Liability in Professional Sports: An Alternative to Violence?

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There has been an increasing awareness of violence in professional sports. Examples of violent behavior on the playing field are observed on home television[1] and mimicked in amateur competition.[2] This violence is due in part to the players' large salaries and the increased pressure to earn those salaries.[3] A psychiatrist has compared the violence in professional sports to that of corporate ruthlessness.[4]

Much of the violence in professional football is directly attributable to the inordinate use of drugs by the athletes[5] and coaching techniques designed to increase the punishment meted out to the opponents.[6] The inability of football officials to police the game adequately has allowed a proliferation of late tackles and hits bordering on infractions.[7] Violence escalates as teams attempt to get revenge for

1. J. UNDERWOOD, THE DEATH OF AN AMERICAN GAME 49-50 (1979).

2. *Id.* at 67-69, 94-95; Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, 427 (1977).

3. J. UNDERWOOD, *supra* note 1, at 42, 63-64; Hechter, *supra* note 2, at 432; Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 159 n.39 (1976). The pressure on draft recruits stems from the discovery that professional football is a highly competitive business, that careers are short, and that each $100,000 check might be the last for a thirty-one year old hasbeen. J. UNDERWOOD, *supra* note 1, at 59.

4. Durslag, *Temper! Temper!*, T.V. GUIDE, Nov. 10, 1979, at 46 (quoting Dr. Gerald Nemeth). "What we seem to have in professional sports today could be an extension of corporate ruthlessness. A lot of money is up for grabs, arousing the basic instincts of the competitors, who are going after it with all the zeal of industry." *Id.*

5. J. UNDERWOOD, *supra* note 1, at 71-88. Dr. Arnold Mandell, a professor of psychiatry at the University of California at San Diego and a former analyst for the San Diego Chargers, has stated that football players will take around 150 milligrams of amphetamines at a time, approximately thirty times the dosage of the usual "diet" pill. *Id.* at 74. The result of this dosage is a " 'pre-psychotic paranoid rage state. A five-hour temper tantrum that produces the late hits, the fights, the unconscionable assaults on quarterbacks that are ruining pro football.' " *Id.* But as one player told Mandell, " ' "Doc, I'm not about to go out there one-on-one against a guy who's grunting and drooling and coming at me with big dilated pupils unless I'm in the same condition." ' " *Id.* at 76.

6. *Id.* at 51-53, 58, 165.

7. *Id.* at 43, 54.

brutal hits on team members or for previous losses.[8] The belief of the corporations owning the professional teams that violence increases gate receipts has also contributed to the rise in violence.[9] A combination of these factors has resulted in violence replacing skill as an essential element of winning.[10]

One sport in which skill has been overshadowed by violence is professional hockey.[11] For years, violence has been an accepted part of hockey in the United States and Canada.[12] Violence increases hockey gate receipts[13] as fans go to games expecting to see fights.[14]

Not only in football and hockey but also in sports as a whole,[15] the increase in violence has led to an increase in injuries[16] which in turn has spawned an increase in litigation.[17] In an effort to stem this tide of violence, law enforcement officials in Canada and in some areas of the United States have begun to prosecute athletes.[18] Injured participants

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8. *Id.* at 42, 54.

9. *Id.* at 61.

10. *Id.* at 43; Hechter, *supra* note 2, at 428.

11. The Philadelphia Flyers, for instance, kept three "enforcers" in their line-up as a means of physically intimidating other teams. Hechter, *supra* note 2, at 434. The Flyers' coach said that although his team lacked the quality players of other teams, the enforcers made up for this deficiency through intimidation. Comment, 1975 WIS. L. REV. 771, 777 n.33 (1975).

12. Hechter, *supra* note 2, at 428.

13. *Id.* "The NHL [National Hockey League] appears reluctant to stop violence for monetary reasons." *Id.* at 432. Richard B. Horrow, a lawyer who helped draft a bill to make violence in professional sports a federal offense and who has written a book, *Sports Violence*, claims that the NHL teams encourage violence by using at least one player to intimidate opponents, by pairing players off for fights by their size and position, by negotiating salaries on the players' fighting abilities, by trading players who do not stand their ground in fights, and by utilizing inadequate punishment when players commit a violent act without provocation. *Scorecard*, SPORTS ILLUSTRATED, Oct. 13, 1980, at 32.

14. J. UNDERWOOD, *supra* note 1, at 42-43; Hechter, *supra* note 2, at 428.

15. In professional basketball, Rudy Tomjanovich of the Houston Rockets was awarded $3,246,376 after a knockout punch from Kermit Washington of the Los Angeles Lakers dislocated the facial bones from Tomjanovich's skull. *Recent Cases*, 23 ATLA L. REP. 107 (1980). The Houston Rockets basketball association settled its claim against California Sports, Inc. for the loss of Tomjanovich's services and gate receipts for approximately $750,000. *Id.* Professional baseball is not free from violence. Reggie Jackson of the New York Yankees ran to the mound during a nationally televised game and took a punch at Milwaukee Brewer pitcher Mike Caldwell because Jackson believed that Caldwell was deliberately throwing the ball at him. Durslag, *supra* note 4, at 45. Stan Williams claimed to have deliberately hit Hank Aaron on a 3-0 pitch since he was going to have to walk him anyway. Hechter, *supra* note 2, at 440-41.

16. J. UNDERWOOD, *supra* note 1, at 95. In 1978, 186 National Football League [NFL] players, representing 14.9% of the roster, were incapacitated. In college play, an early 1978 survey indicated that injuries requiring surgery had more than doubled since 1974. *Id.* at 97. One projection cited by Underwood was that "injury will strike a million high schoolers, seventy-thousand collegians, and cause a 100% casualty rate in the pros. . . ." *Id.* at 98. This projection was challenged by Brice Durbin of the National Federation of State High School Associations on the basis that "minor" injuries were also included. *Id.* at 98-99. The definition of minor injuries varies from coach to coach, meaning anything from scratches and bruises to more serious injuries as long as no loss of game time results. *Id.* at 99.

17. *Id.* at 176. "With a sport whose leadership is more responsive to Nielsen ratings than injury reports, it is small wonder that the wolves (mostly lawyers) are at football's door." *Id.*

18. *See* text & notes 33-36 *infra*.

have brought civil suits against equipment manufacturers,[19] teams,[20] and school districts[21] to recover for their injuries. Until recently, however, the question of whether a professional athlete could recover in civil litigation against a fellow athlete for injuries incurred during a game had not been decided.[22]

This Note begins with a discussion of the elements of criminal liability used in the prosecution of athletes. In the criminal context, the ability of the courts to deal effectively with violence in professional sports will be considered. The examination next turns to basic tort elements involved in the civil litigation of sports injuries. Since amateur sports have provided a common law basis for deciding whether a claim for civil liability might lie between professional athletes, judicial treatment of torts in the field of amateur athletics will also be considered. Finally, this Note will focus on the possible effects of civil litigation in professional football in particular.

CRIMINAL LIABILITY: THE STATE'S RESPONSE TO VIOLENCE IN SPORTS

The state tolerates rough, potentially violent contact sports because of the societal benefits of sports activity.[23] Conduct not within the norms of the particular sport, however, is unacceptable.[24] Norms are created through the rules of the game,[25] and injuries that occur when the game is played within these rules are considered a natural part of the game.[26] But when a player's actions depart from these norms, no socially useful purpose is present, and the player loses the protection the state gives to the sport's rule-abiding participants.[27]

One method of curbing violence in professional sports is criminal prosecution of offenders. Although successful prosecutions have been rare, prosecutors in Minnesota and Canada have attempted to curb violence in professional sports by holding offending players criminally lia-

19. J. UNDERWOOD, *supra* note 1, at 101. Riddell, Inc., the nation's largest helmet manufacturer, lost a $5.3 million suit in 1977. *Id.* By the end of 1978, suits worth five times the size of the industry had been filed. *Id.* Out of fourteen helmet manufacturers in the country, only eight are still operating because of increased litigation and concomitant increases in the cost of liability insurance. *Id.* at 102.

20. *Id.* at 137.

21. *Id.* at 116.

22. *See* discussion of Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979), in text & notes 160-64 *infra*.

23. Sports are thought to benefit society by providing an acceptable outlet for aggression, enabling people to prove their self worth, providing leisure time recreation, training individuals to sacrifice themselves for the good of the group, and providing a unifying force among divergent social and economic groups in the society. Note, *supra* note 3, at 162.

24. Hechter, *supra* note 2, at 447.

25. Note, *supra* note 3, at 160.

26. *Id.* at 177. Hechter, *supra* note 2, at 450.

27. Note, *supra* note 3, at 160-61.

ble for their acts.[28] The Canadian hockey prosecutions are intended to pressure professional hockey players and officials to "decriminalize" the sport.[29] Blatantly vicious, unprovoked attacks made with full knowledge of the possible injuries are subjected to criminal sanctions.[30] New York has applied the rationale behind prosecutions of professional athletes to amateur sporting events.[31] The objective is the same: the protection of the athletes via criminal statutes.[32]

Prosecutions in Canada, Minnesota, and New York have been based upon charges of assault and battery.[33] In the simplest sense, a

28. State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975) (dismissed following declaration of mistrial); Regina v. Green, 16 D.L.R.3d 137 (1970); Regina v. Maki, 14 D.L.R.3d 164 (1970).

29. Hechter, *supra* note 2, at 429.

30. *Id.* at 433. Commenting on State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975) (dismissed following declaration of mistrial), former NHL president Clarence Campbell stated: " 'Courts are not the answer. Discipline must remain with the sport. Civil authorities are not equipped to deal with happenings in a game [particularly] isolated incidents. If you begin to rely on a court, no discipline in sport would be acceptable in terms of public opinion.' " Kennedy, *A Nondecision Begs the Question*, SPORTS ILLUSTRATED, July 28, 1975, at 12. Joseph Keough, Forbes' private attorney, claimed the whole case was a political maneuver to gain publicity for Gary Flakne, the Minnesota prosecutor. *Id.* Mark Mulvoy, a senior editor for *Sports Illustrated*, who has written or edited hockey stories for 15 years, wrote an open letter to NHL president John Ziegler in which he stated that "those people who cheer hockey fights are not hockey fans; they're fight fans." Mulvoy, *Hockey/ 1980-81 Dear John:*, SPORTS ILLUSTRATED, Oct. 13, 1980, at 50. Mulvoy presented a simple, nonlegal method of ending violence in professional hockey:

> The first time a player drops his gloves or swings his stick, kick him out of that game and the next five; also, don't allow teams to replace suspended players on their roster. For the second such incident, kick the player out of that game and the next 10. And when some cheap-shot goon KOs a clean superstar like Wayne Gretzky—as one Penguin did last season—or Mike Bossy or Marcel Dionne, kick the thug out of that game and suspend for the next 10.

Id.

31. People v. Freer, 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976).

32. Commonwealth v. Collberg, 119 Mass. 350 (1876). In this case, Collberg and Phenix were codefendants in a criminal trial for assault and battery. *Id.* at 350. The two had a small argument at the train station. *Id.* at 351. They decided to fight each other outside town to settle the argument. *Id.* They had often had friendly wrestling matches in the six years that they had been friends. *Id.* Each claimed the fight was by mutual consent and without malice. Nevertheless, the court stated that consent was "no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury." *Id.* at 353. In Regina v. Moore, 14 T.L.R. 229 (1898), the victim Briggs died as a result of injuries sustained in a soccer game when defendant Moore kneed him in the back and knocked him into the goalie's knee. *Id.* at 229. The judge stated that the rules of the game were immaterial. *Id.* Although soccer is a legal game, its inherent roughness requires players to restrain themselves so as to prevent injuries to others. *Id.* at 230. The judge further stated that since no one had a right to use "force which was likely to injure another," if death resulted from the use of such force, "the crime of manslaughter had been committed." *Id.*

33. Regina v. Green, 16 D.L.R.3d 137, 137-43 (1970) (Green, a hockey player, was charged with assault in violation of CAN. REV. STAT. C-34, § 244 (1970), which states that an assault is committed when a person intentionally applies force to another person, whether directly or indirectly, when there has been no valid consent; Regina v. Maki, 14 D.L.R.3d 164, 164 (1970) (Maki, a hockey player, was charged with assault under CAN. REV. STAT. C-34, § 245(2) (1970), which provides that anyone who commits an assault causing bodily harm is guilty of an offense and may be imprisoned for two years); State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975) (dismissed following declaration of mistrial) (Forbes, a hockey player, was charged with violating MINN. STAT. ANN. § 609.225(2) (West 1964), which proscribes assault with a dangerous weapon that does not inflict serious injuries); People v. Freer, 86 Misc. 2d 280, 280, 381 N.Y.S.2d 976-77 (1976) (Freer, an amateur football player, was charged with assault in the third degree in violation

traditional battery consists of the defendant unlawfully touching the plaintiff. Assault may be either an attempted battery or an intentional frightening of the victim,[34] but it involves no physical contact.[35] When assault and battery are used in conjunction, they usually refer to battery alone.[36] A traditional defense to assault and battery is self defense. Self defense becomes operative when a person, reasonably fearing immediate danger, believes force must be used to avoid being injured.[37] The amount of force used must be reasonable under the circumstances.[38]

Consent is generally not a defense to a criminal charge because the wrong affects the general public and therefore cannot be condoned by the victim.[39] Where, however, lack of consent is a necessary element of a crime as in rape, consent can be a defense to the crime.[40] In athletic events, when minor bodily harm is condoned as part of the game, the lawful nature of the sport itself would make consent a defense for what would ordinarily be a nonconsensual battery.[41]

Several cases illustrate the reasoning applied in prosecutions for conduct arising during the course of a sporting event.[42] For example, in September of 1969, Wayne Maki, a player for the St. Louis Blues, fractured the skull of Ted Green, a player for the Boston Bruins, by hitting Green with a hockey stick.[43] This was the final blow in a fight precipitated by Green hitting Maki in the face with his gloved hand during a Boston Bruins-St. Louis Blues exhibition hockey game played in Ottawa, Canada.[44] The fight resulted in both players being charged

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of N.Y. PENAL LAW § 120.00(1) (McKinney 1975), proscribing the intent to cause a physical injury that actually results in the injury, or the reckless injuring of another, or causing an injury through criminal negligence in using a deadly weapon).

34. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 603 (1972).

35. *Id.* Battery is comprised of an act by the defendant with intent to injure (or, in some cases, an intent to perform the act), and resulting injury to the victim. *Id.* at 604. The force needed to commit a battery may be applied to the victim directly, or indirectly as through another person or thing. *Id.* Causing another to take actions leading to self-injury can also be a battery. *Id.* A battery may be transferred to another when one intends to injure one person and accidentally injures a second. *Id.* at 604-05. The mens rea for battery is: 1) intent to commit injury, 2) intent to commit a criminally negligent act that creates a high degree of risk resulting in injury, or 3) intent to commit an unlawful act that results in injury. *Id.* at 605-06.

36. *Id.* at 603.

37. *Id.* at 391.

38. *Id.*

39. *Id.* at 408.

40. *Id.*

41. *See* MODEL PENAL CODE § 2.11(2)(b) (Revised Proposed Official Draft 1962). "[T]he conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport. . . ." *Id.*

42. State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975) (dismissed following declaration of mistrial); People v. Freer, 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976); Regina v. Green, 16 D.L.R.3d 137 (1970); Regina v. Maki, 14 D.L.R.3d 164 (1970).

43. Maki and Green were tried separately. Regina v. Green, 16 D.L.R.3d 137, 137 (1970); Regina v. Maki, 14 D.L.R.3d 164, 164 (1970).

44. Regina v. Green, 16 D.L.R.3d at 137; Regina v. Maki, 14 D.L.R.3d at 164. When Green struck Maki, a delayed penalty was called. Regina v. Green, 16 D.L.R.3d at 138. When a penalty

with assault in the Canadian courts.[45]

Maki was tried first. The judge in *Regina v. Maki*[46] stated that he could not find beyond a reasonable doubt the absence of the elements of self-defense.[47] The evidence did not prove that Maki intended to injure Green, that Maki lacked any fear of being injured by Green, or that Maki used excessive force in protecting himself.[48] Since the judge considered Green the original aggressor,[49] and since the prosecutor could not prove beyond a reasonable doubt that Maki was not acting in self defense,[50] Maki was acquitted.[51]

The judge in *Regina v. Green*,[52] however, viewed the action during the fight differently. Since being hit in the face with a glove is an ordinary occurrence during a hockey game, the judge held that it should be considered one of the risks of the game rather than an assault.[53] Green's action in chopping Maki on the shoulder was found to be an instinctive reaction to Maki's spearing him in the testicles; Green was only protecting himself.[54] Since the judge found that Green's actions were instinctive,[55] he was acquitted.[56]

Although both players were acquitted of the criminal charges against them,[57] the judges in both trials made it clear that under other circumstances they would not hesitate to find an athlete-defendant guilty.[58] The judge in *Maki* stated that participation in a sport, regardless of the extent of self-regulation, should not give players immunity from criminal sanctions.[59] Even though players accept certain risks whenever they enter the playing field or the ice rink, consent is a matter of degree; no athlete can be presumed to consent to unprovoked or

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is called upon the team defending the goal, the penalty is delayed until the team to be penalized gains possession of the puck. R. HICKOK, NEW ENCYCLOPEDIA OF SPORTS 266 (1977). As play continued, both players came off the boards, and a short time later, Maki speared Green in the genitals with the blade of his hockey stick. Regina v. Green, 16 D.L.R.3d at 138-39. Green immediately retaliated by hitting Maki on the shoulder with his stick. *Id.* at 142. Maki swung at Green again when he thought that Green was going to hit him a second time. Regina v. Maki, 14 D.L.R.3d at 166. This time Maki's stick hit Green's upraised stick and glanced off, hitting Green on the head and giving him a concussion. *Id.*

45. Regina v. Green, 16 D.L.R.3d at 137; Regina v. Maki, 14 D.L.R.3d at 164.
46. 14 D.L.R.3d 164 (1970).
47. *Id.* at 166.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. 16 D.L.R.3d 137 (1970).
53. *Id.* at 140-41.
54. *Id.* at 142.
55. *Id.*
56. *Id.* at 143.
57. *Id.*; Regina v. Maki, 14 D.L.R.3d at 167.
58. Regina v. Green, 16 D.L.R.3d at 143; Regina v. Maki, 14 D.L.R.3d at 166-67.
59. 14 D.L.R.3d at 167.

exceedingly violent attacks.[60] The judge in *Green* commented that although it would be difficult to find a circumstance where a prosecution could stand on facts arising from a professional hockey game, "unprovoked savage attacks in which serious injury results" might provide such a case.[61]

Just such a savage attack occurred in January of 1975 in Minneapolis, Minnesota, when David Forbes of the Boston Bruins clubbed Henry Boucha of the Minnesota North Stars over the head with the butt of his hockey stick, knocking Boucha to the ice.[62] Forbes then jumped on Boucha and began pounding his head into the ice until another player stopped him.[63] The savage nature of this unprovoked attack led to the prosecution of Forbes for assault.[64] Under the rationale of the Canadian courts, Forbes' attack would warrant liability since it was both unprovoked and exceedingly violent.[65] The American jury, however, was unable to reach a verdict, and a mistrial was declared.[66] The prosecutor did not retry the case[67] for two reasons: 1) he felt that the first prosecution was sufficient to give the sporting community the word that intentional assaults would not be tolerated, and 2) he was afraid a second trial would also result in a hung jury.[68]

On the other hand, in *People v. Freer*,[69] a criminal charge stemming from an amateur football game was successfully brought against John Freer in the New York state courts. Freer was punched in the throat during a tackle by a player from the opposite team.[70] After all the players involved in the ensuing pileup got off Freer, he punched the original assailant in the eye, causing damage requiring plastic surgery.[71] The court held that since Freer had no reason to fear a continu-

60. *Id.*
61. 16 D.L.R.3d at 143.
62. State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Dist., Aug. 12, 1975); Hechter, *supra* note 2, at 431; Kennedy, *supra* note 30, at 12.
63. Kennedy, *supra* note 30, at 14.
64. Hechter, *supra* note 2, at 431.
65. See text & notes 57-61 *supra.*
66. Note, *supra* note 3, at 148 (citing N.Y. Times, July 19, 1975, at 17, col. 3). Three of the jurors were purportedly unable to find that Forbes intended to inflict bodily injury on Boucha. *Id.* at 149 n.9. The nine jurors willing to convict felt that the three operations required to repair Boucha's eye socket, twenty-five stiches, and eight months recovery period from double vision showed excessive violence constituting aggravated assault. Hechter, *supra* note 2, at 431 n.29; Comment, *supra* note 11, at 771, n.10. Boucha settled his $3.5 million suit against Forbes, the Boston Bruins, and the NHL out of court. Arizona Daily Star, Aug. 27, 1980, at 7, col. 1. Although the criminal jury did not find that Forbes intended to injure Boucha, the defendants in this case apparently chose not to see what determination a civil jury might make.
67. Flakne & Caplan, *Sports Violence and the Prosecution*, TRIAL, Jan. 1977, at 34.
68. *Id.*
69. 86 Misc. 2d 280, 381 N.Y.S.2d 976 (1976). Freer, a juvenile, was tried by the court without a jury. *Id.* at 281, 381 N.Y.S.2d at 977.
70. *Id.*
71. *Id.*

ing attack by the other player, Freer had committed an assault.[72]

Although Freer's attack was obviously not as brutal as Forbes',[73] Freer was convicted and Forbes was not. The disparity may be attributable to such intangible differences as jury attitudes, judicial interpretations, or prosecutorial approaches. These intangible differences might mean that an amateur would be more likely to be convicted than a professional; many people still tend to view amateurs as playing for the love of the sport whereas professionals are thought to play primarily for their salaries. Thus, the trier of fact would be less tolerant of unsportsmanlike conduct occurring during an amateur event than of similar conduct occurring during a professional game.

The failure of the courts to clearly define the level of violence necessary for liability to attach may also be a factor behind the disparity. Neither the *Green* nor the *Maki* court was able to find that an unprovoked attack had occurred[74] despite the fact that Green received a concussion during the fight involving illegal hits with the hockey sticks. The jurors in *Forbes* were unable to agree that Forbes had intended to inflict harm when he attacked Boucha from behind with a hockey stick.[75] These cases show the difficulty a prosecutor faces in proving intent to cause harm in cases involving professional athletes.

In only a relatively few cases would a prosecutor be able to prove that an injury caused during the heat of the game was anything other than a reflex action or an accident of the game.[76] Even if intent could be shown, there appears to be a general reluctance to convict an athlete for an assault committed during a professional game.[77] Fans witnessing a fight between opposing players may be reluctant to distinguish between an accidentally or intentionally inflicted blow;[78] they may also be biased toward their team.[79] Further, although criminal convictions may serve to warn amateurs who seek to emulate the professionals,[80] the typical prosecutor may feel that the resources of his office are better directed elsewhere.[81] On the other hand, the immunity from prosecution that an athlete has traditionally received by wearing a uniform should not extend to criminal conduct.[82] The threat of criminal sanc-

72. *Id.* at 284, 381 N.Y.S.2d at 979.
73. *See* text & notes 62-64 *supra.*
74. *See* text & notes 43-61 *supra.*
75. *See* text & notes 65-67 *supra.*
76. Hechter, *supra* note 2, at 430.
77. *Id.* at 431; Note, *supra* note 3, at 172.
78. Létourneau & Manganas, *Violence in Sports: Evidentiary Problems in Criminal Prosecutions*, 16 OSGOODE HALL L.J. 577, 579 (1978) (T. Burris trans.).
79. *Id.*
80. Note, *supra* note 3, at 174-75.
81. *See* Hechter, *supra* note 2, at 431. "In the United States, prosecutors have been reluctant to enforce criminal codes on any playing field." *Id.*
82. Flakne & Caplan, *supra* note 67, at 35.

tions would deter the athlete's participation in criminal behavior.[83]

The criminal process is not designed to provide compensation for the injuries an athlete suffers. Civil litigation, however, can provide such compensation. In addition, the threat of civil litigation—the threat of holding an assailant and the team personally liable for the victim's injuries and the value of the loss of services to the victim's team—may reduce sports injuries.[84] As the court in *Hackbart v. Cincinnati Bengals, Inc.*[85] acknowledged: "[T]he potential threat of legal liability has a significant deterrent effect and . . . private civil actions constitute an important mechanism for societal control of human conduct."[86]

CIVIL LIABILITY: COURTS SORT SPORTS TORTS

Traditional defenses to civil liability for sports injuries were first eroded at the amateur level.[87] In 1979, in *Hackbart v. Cincinnati Bengals, Inc.*,[88] a professional athlete was finally given the right to sue for a civil remedy.[89] This section will first consider the traditional approaches to civil recovery in amateur sports and then discuss the more recent trends that have allowed recovery for professional athletes.

Civil liability in amateur sports is generally based upon a claim of negligence.[90] Traditionally, four elements are required to maintain a cause of action for negligence: 1) a duty requiring a certain standard of conduct to protect others from unreasonable risks; 2) a breach of this standard; 3) a reasonably close causal connection between the failure of the defendant to meet this standard and the resulting injury; and 4) actual damage resulting to another.[91] Two defenses to a negligence claim are contributory negligence and assumption of risk.[92]

Contributory negligence occurs when the injured person fails to meet the standard of care required of a reasonable person to avoid being injured under the given circumstances.[93] The contributory negligence defense has generally been used in cases where spectators have

83. *Id.*
84. *See* note 15 *supra*. The Houston Rockets settled its suit against California Sports, Inc. for the loss of Rudy Tomjanovich's services, gate receipts, and money for replacements. *Recent Cases, supra* note 15, at 107.
85. 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).
86. 601 F.2d at 520.
87. *E.g.*, Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976); Niemczyk v. Purleson, 538 S.W.2d 737 (Mo. Ct. App. 1976).
88. 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).
89. 601 F.2d at 526.
90. J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 8.02, at 933 (1979).
91. W. PROSSER, THE HANDBOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971).
92. J. WEISTART & C. LOWELL, *supra* note 90, at 934-35.
93. W. PROSSER, *supra* note 91, § 65, at 416-17.

been injured; no case involving athletes alone seems to rely solely on this defense.[94]

The assumption of the risk defense is created when a person, knowing harm may occur, voluntarily assumes the risk of another person's conduct.[95] The rationale of the assumption of the risk defense is that the participants are presumed to know of the myriad mishaps that may occur on the playing field.[96] By voluntarily engaging in the sport, the player assumes the risk of any injury that can be reasonably foreseen.[97] A player does not, however, assume the risk of an injury caused by conduct that the injured person could not reasonably foresee.[98] Behavior violating the rules and customs of the sport has been held to create an unforeseeable risk, thereby precluding an assumption of the risk defense.[99]

Although claims are most frequently based on negligence, another avenue of recovery is reckless misconduct. The liability standard for reckless misconduct differs from that for negligence in that reckless misconduct requires the actor to intentionally choose a course of conduct knowing there is a strong probability that harm to another will

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94. Contributory negligence was raised as a defense in *Hackbart*, but it was found inapplicable since negligence did not apply. 601 F.2d at 520.

95. J. WEISTART & C. LOWELL, *supra* note 90, at 935.

96. *See* Tavernier v. Maes, 242 Cal. App. 2d 532, 552-53, 51 Cal. Rptr. 575, 589 (1966); Tite v. Omaha Coliseum Corp., 144 Neb. 22, 35, 12 N.W.2d 90, 97 (1943); Rosensweig v. State, 5 A.D.2d 293, 296, 171 N.Y.S.2d 912, 914 (1958); Vendrell v. School Dist. No. 26 C, 233 Or. 1, 15-19, 376 P.2d 406, 412-13 (1962).

97. Langerman & Fidel, *Responsibility Is Also Part of the Game*, TRIAL, Jan. 1977, at 25.

98. Niemczyk v. Burleson, 538 S.W.2d 737, 739 (Mo. Ct. App. 1976); Alpert v. Finkelstein, 42 A.D.2d 515, 515, 344 N.Y.S.2d 649, 650 (1952); Oberheim v. Pennsylvania Sports & Enterprises, Inc., 358 Pa. 62, 68, 55 A.2d 766, 769 (1947).

99. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520-21 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979); Nabozny v. Barnhill, 31 Ill. App. 3d 212, 215-16, 334 N.E.2d 258, 260-61 (1975); Bourque v. Duplechin, 331 So. 2d 40, 42 (La. Ct. App. 1976); Niemczyk v. Burleson, 538 S.W.2d 737, 739 (Mo. Ct. App. 1976). *See* Note, *supra* note 3, at 156-59.

Various commentaries on the scope of consent indicate that some question remains as to whether violations of rules may be expected by the players. One commentator is of the view that players do not consent to injury caused by play that falls outside the rules, while another maintains that players may even consent to force used outside the rules if that type of violation may be expected to occur in a game. *Id.* at 156-57 (discussing divergence). Adding "customs" to the test may reconcile these views. If a rule violation has become customary in the game, a player may be assumed to have accepted the risk of any injury arising from such a rule violation. Any injury caused by conduct that violated both rules and customs would not be subject to an assumption of the risk defense, nor could the plaintiff be said to have consented to the injury. *But see* RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965), which 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. . . .

Id. Thus, under the *Restatement*'s scheme, the court is expected to distinguish between a violation of rules designed to protect the athletes from a violation of rules designed to ensure more skillful play. *Id.* Distinguishing between rules on the basis just described may prove to be a difficult task in the actual litigation of a sports violence case. This view indicates that a violation of either rules or customs prevents operation of an assumption of the risk defense.

result.[100] The hope that the act will prove to be harmless is irrelevant.[101] Because the actor's recklessness has created a substantially greater risk of harm than in the typical negligence situation, the defense of contributory negligence is inapplicable.[102] A plaintiff cannot be considered to contribute to the injury when the risk is unforeseeable because of another's recklessness.[103] Defenses to reckless misconduct are: 1) actions by the plaintiff in reckless disregard of his or her own safety;[104] and 2) assumption of the greater degree of risk by the plaintiff.[105]

Application of the reckless misconduct standard, which requires an intentional act creating a greater risk of harm, results in a lower standard of care toward one's competitors than where negligence is the standard of care. For reasons discussed in more detail below,[106] the reckless misconduct standard is particularly suited to professional sports contests; it permits participants to play the sport at a higher level of competition without incurring liability than would be possible under the negligence standard of care. A simple negligence standard may be more appropriate in amateur sports as it would require each competitor to maintain a higher level of care for his fellow competitors.

Two separate standards exist in determining liability for sports injuries incurred by players: 1) the negligence standard generally applied in amateur sports;[107] and 2) the reckless misconduct standard that may be applied in professional sports.[108] The difference in standards for amateur and professional sports may be based, at least in part, upon the perceived differences in player attitudes. Professional sports are commercial enterprises.[109] Thus, professional athletes may be assumed to be playing as much for their salaries as for their enjoyment of the sport.[110] Amateurs, on the other hand, are assumed to be playing for the love of the sport alone.[111] The difference in motivation combined

100. RESTATEMENT (SECOND) OF TORTS § 500 (1965).
101. *Id.* Comment f.
102. *Id.* § 503(1).
103. *Id.* Comment b. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).
104. RESTATEMENT (SECOND) OF TORTS § 502 (1965).
105. *Id.* § 503(4).
106. See text & notes 107-14 *infra.*
107. See text & notes 90-99 *supra.*
108. See text & notes 100-05 *supra.*
109. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 354 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).
110. *See* Note, *supra* note 3, at 159 n.39.
111. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 358 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). "Football as a commercial enterprise is something quite different from athletics as an extension of the academic experience and what I have said here may have no applicability in other areas of physical competition." *Id.*

with the difference in the level of skill at which the sport is played[112] justifies a standard of care at the professional level different from that imposed at the amateur level.[113] Further justification for a different standard stems from the use in professional sports of artificial stimulants, which reduces the ability of the player to rationally assess the violence employed.[114]

Several recent amateur sports cases appear to have combined the negligence and reckless misconduct theories.[115] Combining these two theories might provide a less restrictive standard of care for the amateur athlete participating in a sport where a greater degree of bodily contact might reasonably be expected to occur. The first of these cases was *Nabozny v. Barnhill*.[116] Nabozny was playing goalie in an amateur soccer match when an opponent kicked him in the head.[117] The *Nabozny* court determined that when teams involved in athletic competition are trained and coached in the rules of the game and one of the rules pertaining to the safety of an athlete is broken resulting in injury to another player, the athlete who causes the injury is liable in a tort action.[118] An assumption of the risk defense was negated by the fact that a violation of the safety rules created a dangerous situation to which the plaintiff could not consent.[119] This enabled the *Nabozny* court to permit recovery.[120] This emphasis on conformance to the rules of the game as a standard of conduct permits free and vigorous participation in the sport while protecting the individuals from injuries caused by those acting outside the rules.[121]

The court explicitly stated that a "reckless disregard for the safety

112. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 354 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

113. Niemczyk v. Burleson, 538 S.W.2d 737, 741 (Mo. Ct. App. 1976).

> [W]hether one player's conduct, causing injury to another, constitutes actionable negligence hinges upon the facts of the individual case. Material factors include the specific game involved, the ages and physical attributes of the participants, their respective skills at the game and their knowledge of its rules and customs, [and] their status as amateurs or professionals. . . .

Id.

114. J. UNDERWOOD, *supra* note 1, at 71-88.

115. *See, e.g.*, Stewart v. D & R Welding Supply Co., 51 Ill. App. 3d 597, 366 N.E.2d 1107 (1977); Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976). It is unclear whether the courts intended to combine the two theories, or simply used language from each.

116. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

117. *Id.* at 214, 334 N.E.2d at 259. The injury occurred after a teammate passed the ball to Nabozny. *Id.* Nabozny went down on his knees and scooped the ball to his chest. *Id.* at 214, 334 N.E.2d at 260. Barnhill, a player for the other team, continued to run toward Nabozny and kicked Nabozny in the head. This directly violated the rules of the game. *Id.* Nabozny suffered permanent brain damage from the injury. *Id.*

118. *Id.* at 215, 334 N.E.2d at 260-61.

119. *Id.* at 216, 334 N.E.2d at 261.

120. *Id.* The court stressed that the plaintiff was exercising due care for his own safety and had no reason to know of the danger the defendant created. *Id.*

121. 42 MO. L. REV. 347, 354 (1977).

of other players"[122] would not be excused because "[t]o engage in such conduct is to create an intolerable and unreasonable risk of injury to other participants."[123] The court went on, however, to consider whether the plaintiff was contributorily negligent,[124] which suggests that the court was considering this case as a negligence claim rather than a claim of recklessness.[125] If the court was combining the two theories, the intention may have been to find that the duty owed to other participants by an athlete in a contact sport is somewhat less than the duty owed by athletes in noncontact sports—without entirely abandoning the duty of care found in a negligence cause of action. The appellate court concluded that questions of negligence and contributory negligence should be questions for the jury.[126] Therefore, it reversed the directed verdict of the lower court and remanded the case for trial on those issues.[127]

In *Hackbart v. Cincinnati Bengals, Inc.*,[128] the Tenth Circuit Court of Appeals adopted the standard of reckless misconduct for determining liability in professional football games.[129] Whether civil liability could be extended to professional athletes was the underlying issue in *Hackbart* at the district court level[130] and again on appeal.[131] The Tenth Circuit reversed the district court's decision that had denied Dale Hackbart of the Denver Broncos a cause of action in tort.[132] Hackbart's neck was seriously fractured by Charles "Booby" Clark of the Cincinnati Bengals during a game in 1973.[133] The blow was in no way connected with the action on the field,[134] but the Tenth Circuit denied recovery on the basis of public policy.[135] The public policy rationale raised by the district court was that football, like coal mining and railroading, was government sanctioned and was also inherently

122. 31 Ill. App. 3d at 215, 334 N.E.2d at 261.
123. *Id.*
124. *Id.*
125. *See* text & notes 115-16 *supra.*
126. 31 Ill. App. 3d at 216, 334 N.E.2d at 261.
127. *Id.*
128. 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).
129. *Id.* at 524-25.
130. 435 F. Supp. 352, 358 (D. Colo. 1977).
131. 601 F.2d at 521.
132. *Id.* at 527.
133. *Id.* at 518. Clark had run a pass play, but a member of Hackbart's team intercepted the pass. *Id.* at 519. Because of this interception, Hackbart, who had been defending against Clark, suddenly found himself in an offensive role. Hackbart proceeded to block Clark by throwing himself in front of Clark. Keeping one knee on the ground, Hackbart watched the play proceed back down the field. Clark was so angry and frustrated by this course of events that he clubbed Hackbart's neck from the rear with his forearm. The blow knocked both players to the ground. Hackbart's neck was seriously fractured as a result of the blow. Nevertheless, Hackbart continued to play for two successive weeks before he was released on waivers and sought independent medical advice. At this time, the fracture was first revealed. *Id.*
134. *Id.* at 519.
135. *Id.* at 520.

dangerous to the health and welfare of its participants. Therefore, it should be regulated by the government, just as coal mining and railroading are.[136] Furthermore, the difference between legal and illegal hits is so small as to be inarticulable, which the court reasoned, would lead to conflicting decisions in each of the states in which the game is played.[137] This in turn would essentially destroy the present NFL sport since each state would subject the teams to differing legal standards for the same action.[138] For these reasons, the court held that the only government involvement in the NFL should come through the legislative branch.[139]

Hackbart alleged six theories of liability in the district court.[140] The first of these, intentional misconduct,[141] was barred by the Colorado statute of limitations.[142]

The second and third theories, reckless misconduct and negligence, alleged liability arising from the defendant's duty to act as a reasonably prudent person toward the plaintiff.[143] Despite the fact that the injury occurred outside the scope of the rules,[144] the district court judge denied liability.[145] He stated that the tort claim was to be examined in the context of football played as a commercial enterprise whose most obvious characteristic is violent physical contact.[146] He stressed the game's emphasis on the aggressiveness of the players, fueled by the pregame psychological preparation, and the intensity of the game with its sudden reversals and high level of competition.[147] Because of these factors, the judge held that upon entering the playing field, Hackbart assumed the risk of the injury.[148] There would be no recovery, therefore, even if Clark had breached a duty to Hackbart.[149]

Hackbart's fourth theory of liability, that Clark was guilty of outrageous conduct,[150] was also found inapplicable as Clark's conduct did

136. 435 F. Supp. at 357.
137. *Id.* at 358.
138. *Id.*
139. *Id.*
140. *Id.* at 355-57.
141. *Id.* at 355. Intentional conduct, according to the *Hackbart* court of appeals, is the greater degree of intent to cause injury required to distinguish reckless misconduct from assault and battery. 601 F.2d at 524; *see* text & notes 167-69 *infra.*
142. 435 F. Supp. at 355.
143. *Id.*
144. *See id.* at 353-54.
145. *Id.* at 357-58.
146. *Id.* at 354.
147. *Id.* at 354-55.
148. *Id.* at 356.
149. *Id.*
150. *Id.* Outrageous conduct, according to the court, arises from behavior that departs from societal norms to such an extent as to be considered atrocious and completely intolerable. Severe emotional distress results from outrageous behavior. The court did not find that Hackbart suf-

not fall outside the accepted norms of the NFL.[151] The fifth claim was based on interference with contract.[152] Since Hackbart's team, the Denver Broncos, fully performed their contract with him, and since Clark did not intend to interfere with Hackbart's contract when he hit Hackbart, Clark was not liable under this theory.[153]

Hackbart finally claimed that the Cincinnati Bengals were negligent in failing to properly instruct and control Clark. Since Clark's conduct was typical of the behavior in the NFL, the court found that the team had properly instructed him and was, therefore, not negligent.[154]

After discussing the alleged theories of liability, the judge, in dictum, considered whether the court should find liability for injuries incurred by participants in any professional football game.[155] Because of the higher skill level than that found among amateur athletes and the greater physical abilities of the players at the professional level, as well as the lack of a consistent code of conduct for the participants,[156] the trial judge held that it would be impossible for a court to differentiate between violations occurring during the course of fair play and those subject to liability because of deliberate or reckless actions beyond the bounds of the rules and customs of the game.[157] Since the NFL is a self-regulated industry which implicitly receives the support of the government, the judge ruled that it was not the province of the court to interfere.[158] Thus, regulation of violence in each professional sport should be left to the sport itself and to the government through legislation.[159]

In reversing the district court's decision, the Tenth Circuit followed a different rationale and found a cause of action for the plaintiff's injuries.[160] The court held that there were "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."[161] The appellate court found that there were specific rules prohibiting the type

fered severe emotional distress from Clark's actions, nor did it find Clark's actions outside the societal norms of the NFL. *Id.*

151. *Id.*

152. *Id.* Interference with contract requires intent by the defendant to cause a breach of contract and actual performance by the defendant of some action which leads to the breach of the contract. *Id.*

153. *Id.* at 356-57.

154. *Id.* at 357.

155. *Id.* at 357-58.

156. *Id.* at 358.

157. *Id.*

158. *Id.* at 357.

159. *Id.* at 358.

160. 601 F.2d at 527.

161. *Id.* at 520.

of blow which injured Hackbart.[162] Furthermore, the testimony of the players demonstrated that intentionally striking a player from the rear is also prohibited by the customs of the game.[163] Therefore, the court determined that retaliation should not be the only possible remedy for victims of intentionally inflicted injuries.[164] It stated that the conduct in *Hackbart* might constitute reckless misconduct rather than negligence.[165] According to the court, the essence of negligence is the creation of an unreasonable risk of harm. Behavior which under other circumstances would be considered negligence, is inherent in a violent sport such as football. Since players know negligence is inherent in the sport, a competitor's claim of negligence would be defeated by an assumption of the risk defense. A player would be liable under a reckless misconduct standard, on the other hand, for choosing a course of action involving a substantially greater risk of harm to another than would be created by negligence alone.[166]

The Tenth Circuit then compared the degree of intent necessary for reckless misconduct with that necessary for the intentional torts of assault and battery.[167] Recklessness is like assault and battery in that the act itself is intentional.[168] Although an intent to cause injury is a necessary element in assault and battery, the harm arising from reckless misconduct results from a failure to realize the extreme harm caused by the performance of the act. For this reason, the court considered recklessness to be a "lesser included act" of assault and battery.[169]

Although the statute of limitations had run for assault and battery, Clark could still be held liable under the recklessness theory which is subject to a six-year statute of limitations.[170] The court said that since Clark's action was clearly an intentional act,[171] the fact that the result-

162. *Id.* at 521.
163. *Id.*
164. *Id.* Whether retaliation would subject the retaliator to criminal liability would certainly depend upon the prosecutor and the jury, as was seen in the cases of Forbes, Maki, and Green. See text & notes 43-83 *supra*.
165. 601 F.2d at 524.
166. *Id.* at 520.
167. *Id.* Assault in tort is any act that creates an apprehension of a harmful or offensive touching. W. PROSSER, *supra* note 91, § 10, at 38. Battery is the unpermitted contact with a person's body or anything attached to it or identified with it, such as a cane. *Id.* § 9, at 34.
168. 601 F.2d at 524.
169. *Id.* at 524-25. In both battery and reckless misconduct, the injury arises from an unlawful touching. With reckless misconduct the actor does not intend the harm to result from the intentional act. In battery, however, both the act and the touching which causes the injury are intended. *Id.* at 525. The same injury might be interpreted as a battery if the intent to injure were present, or as reckless misconduct if the intent to injure were not present. Because of the differing degrees of intent necessary to find either battery or reckless misconduct as the cause of the injury, the court has apparently chosen the criminal law analogy of "lesser included act" to more clearly illustrate the connection.
170. *Id.* at 525.
171. *Id.* at 524.

ing serious injury was not intended would not preclude Hackbart from proving that Clark acted recklessly.[172] Thus, the court concluded that Hackbart should be allowed to offer proof of this misconduct.[173]

The *Hackbart* decision, then, allows a civil cause of action for injuries suffered during the course of a professional sports event. The decision of the Tenth Circuit is more reasonable than that of the district court because it allowed an injured player a remedy beyond simple retribution,[174] while still maintaining the integrity of the sport.[175] The district court would have left resolution of the question to the legislature.[176] Legislatures have not, on the whole, been in the forefront in reducing violence in professional sports.[177] The Tenth Circuit carefully restricted the circumstances under which an athlete could recover by creating a test for determining whether an injury would be compensable.

The test for civil liability set out in *Hackbart* consists of three interlocking parts: 1) there must be an intentional act 2) violating the rules and customs of the game 3) that the actor knows contains the probability of injury to another.[178] Players can play the game at the professional level without incurring liability for their acts, so long as their actions do not satisfy all three parts of this test.

The impact of the *Hackbart* decision upon professional football has yet to be determined. The Tenth Circuit's language indicates that the decision need not toll the death knell of professional football. The three-part standard places the power to reduce violence squarely within the control of the NFL.[179] The NFL could reduce the number of injuries and the violence by altering the rules and customs of the game.[180]

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172. *Id.* at 525.
173. *Id.*
174. *Id.* at 521.
175. *Id.* at 525; see text & notes 178-82 *infra.*
176. 435 F. Supp. at 357-58.
177. Rep. Ronald Mottl (D-Ohio) introduced a bill proposing that the use of excessive physical force in sports be made a federal crime punishable by a year in prison and a $5,000 fine. H.R. 7903, 96th Cong., 2d Sess. (1980). This legislative move comes a timely 75 years after President Theodore Roosevelt called the leaders of football together to order them to change the rules and protect the players, J. UNDERWOOD, *supra* note 1, at 93, or risk abolition of the game, Hechter, *supra* note 2, at 436.
178. 601 F.2d at 520, 525.
179. *See* J. UNDERWOOD, *supra* note 1, at 71. Underwood describes the present disciplinary action of the NFL as having done nothing more than "reddened a few wrists and put a small dent in a few pocketbooks. . . ." *Id.* He reports that the players feel the best way to end dirty football is to put the violators on the bench or " 'throw their ass out of the game. . . .' " *Id.* at 164-65 (quoting Johnny Unitas).
180. *Id.* at 178-79. Underwood demonstrates the present lack of concern of the NFL by quoting from an interview with the General Manager of the Dallas Cowboys in which the latter commented that linemen in the NFL wrap their forearms for protection rather than as weapons, that spearing with the helmets is not taught, and that while no one likes acts which lead to severe injuries, such as the paralysis of Darryl Stingley, the world has to go on. *Id.* at 65. According to Underwood, this statement is characteristic of the attitudes of the leaders in professional football.

Even stricter enforcement of the present rules would encourage changes in conduct.[181] Violators of the rules and customs of the game would be subject to civil liability since the assumption of the risk defense would fail.[182] Injuries occurring within the scope of the rules and customs of the game, however, would be subject to an assumption of the risk defense.[183]

The *Hackbart* decision should also provide guidance for allowing recovery in suits brought by professional athletes in other sports. The "rules and customs" language enables a court to permit recovery for injuries resulting from behavior that was unnecessary in light of the purpose of the sport. Whether imposing civil liability would actually have a deterrent effect in professional sports, however, may be impossible to determine. In sports injury cases, the doctrine of respondeat superior would operate to place the burden of compensation, and thus what would ordinarily be considered the deterrent effect, on the franchise rather than on the individual athlete.[184] Because the franchise can pass the cost of the "human breakage" on to the ticket holders,[185] the deterrent effect of the litigation may be nominal, at least initially. Violence may be encouraged as long as it seems profitable.[186] Even if at some point the increased costs can no longer be passed along to ticket holders because they find the cost of the more expensive tickets too great in terms of other opportunities foregone, the franchise may presumably still pass the costs on to the broadcasting networks.[187] The

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Id. Underwood does suggest rule changes that he believes would make football safer without destroying the game. *Id.* at 178-81.

181. *Id.* at 161-62. Underwood claims that game officials are willing to put up with a great deal of violence in order to keep their salaries. *Id.* at 162. Referees who do not adequately restrain players through rule enforcement may eventually find themselves held liable for injuries caused through their failure to do so. Narol & Dedopoulos, *Potential Liability, A Guide to Referees' Rights*, TRIAL, Mar. 1980, at 18.

182. *See* text & notes 95-99 *supra.*

183. *See* text & notes 95-97 *supra.*

184. Liability through the doctrine of respondeat superior could easily be imputed to the team since the actions of the player would meet the required standard. Liability may be imputed to the master when the servant's conduct falls within the scope of his employment, as long as the conduct is of the kind authorized, occurs within the authorized time and space, and is performed, at least in part, with the desire to serve the master. W. PROSSER, *supra* note 91, § 70, at 461. Respondeat superior may still be imputed to the master even if the master specifically and emphatically prohibited the employee from engaging in certain conduct as long as the employee continued to engage in the prohibited conduct in an effort to carry out his authorized purpose. *Id.*

185. Higher player salaries are already passed on to the ticketholders. J. UNDERWOOD, *supra* note 1, at 61-62. The American Insurance Association placed an advertisement in *Sports Illustrated* warning that since the trend in the legal system is toward holding manufacturers of helmets liable for injuries, insurance companies are going to charge more for coverage, which will in turn be passed on to consumers. SPORTS ILLUSTRATED, Oct. 13, 1980, at 6. The advertisement concluded by suggesting that the reader "[g]et involved! Become aware of proposals to improve fairness in the legal liability system." *Id.*

186. J. UNDERWOOD, *supra* note 1, at 61-63. Players themselves have discovered that a reputation for brutality is marketable since violence itself is considered marketable. *Id.* at 63.

187. As an illustration of the amounts of money involved in broadcasting professional football games, Commissioner Pete Rozelle signed a $650 million, four-year contract with the networks in

networks, in turn, will pass on the increased costs to their advertisers, and from there to the consumer. If, however, falling attendance leads to an apparent loss of revenue, or if advertisers stop sponsoring sporting events because the increased costs make their products less competitive or because advertising time on other programs becomes more cost effective, violence will be less profitable. When the costs of injuries outweigh the perceived benefits, changes will come to the game.[188]

Even if civil liability will not effectively deter violence in professional sports, it will still permit an injured athlete to recover for his injuries. Since one of the purposes of tort liability is to make the injured party whole,[189] professional athletes should not be denied recovery in a civil tort action merely because of their professional status.

CONCLUSION

Injuries to professional athletes have been on the rise because of the increasing incidence of violence in professional sports. This violence results in part from the corporate drive to make money, but it is also fueled by coaching techniques, drugs, and societal pressures. The legal system can help curb violence through criminal sanctions and civil liability.

Criminal sanctions have the benefit of making individuals directly responsible for their acts. Although civil liability would normally also hold individuals responsible for their acts, the doctrine of respondeat superior tends to relieve the individual wrongdoer from personal liability. The disadvantages of criminal sanctions may be seen in the difficulties in securing convictions in a sports-oriented society and in the varying importance that different prosecutors may attach to reducing violence of this nature. As a consequence, enforcement of criminal statutes against athletes is haphazard.

Civil liability has the primary benefit of providing compensation for the injured person. It may have a deterrent effect by causing the athlete to play within the rules and customs of the game or else be liable for the injuries caused. The doctrine of respondeat superior may encourage teams to curb more violent play to reduce the costs of litiga-

1978 to televise the regular season games. J. UNDERWOOD, *supra* note 1, at 92. NBC paid $6 million just to televise the Super Bowl in 1978. *Id.* at 90. A spokesperson for the NFL stated that no information concerning dollar amounts has ever been released by the NFL. She did describe the network package as including all regular, pre- and post-season games. ABC broadcasts Monday night games, and NBC and CBS split Sunday games, with CBS broadcasting NFC (National Football Conference) games and NBC broadcasting AFC (American Football Conference) games. The conference affiliation of the visiting team determines which network broadcasts interconference games. Telephone interview with Nancy Behar, NFL Aide to the Director of Broadcasting (Nov. 3, 1980).

188. J. UNDERWOOD, *supra* note 1, at 176.

189. W. PROSSER, *supra* note 91, § 1, at 6.

tion. If the violent play appears to have a positive effect on the ticket sales, however, the teams may simply pass the increased costs on to the fans and do nothing to change what they perceive as a profitable way of doing business. Any ultimate resolution, therefore, must come from the fans themselves. When the public becomes more interested in watching a sport for the skill with which it is played rather than for the number of violent acts committed, then the leagues themselves will work to eliminate excessive violence from the sport.