R. Horrow, supra note 6, at 164. This book is an excellent thorough source on criminal law in relation to sports violence.
136 See Note, supra note 123, at 770-71, at 774-75.
137 See R. Horrow, supra note 6, at 13-18.
138 Id. at 16-17.
139 Note, supra note 4, at 439-40.
In those instances where an athlete intentionally injures another participant, criminal sanctions should be available. Excessively violent acts such as the Juan Marichal-John Roseboro bat affair in baseball and the stick swinging brawls in hockey merit the initiation of criminal charges.

V. LEGISLATION

On July 31, 1980, Democratic Congressman Ronald Mottl of Ohio introduced H.R. 7903, the Sports Violence Act of 1980, in an attempt to curb excessive violence in professional sports. The bill, if enacted, would make it a federal crime for professional athletes to use "excessively physical force" during a sporting event thereby causing "risk of significant bodily harm to another person in that event. . ." Excessive force under the act was defined as physical force having "no reasonable relationship to the competitive goals of the sport; is unreasonably violent; and could not reasonably be foreseen, or was not consented to, by the injured person. . ." Violation of the act called for fines "not more than $5,000 or imprisonment not more than one year, or both."

Proponents of the bill advocated its passage to preserve the health and vitality of professional sports. The bill was designed as a measure to curb excessive violence in professional sports since the leagues were unwilling to effectively combat the problem and local prosecutors had ineffectively and inconsistently dealt with the issue.

As expected, the bill received little support in Congress. Opponents of the bill opposed federal intervention with good reason. The federal government should concern itself with national problems and "leave the regulation of sports" to the leagues involved. Existing local criminal laws and civil remedies can adequately handle problems of excessive sports violence when outside intervention is needed. Furthermore, the bill's definition of excessive violence was

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140For a narration of the facts of this incident see supra note 59.
141The facts of three of the most violent stick swinging brawls in professional hockey are contained in Forbes, No 63280 (D. Minn. dismissed Aug. 12, 1979); Maki, 14 D.L.R.3d 164; Green, 16 D.L.R.3d 137; Polonich, No. 74635 (E.D. Mich. filed Nov. 10, 1982). See supra note 17.
142Hearings, Violence in Sports, supra note 3, at 5 (statement of Representative Ronald M. Mottl of Ohio).
144Id. at 4.
145Id.
146See id. at 5-6. (statement of Representative Ronald M. Mottl of Ohio).
147Sprotzer, supra note 21, at 8.
148Oklahoma has enacted a sports violence statute, OKLA. STAT. tit 21, § 650.1 (1979) which provides:

   Every person who, without justifiable or excusable cause and with intent to do bodily harm, commits any assault, battery, assault and battery upon the person of a referee, umpire, timekeeper, coach, player, participant, official, sports reporter or any person having authority in connection with any amateur or professional athletic contest is punishable by imprisonment in the county jail not exceeding 6 months, or by a fine not exceeding $500, or by both such fine and imprisonment.

   The statute was upheld in Carroll v. State, 620 P.2d 416, 418 (Okla. Crim App. 1979). Carroll, the defendant, an assistant baseball coach, was convicted of assault for attacking an umpire after the game was completed. The defendant appealed his conviction claiming the statute was vague and indefinite, but the Court of
assailed as being ambiguous, providing no more of an answer to establishing a boundary line for actionable violence than existing state law.\textsuperscript{49}

Hearings on H.R. 7903 were held in September and November of 1980, but no action was taken. Two other bills H.R. 5079, a repeat of H.R. 7903, and H.R. 2263 were introduced in 1981, however, no action has been taken on these proposals either.\textsuperscript{50} Federal legislation would not provide any deterrent to excessive sports violence that local authority could not fulfill.

VI. CONCLUSION

Violence in athletics is a growing media concern. Internal league controls have proven to be inadequate in abating sports violence. Courts can provide an alternative remedy to combating the problem. Professional sports should not be immune from judicial review. Athletes who commit excessively violent acts against other participants or spectators during a game should be subject to liability.

Criminal sanctions may be warranted in extreme cases of violence. However, criminal sanctions have disadvantages that are readily apparent. Juries have found it difficult to agree that an athlete intended to commit a violent act even in the most egregious circumstances. Many excessively violent acts are not intended to injure another player or are borderline situations where a criminal sanction would not be available. The problems inherent in employing criminal sanctions make civil remedies a more feasible solution to abating sports violence.

Civil remedies are the best means of deterring excessive sports violence while providing compensation to the injured athlete. Awarding damages to the injured athlete deters violence by hitting the defendant athlete where it hurts most — his pocketbook. Players will be encouraged to play by the rules or be subject to liability for injuries caused to other players. The doctrine of vicarious liability may also encourage team owners to reform the league rules and/or blacklist dirty players who will not refrain from committing excessively violent acts.

Courts must be willing to take action against professional athletics despite the problems confronting them. Professional athletes should not have virtual immunity from suit when using excessive violence. Otherwise, the serious problem of violence in sports may become even greater.

John F. Carroll

\textsuperscript{49}See Note, supra note 4, at 440-41.

\textsuperscript{50}Id. at 440 n.131.

Criminal Appeals of Oklahoma affirmed on the basis that the statute was clear and reasonable.