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Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?

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COMMENT

SPORTS OFFICIALS SHOULD ONLY BE LIABLE FOR ACTS OF GROSS NEGLIGENCE: IS THAT THE RIGHT CALL?

KENNETH W. BIEDZYNSKI, Esq.*

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INTRODUCTION

At the outset, it is useful to observe some basic truisms about amateur and professional sports in this country. First, and probably foremost, sports is a big money industry.¹ Owners, players,

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1. See, e.g., Bradley C. Nielsen, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681, 681 n.1 (1989). Consider also that the total gross revenues for the major professional leagues in this country in 1988 reached \$2.7 billion. Robert J. Samuelson, *Sporting Life: Oh, The Money We Spend—And Bet—On Sports*, WASH. POST, Aug. 30, 1989, at A23. Of 1988's total \$2.7 billion figure, Major League Baseball (MLB) accounted for the most revenues, at approximately \$1 billion. *Id.* More currently, for the 1991 season, MLB's average salary was \$851,492. *How Does A 42.5-Percent Increase In Salary Sound? Players' Average Raises*, AKRON BEACON J., Dec. 5, 1991, at C4.

agents, retailers, and cities prosper each year from the tremendous revenues derived from both amateur and professional sports. Additionally, a host of promotional and media groups are required to coordinate and cover these events for millions of viewers and listeners each year so that today's sports fan can access virtually any sport from nearly anywhere in the country (and sometimes the world) at the push of a button.

Another group of individuals play perhaps the most important supporting role (and certainly most immediate to the participants themselves) within this massive industry: the sports officials.² However, unlike the other groups, sports officials do not usually benefit from the tremendous revenues, and rarely (if ever) succeed in gaining the public spotlight in a favorable way.³ Most fans know nothing about the officials on a personal level, and are not even aware of the particular function they play in officiating a game or event.⁴ Unfortunately, the official receives no attention until he or

2. As used herein, the term "sports official" denotes a person implementing certain rules of a game for the orderly playing of a particular sporting event. In contrast, some commentators define "sports officials" as "those individuals who officiate or are charged with the administration of a game or contest." Darryll M. Halcomb Lewis & Frank S. Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L.REV. 673, 673 n.1 (1990) [hereinafter Lewis & Forbes]. Depending upon the sporting event, there may be different types of, and responsibilities for, "sports officials." See Victoria J. Davis, *Sports Liability: Blowing the Whistle on the Referees* 12 PAC. L.J. 937, 937 n.1 (1981) (hereinafter Davis). For example, in amateur ice hockey, the sports officials consist of a referee, a linesman, a goal judge, an official scorer, and a timekeeper. See 1993-95 Official Playing Rules of USA Amateur Hockey, Rules 502-507 (1993) [hereinafter *USA Hockey Rules*]. The referee is responsible for the calling of penalties and has "general supervision of the game, and shall have full control of all game officials and players during the game, including stoppages . . ." *Id.* Rule 502(a). Conversely, the Linesman's duties are to "determine any infractions of the rules concerning off-side play at the blue lines, or center line, or any violation of the 'Icing the Puck' rule." *Id.* at Rule 503(a). Finally, although some commentators have equated sports officials with "participants," some courts have not. See, e.g., Charles E. Friend et al. eds., 4 ACTIONS AND REMEDIES § 17:08 (1986 rev. ed.) (stating that "participants" encompass "all persons who participate in the activity, including . . . umpires or referees, and additional personnel, such as . . . scorekeepers . . ." (footnotes omitted)). Compare *Hockey Club of Saginaw v. Ins. Co. N. Am.*, 468 F. Supp. 101, 103 (E.D. Mich. 1979) (holding injured sports official could recover under hockey club's comprehensive general liability policy despite exclusion for personal injury incurred while "participating" in sports contest because linesman was not deemed a "sports participant").

3. See, e.g., Marty Noble, *Rose's Punishment Manager Suspended 30 Days for Showing Ump*, N.Y. NEWSDAY, May 3, 1988, at 138 (describing incident where Cincinnati Reds manager Pete Rose pushed an umpire during a game against the New York Mets). See also, Tim Dermody, *Games Have Been Canceled Because of the No-shows—Most Blame the Walk-on Coaches with Interest in Only One Sport. What Happened to the Umpires?*, L.A. TIMES, Mar. 31, 1989, at pt. 3, p. 18, col. 1 (describing difficult and abusive conditions, including nominal pay, which purportedly led to shortage of baseball umpires).

4. Often, officials must balance competing "functions" in overseeing the action. This

she has "erred"⁵ or is sued.

Recent stories detail the proliferation of lawsuits directed at sports officials.⁶ To illustrate the number and variety of stories related to litigation against sports officials, consider the following events which were recently highlighted in the February 1994 issue of *Referee* magazine:

Legal Log. From courtrooms of various venues came these legal cases impacting officials. . . . U.S. District judge dismisses defamation lawsuit filed by ex-Atlantic Coast Conference women's basketball ref Pete Reed against the ACC; Dee Todd, supervisor of ACC women's basketball refs, and Ray Johnstone, then-ACC coordinator of women's basketball officials. . . . Former NFL official Ben Dreith receives \$165,000 plus \$100,000 in legal fees for settling age-bias complaint vs. NFL. . . . Gene Calhoun, former Big Ten Conference football referee and ex-Big Ten supervisor of football officials, given two years probation after pleading no contest to cocaine-possession charge. . . . Dallas rec basketball league commissioner sentenced to one year probation and ordered to pay medical costs to Brian Brock, a six-year official who the commish [sic] punched in a post-game incident A 17-year old boy was killed and umpire Robert Lloyd's house was set on fire after a melee following a Castro Valley, Calif., youth baseball game N.L. ump Joe West files \$10 million lawsuit claiming that a longtime associate stole West's idea for a new model chest protector Ron Blaufarb, a football official from Suffolk, N.Y., receives an \$8,800 out-of-court settlement from a November 1988 assault at a local high school.⁷

This Comment addresses those situations where the sports official receives "attention" from being sued.⁸ Surprisingly, the lia-

usually goes unnoticed by the fans. See, e.g., Thom Greer, *Men in the Middle - Referees Must Prevent Injury yet Satisfy Fans*, PHIL. INQUIRER, May 19, 1983, at C06 (describing boxing referees' dilemma in trying to maintain the competitiveness of a bout while protecting the safety of the boxers).

5. As used herein, an "error" refers to "[a] mistaken judgment" BLACK'S LAW DICTIONARY 542 (6th ed. 1990). Other commentators writing on this topic have defined a sports official's "error" as either a "misidentification of fact[.]" a "misinterpretation of [a] rule[.]" or the official assessment of a penalty "other than the prescribed penalty" Lewis & Forbes, *supra* note 2, at 673, n.2.

6. See, e.g., Robert Tomsho, *More Referees Play Defense—In the Courts*, WALL ST. J., Aug. 11, 1989, at B1; David Brooks, *Umpires, Referees Are New Negligence Suit Targets*, 119 N.J.L.J. 757 (Apr. 30, 1987).

7. Jerry Tapp, 1993 *The Year in Review*, 19 *Referee* 36, 41 (Feb. 1994). See also Erik Brady, *For Officials, Judgment Call Has New Role*, USA TODAY, Aug. 13, 1990, at 01C (recounting law suits against sports officials).

8. This Comment includes anecdotes from the sport of ice hockey whenever possible. Although subjecting this Comment to great debate, it is submitted that ice hockey is one of

bility of a sports official, or as it is sometimes called, "sports official malpractice,"⁹ has received a fair amount of attention from commentators¹⁰ and cases¹¹ in this country and abroad.¹²

As one response to the increasing number of lawsuits involving sports officials, some state legislatures have enacted statutes to protect officials; they address issues such as the assault and battery of officials,¹³ and other sidelights.¹⁴ More pertinent to this Com-

the more difficult, if not the *most* difficult, sports to officiate. Yet, interestingly, most commentators (and even statutes, as will be seen), *do not* take into account the rapidly growing sport of ice hockey.

9. The term "sports official malpractice" embraces, as one author suggests, "bad judgment in calls, permitting games to be played under bad field conditions, allowing events to proceed despite threatening weather, and not inspecting the quality of equipment used by players." WALTER T. CHAMPION, *FUNDAMENTALS OF SPORTS LAW* § 4:1, at 76 (1990) [hereinafter *Champion*].

10. See, e.g., GEORGE W. SCHUBERT ET AL., *SPORTS LAW* 232-33 (1986); Herb Appenzeller ed., *SPORTS AND LAW: CONTEMPORARY ISSUES* 188-206 (1985) [hereinafter *SPORTS AND LAW*]; JAMES A. BAILEY & DAVID L. MATTHEWS, *LAW AND LIABILITY IN ATHLETICS, PHYSICAL EDUCATION, AND RECREATION* 6 (1984); ALAN S. GOLDBERGER, *SPORTS OFFICIATING: A LEGAL GUIDE* (1984) [hereinafter *Goldberger*]; Scott Parvin, *Judgment Calls—Sports Officials in Court*, 9 ENT. AND SPORTS LAW 9 (Fall 1991); Lewis & Forbes, *supra* note 2; Melvin S. Narol, *Courts May Soon Be Asked to be Monday-Morning Quarterbacks*, 3 ENT. AND SPORTS LAW 11 (Summer 1984); Davis, *supra* note 2; A.M. Swarthout, Annotation, *Liability for Injury to or Death of Umpire, Referee, or a Judge of Game or Contest*, 10 A.L.R.3d 446 (1966). See also Melvin S. Narol, *Sports Torts: A Standard of Care Issue*, 134 N.J. LAW. 41 (May/June 1990) [hereinafter *Narol, Sports Torts*]; Melvin S. Narol, *Protecting the Rights of Sports Officials*, 23 TRIAL 64 (Jan. 1987) [hereinafter *Narol, Protecting Rights*]; Brooks, *supra* note 6; Melvin S. Narol, *Refereeing Athletic Officials' Calls is Ruled Out-of-Bounds for Courts*, 9 NAT'L. L.J. 24 (Sept. 29, 1986); Melvin S. Narol, *The Official's Potential Liability for Injuries in Sporting Events*, 4 NAT'L. L.J. 20 (Sept. 6, 1982); Melvin S. Narol & Stuart Dedopoulos, *The Official's Potential Liability for Injuries in Sporting Events*, 4 NAT'L. L.J. 20 (Sept. 6, 1982); Melvin S. Narol & Stuart Dedopoulos, *The Official's Right to Sue for Game-related Injuries*, 4 NAT'L. L.J. 26 (June 7, 1982); Melvin S. Narol & Stuart Dedopoulos, *Defamation: A Guide to Referees' Rights*, 16 TRIAL 42 (Jan. 1980) [hereinafter *Narol, Defamation*]; Melvin S. Narol & Stuart Dedopoulos, *Potential Liability: A Guide to Referees' Rights*, 16 TRIAL 18 (March 1980) [hereinafter *Narol, Potential Liability*]; Melvin S. Narol & Stuart Dedopoulos, *Kill the Umpire: A Guide to Referees' Rights*, 15 TRIAL 32 (March 1979) [hereinafter *Narol, Kill the Umpire*].

11. See *infra* notes 43-77 and accompanying text.

12. See, e.g., G.M. Kelly, *Prospective Liabilities of Sport Supervisors*, 63 AUSTRAL. L.J. 669 (1989); 31 CAN. ENC. DIG. ONT. § 59 (3rd ed. 1990) (citing cases).

13. See, e.g., CAL. PENAL CODE § 243.8 (West Supp. 1994); DEL. CODE ANN. tit. 11, § 614 (Supp. 1994); MONT. CODE ANN. § 45-5-211 (1993); OKLA. STAT. ANN. tit. 21, § 650.1 (West Supp. 1994); 18 PA. CONS. STAT. ANN. § 2712 (Supp. 1993); W. VA. CODE § 61-2-15a (Supp. 1993). The constitutionality of Oklahoma's statute was upheld in *Carroll v. State*, 620 P.2d 416 (Okla. Crim. App. 1980).

In New Jersey, recent legislation has been introduced which would stiffen penalties for fans who assault sports officials and coaches. See Stacie Servetah, *No Roughing the Ref*, ASBURY PARK PRESS, Nov. 15, 1994, at A1. These tougher penalties would include up to nine months in jail for fans threatening sports officials, with the penalty increasing to four years if the official is injured. *Id.* at A6.

14. See, e.g., S.D. CODIFIED LAWS ANN. § 10-45-20.7 (Supp. 1993) (granting sports offi-

ment, some states have also attempted to curb the ever increasing threat of tort liability.¹⁵

This Comment agrees with the position taken by those states that grant sports officials a qualified tort immunity in civil lawsuits. Qualified immunity posits that unless the sports official partakes in actions or conduct which constitute either "gross negligence" or "recklessness," the sports official should *not* be held liable for his or her acts. Thus, sports officials are protected from claims of "ordinary negligence."

Part I of this Comment surveys the current state of the law regarding "sports official malpractice," and includes a discussion of that body of law's antithesis—the sports official as plaintiff. It is important to understand how sports officials fare as plaintiffs in order to comprehend why an alleged breach of a sports official's standard of care should not be actionable where the allegations claim acts of "ordinary negligence."

Part II critiques the current standard, which generally imputes liability based on a showing of "ordinary negligence;" it concludes that absent situations where the sports official has committed a crime, an intentional tort, or has been found to have acted in a manner which constitutes recklessness or gross negligence,¹⁶ the official should not be liable for damages or otherwise legally responsible for "negligent" acts.¹⁷

ciala a tax exemption for "gross receipts of persons officiating amateur sporting events").

15. See *infra* notes 48-63 and accompanying text.

16. Arguably, the conceptual difference between "ordinary" negligence and "gross" negligence is just that—a concept, and nothing more. Nevertheless, for the purposes of this Comment, "gross" negligence is a breach of a standard of conduct which constitutes a derivation greater than "ordinary" negligence but which is less than tortious recklessness.

As it originally appeared, this [gross negligence] was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous, and struggling to assign some more or less definite point of reference to it, have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof—sometimes on the ground that this must necessarily have been the intent of the legislature. But it is still true that most courts consider that "gross negligence" falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind. There is, in short, no generally accepted meaning; but the probability is, when the phrase is used, that it signifies more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences.

W. PAGE KEETON et al., *PROSSER AND KEETON ON TORTS* § 34, at 211-12 (5th ed. 1984) (footnotes omitted) [hereinafter *PROSSER AND KEETON*].

17. Because of the obviousness of a sports official's responsibility for his or her criminal acts and his or her liability for the commission of an intentional tort, this Comment only addresses the extent that liability may be imposed upon a sports official for his or her *negli-*

PART I: SPORTS OFFICIALS AND THE LAW

A. *The Sports Official and Basic Tort Concepts*

Any discussion of liability in negligence¹⁸ for personal injuries¹⁹ must begin with a brief discussion of the general principles of

gent acts.

18. Tortious theories have not been the only bases for sports officials' liability. Some commentators have argued that officials should be liable under a "contractual duty of care" analysis. See, e.g., Davis, *supra* note 2, at 946-48 ("Obviously, a contract for a referee's services is intended to benefit sports participants, and athletes rely on having those services carried out in a non-negligent manner."). It is submitted that this reasoning is flawed because the reality is that most sports officials *do not* have contracts when they undertake to officiate a game. Moreover, even if such a document does exist, sports officials' contracts do not usually talk in terms of "quality of performance," but rather address personal concerns of the official such as "the fee, date, time of cancellation, rain-out arrangements, number of officials on the game and working conditions." GOLDBERGER, *supra* note 10, at 136. See also Lewis & Forbes, *supra* note 2, at 699 ("Typically, these contracts are drafted in a sketchy manner. The lack of details makes it difficult to analyze the parties' intent respecting sports officials' liability." (footnote omitted)). Thus, any analysis seeking to impose liability on sports officials based on contract principles should be viewed with skepticism.

19. Lawsuits involving personal injuries are not the only actions that have been brought against sports officials. For example, sports officials have been tortiously sued for economic loss caused by their erroneous officiating; however, no court to date has been receptive to these theories. See, e.g., Bain v. Gillispie, 357 N.W.2d 47, 49 (Iowa Ct. App. 1983) (affirming dismissal, absent showing of corruption or bad faith, of store owner's claim against basketball official where store owner asserted official's erroneous call destroyed store owner's market for selling sports memorabilia because the team the memorabilia portrayed had been eliminated from conference championship by the official's erroneous call); Georgia High Sch. Ass'n v. Waddel, 285 S.E.2d 7, 9 (Ga. 1981) (per curiam) (holding high school football referee's call made during high school football game, although erroneous, did "not present [a] judicial controversy[y]" and hence, it was not judicially reviewable). See also JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 2.15, at 154 (1979) (stating "the general rule will be that, in the absence of bad faith or corruption, the decisions of judges, umpires or referees in athletic contests will be final, and will not be disturbed—that is, they will be presumptively correct." (footnote omitted)); *Suit Flagged Refs Are Not Liable for Malpractice, Court Rules*, PHILA. INQUIRER, Sept. 7, 1984, at D07 (reporting court's ruling in Bain).

Some commentators posit that this position, however, may change with the advent of instant replay or sophisticated video technology. See, e.g., SPORTS AND LAW, *supra* note 10, at 202; Lewis & Forbes, *supra* note 2, at 676. However, it is still questionable (on both the basis of policy in encouraging competitive sports, see Shapiro v. Queens County Jockey Club, 53 N.Y.S.2d 135, 138-39 (N.Y. Mun. Ct. 1945), and the sophistication of technology) as to whether such decisions should be reviewable by a court of law. See SPORTS AND LAW, *supra* note 10, at 206 (stating that "[t]o permit sports officials to be sued in the absence of strong evidence of fraud or corruption would seriously impair the ability of a sports official to perform his task in an independent, professional and competent manner; it would also threaten the integrity of all levels of athletic competition."). Perhaps the Shapiro court was correct when it observed that the standard for such lawsuits challenging a game call should be restricted to those instances when "bad faith" is alleged and proven. 53 N.Y.S.2d at 139.

One leading commentator agrees this is the correct position the courts should take. See Narol, *Protecting Rights*, *supra* note 10, at 70-71 (stating that some "[c]ourts have dealt with whether a cause of action exists against an official for honest error or misapplication of

tort law. To recover in negligence, a plaintiff must prove the existence of a duty, a breach of that duty, the existence of a causal connection between the alleged negligent conduct and the plaintiff's injury,²⁰ and damages resulting from such conduct.²¹ Additionally, if the person found to have committed the negligent act(s) was in the employ of another, then his or her employer may also be liable for damages under the theory of *respondeat superior*.²²

Similarly, if the negligent actor was *not* an employee of another but was acting as another's agent,²³ then liability may be imposed upon the actor's principal under the theory of *vicarious liability*.²⁴ Conversely, a finding that a person was acting as an *independent contractor*²⁵ serves as an obstacle to these two theories of liability (*respondeat superior* or *vicarious liability*). In that instance, the alleged tortfeasor begets no liability, subject to exception.

In light of the foregoing, given that courts frequently characterize a sports official as an "independent contractor," the tortious doctrines of *respondeat superior* and *vicarious liability* will rarely prevail against sports officials.

For general contractors, the rule is that an "owner or employer

a rule [and] have found that there is no justiciable controversy. These courts have held correctly that judicial review will not be exercised." *But see Kelly, supra* note 12, at 677-78 (questioning continued viability of early Australian cases denying liability of horse officials for erroneous decisions but noting exceedingly difficult proof problems presented with litigating such cases).

20. In some instances, a lack of causation argument can be sufficient to relieve a sports official of liability. *See, e.g., Pape v. State*, 456 N.Y.S.2d 863, 864 (N.Y. App. Div. 1982) (finding cause of injury was not referee's failure to properly supervise intramural floor hockey game, but rather injured plaintiff's scuffle with an opposing player).

21. PROSSER & KEETON, *supra* note 16, at 164-65.

22. *Id.* at 499-508.

23. As a general matter, an agent is "[a] person authorized by another (principal) to act for or in place of him; one entrusted with another's business." BLACK'S LAW DICTIONARY 63 (6th ed. 1990) (citation omitted). There are various ways in which a principal-agent relationship can arise. For example, this relationship can arise through *actual authority* which is where the principal's words or conduct give a reasonable person in the agent's position the belief that the agent is authorized to act on behalf of the principal. *See generally* RESTATEMENT (SECOND) OF AGENCY § 26 (1958). Additionally, a principal-agent relationship can arise through *apparent authority*, where the principal's words or conduct give a *third party* a reasonable belief that the agent has authority to act on behalf of the principle. *Id.* § 8. Finally, a principal-agent relationship can arise through *inherent authority*. *Id.* § 8A.

24. *See* PROSSER & KEETON, *supra* note 16, at 508.

25. An "independent contractor" is "one who, in exercise of an independent employment, contracts to do a piece of work according to his own methods and is subject to his employer's control only as to end product or final result of his work." BLACK'S LAW DICTIONARY 770 (6th ed. 1990) (citation omitted).

For an excellent discussion of the nature of an independent contractor, *see* PROSSER & KEETON, *supra* note 16, at 509.

is not answerable for the acts of an independent contractor . . . unless the case comes within one of the exceptions to the rule”²⁶ In the case of a municipality, for example, exceptions to this rule include situations where the municipality *controls* the work of the contractor,²⁷ where the municipality acts under a duty imposed by statute,²⁸ where the city hires a contractor to perform work that is either “inherently or intrinsically dangerous,”²⁹ or where the city employs a contractor to perform an unlawful act.³⁰

Obviously, most of these exceptions, aside from the “control” exception, have little application to the case of a sports official. Cases involving sports officials have primarily focused on the “control” exception to independent-contractor-based employer immunity.³¹

Many courts conclude that where the school, entity, or institution does not retain some sort of *control* over the sports official, or (depending on the jurisdiction) where the sports official is *not* acting within the “ordinary course” of some sort of employment relationship, the sports official remains an “independent contractor” and not an employee.³² Hence, despite isolated decisions holding

26. 18 JAMES PERKOWITZ-SOLHEIM ET AL., THE LAW OF MUNICIPAL CORPORATIONS § 53.75.10, at 469 (3d ed. 1993) (footnotes omitted).

27. *Id.* § 53.76.10.

28. *Id.* § 53.76.20.

29. *Id.* § 53.76.30, at 480.

30. *Id.* § 53.76.40.

31. Similar cases involving athletic coaches have held as such. *See, e.g.,* Lasseigne v. Am. Legion, Post 38, 543 So.2d 1111, 1114 (La. Ct. App. 1989) (holding local post of national organization which organized baseball program was not liable for damages incurred to minor player during practice allegedly caused by coach’s negligence because coach was “solely responsible” for occurrences during practices).

32. A majority of the cases deciding the “status” of sports officials as independent contractors arose when the official attempted to collect workers’ compensation benefits, and not in the context of a negligence action. *See, e.g.,* Farrar v. D.W. Daniel High Sch., 424 S.E.2d 543, 544 (S.C. Ct. App. 1992); Lynch v. Workmen’s Compensation Appeal Bd., 554 A.2d 159, 163 (Pa. Commw. Ct.), *appeal denied*, 578 A.2d 416 (Pa. 1990); Daniels v. Gates Rubber Co., 479 P.2d 983, 985 (Colo. Ct. App. 1970); Gale v. Greater Washington Softball Umpires Ass’n, 311 A.2d 817, 822 (Md. Ct. Spec. App. 1973); Eehalt v. Livingston Bd. of Educ., 371 A.2d 752, 753 (N.J. Super. Ct. App. Div. 1977) (*per curiam*). In terms of workers’ compensation benefits claims brought by sports officials, “such recovery is rarely permitted” because most courts deem the sports official to be an “independent contractor, [and] never an employee of the officials’ association nor of the educational institution at which he or she officiates.” SPORTS AND LAW, *supra* note 10, at 193.

“Independent-contractor” status has also been litigated in the tort context. *See, e.g.,* Kennel v. Carson City Sch. Dist., 738 F. Supp. 376, 378 (D. Nev. 1990) (applying Nevada law to find a school district not liable, where basketball player sued school district alleging negligence of referees in failing to protect him from attack from opposing player, because school district lacked “control” over how referee officiated game); Harvey v. Ouachita Parish Sch. Bd., 545 So.2d 1241, 1243 (La. Ct. App. 1989) (finding that because schools conducted

otherwise,³³ courts rarely apply the doctrine of *respondet superior* to find the school, entity, or municipality liable for the tortious acts of the sports official.³⁴ A different situation presents itself

games and hired referees, referees were not agents or servants of athletic association despite the association's training and testing).

However, as one commentator has asserted, a sports official can be *both* an independent contractor and an employee for different purposes.

Unfortunately, the entire area of the legal status of the official as an independent contractor or employee is fraught with an overriding misconception which is held by many officials and administrators of officiating groups. The misconception takes the form of saying that officials working under any particular system are either independent contractors or employees—for all purposes. This is simply not true. . . . The point is, an athletic official may be an employee for one legal purpose, and an independent contractor for another legal purpose or situation.

GOLDBERGER, *supra* note 10, at 22. For purposes of assessing tort liability, however, the finding that a sports official is an "employee" is critical for potentially holding the "employer" liable.

33. See, e.g., *Ford v. Bonner County Sch. Dist.*, 612 P.2d 557 (Idaho 1980) (holding high school football official who was accidentally struck by player was employee of school district because school district in fact had control over official). At least one commentator has criticized *Ford*, arguing that the decision "does not contain sound reasoning." See *SPORTS AND LAW*, *supra* note 10, at 194. That author reasoned as follows:

It is incorrect that the school district had the right to "control and direct the activities of the claimant" merely because the coach *could have* rejected *Ford* [the sports official] as an official and he would not have officiated the game. This is not the control test envisioned by states' workers' compensation laws. That control is control of how the employee performs the work. In the context of sports officiating, no one can control how a sports official works a game. To do so would be the antithesis of a sports official. Once armored with the rules of the sport, the sports official must then use reasoned judgment in the application of the rules to the players' action.

Id. at 194-95. Compare *Warthen v. Southeast Oklahoma State Univ.*, 641 P.2d 1125 (Okla. Ct. App. 1982) (affirming award of death benefits for university teacher who, at the request of the school's dean, had officiated a fraternity basketball game and then died of a heart attack). In *Warthen*, the court applied the following test:

[W]e hold that the death or injury of a teacher engaged in an extracurricular school activity is compensable . . . as long as the activity is sufficiently related to the employment so as to supply the necessary causal connection between the two. Factors to be applied in determining whether this connection is sufficient include, but are not necessarily limited to, the degree to which the employee was compelled, expected, pressured, requested, encouraged, or permitted to participate; the degree of employer sponsorship and control; other circumstances such as whether the activity was regularly conducted on the work premises or during lunch or recreational breaks; and the benefit derived from the activity by the employer.

Id. at 1130 (citation omitted).

34. One court decided this issue in the context of a lawsuit brought against the State of New York after a boxer died from injuries sustained during a bout at Madison Square Garden's "Felt Forum." See *Classen v. State*, 500 N.Y.S.2d 460 (N.Y. Ct. Ct. 1985). In *Classen*, the decedent's spouse brought suit seeking damages for the negligence of several persons involved with the fight including the referee and the ringside physicians. The court relied upon *Rosensweig v. State of New York*, 158 N.E.2d 229 (N.Y. 1959), to hold that

where the entity, a school or municipality, "furnished" the sports official.³⁵

It is also important to recognize the defenses to a negligence action, all of which may apply to sports officials. They include contributory negligence,³⁶ assumption of risk,³⁷ and lack of causation.³⁸

neither the referee nor the physicians were employees of the State of New York. 500 N.Y.S.2d at 465. *Rosensweig* rested on the basis that while the State had chosen to heavily regulate various aspects of the sport of boxing, it had nevertheless not subjected itself to liability for the acts of the all the persons licensed and required to be present at such events. Specifically, the court stated:

To be sure, the corporation promoting the contest was required to employ for this purpose a physician included on the panel. This, without more, is a phenomenon of everyday occurrence. No one would seriously suggest that every person to whom the State has issued a license to practice his profession or trade thereby becomes an employee or agent of the State. Nor is such a relationship created by virtue of the fact that the State may also prescribe the amount of the fee to be charged; regulation, no matter how close or stringent, is not thereby transmuted into government operation.

158 N.E.2d at 232.

In a subsequent suit brought by the decedent's widow against the ringside physicians and proprietor, another court similarly rejected claims that the proprietor was tortiously responsible for the alleged negligent conduct of the fight's referee. The court based this conclusion on the fact that the proprietor, Madison Square Garden, "neither participated in the selection of the co-defendants [i.e., referee] nor provided them with training, instruction or supervision." See *Classen v. Izquierdo*, 520 N.Y.S.2d 999, 1001 (N.Y. Sup. Ct. 1987).

35. See *Forkash v. City of New York*, 277 N.Y.S.2d 827, 828 (N.Y. App. Div. 1967) (per curiam). In *Forkash*, two 18-year-old softball players collided when both players went for a fly ball during a softball game. At the time of the incident, there was very little daylight in the sky and one of the players had tripped on a piece of glass. Apparently, both players had previously observed "shards of glass from numerous broken bottles; [and] that prior to the game they [had] told a uniformed Park Department Supervisor, who was also acting as umpire," about the field condition. *Id.* Apparently, the umpire had the infield swept, but not the outfield. When the players once again complained, the umpire told them "that the brooms had been put away, and 'it was getting dark and just get out there and play.'" *Id.* The lower court dismissed the players' complaint for failure to state a claim. However, the New York Appellate Division reversed that decision, finding that since the "City [had] furnished the umpire, and the umpire—in baseball proverbially a dominating and inflexible figure—[had] commanded the youths to continue play," the case should have reached the jury. *Id.*

36. See RESTATEMENT (SECOND) OF TORTS § 463 (1965) (defining contributory negligence).

37. See PROSSER & KEETON, *supra* note 16, at 480. Assumption of the risk is probably the most frequently asserted defense interposed in civil actions arising from sporting events. Various forms of the defense exist. For example, there is "express" assumption of risk and "implied" assumption of risk. See *id.* at 482, 484. See also RESTATEMENT (SECOND) OF TORTS §§ 496B (express assumption of risk); 496C (implied assumption of risk) (1965). Moreover, in some jurisdictions, "implied" assumption of risk is further divided into "primary" and "secondary" assumption of risk. "Primary" assumption of risk arises when the "defendant was not negligent because he or she either owed no duty to the plaintiff or did not breach a duty that was owed." John L. Diamond, *Assumption of Risk after Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717, 731 (1991) (citing

B. *The Sports Official's Standard of Liability*

According to some commentators, the sports official fulfills his or her duty to participants and spectators by acting reasonably; in the event the official does not act reasonably in supervising competition, for example, he or she should be held tortiously liable. In other words,

[r]eferees and game officials need only use reasonable care to see that the rules of competition are complied with. Reasonable care might consist of advising the contestants about illegal holds, punches, and similar tactics. Reasonable care will require referees to be diligent in detecting infractions of the rules and in sanctioning violators. . . . Every situation is different, and in evaluating a referee's conduct the law will judge it against that of a reasonable and prudent person with similar training and experience.³⁹

Blackburn v. Dorta, 348 So.2d 287, 290 (Fla. 1977)). "Secondary" implied assumption of risk applies to situations "where the defendant has in fact breached his or her duty to the plaintiff." *Id.* "Secondary" implied assumption of risk can be further divided into "reasonable" and "unreasonable" characterizations. *Id.* at 731-32. "Reasonable" secondary implied assumption of risk occurs when "the utility of the conduct is so high in comparison with the risk involved that it is reasonable for the plaintiff to encounter the risk; and the plaintiff is actually aware of the risk and voluntarily encounters it." Samuel Frizell, *Assumption Of Risk In California: It's Time To Get Rid Of It*, 16 W. ST. U. L. REV. 627, 631 (1989). Conversely, "unreasonable" implied secondary assumption of risk occurs when the conduct in question, "in light of the risk to the plaintiff, is unreasonable, and . . . the plaintiff is actually aware of the risk and voluntarily encounters it . . ." *Id.* at 630.

For the purposes of this Comment, the theoretical distinctions between the various forms of assumption of risk and their survival following the advent of comparative negligence (where adopted) is not treated herein. Thus, as used herein, "assumption of risk" means a defense which completely bars or partially bars (depending upon whether the jurisdiction has adopted comparative negligence) a plaintiff's recovery where the plaintiff: (1) voluntarily assumed the risk of harm arising from the negligent or reckless conduct of a defendant, see RESTATEMENT (SECOND) OF TORTS § 496A (1965); (2) knew of the risk of harm created by the defendant's conduct and appreciated its "unreasonable character," *id.* at § 496D; and (3) voluntarily accepted the risk. *Id.* at § 496E.

38. Lack of causation as a defense essentially involves the introduction of evidence which shows either "unforeseeable consequences" or "intervening causes." See PROSSER & KEETON, *supra* note 16, at 280, 301. The defense of "unforeseeable consequences" holds that "[i]f one could not reasonably foresee any injury as the result of one's act, or if one's conduct was reasonable in the light of what one could anticipate, there would be no negligence, and no liability." *Id.* at 280 (footnote omitted). Under the "intervening causes" version of the defense, the defendant escapes liability if the substantial contributing cause of plaintiff's injury was of "independent origin." *Id.* at 301. Compare RESTATEMENT (SECOND) OF TORTS § 440 (1965).

39. SCHUBERT, *supra* note 10, at 232. See also GOLDBERGER, *supra* note 10, at 20, wherein the author states:

In other words, the long and the short of it is that to minimize your exposure to a costly and expensive lawsuit, you must act as a reasonably prudent official. What is a reasonably prudent official? A reasonably prudent official

*Carabba v. Anacortes Sch. Dist. No. 103*⁴⁰ remains the “semi-nal”⁴¹ case in support of a reasonableness standard for sports officials’ liability. *Carabba* involved an action for damages brought against a school district for a referee’s negligent supervision of a wrestling match. The referee allegedly failed to notice that one of the participants used an illegal hold on the plaintiff. The court described the referee’s actions as follows:

Near the end of the third round of the match between these two boys, Anderson [the opposing wrestler], who was well ahead on points, was attempting to pin Stephen Carabba’s [plaintiff’s] shoulders to the mat and thus score additional points for his team. In the course of this attempt, he was alternating half nelsons, first to one side and then to the other, trying to roll Carabba into a pin position. This process had taken the boys to the north-west corner of the main mat near where small side mats were placed against the main mat. The referee . . . noticed a separation between the main mat and the side mat, and moved to close the gap to protect the contestants should they roll in that direction and off the main mat onto the bare floor. In so doing, his attention was diverted from the boys momentarily.

While the referee’s attention was so diverted, Anderson applied what appeared to many of the eyewitnesses to be a full nelson [the illegal hold]. The estimates made by the witnesses of the length of time during which the full nelson was applied varied from 1 to 10 or more seconds.

Almost simultaneously the buzzer sounded the end of the round, the referee blew his whistle, and Anderson broke the hold on Carabba after a final lunge. Carabba slumped to the mat, un-

- knows the rules that are designed to protect the players,
- knows his or her responsibility in enforcing these rules, [and]
- does not permit anyone to prevent him or her from doing his or her job.

Id. Cf. CHAMPION, *supra* note 9, § 4:1, at 77 (stating in part that sports officials should discharge their duty in a “non-negligent” manner, and that “[i]f this duty is ignored or not performed properly, then . . . the referee . . . might be liable for negligence”); Parvin, *supra* note 10, at 20 (stating “[w]hen a referee’s negligence is an actual and proximate cause of harm, he should be held legally accountable” (footnote omitted)). See also Davis, *supra* note 2, at 943-44 (arguing that the standard for liability should be negligence-based). But see *id.* at 953 (suggesting that in team contact sports claims against sports officials for their failure to control the players may only be actionable if it rises to a level of recklessness).

40. 435 P.2d 936 (Wash. 1967). Although some have posited that *Carabba* was the pioneer decision citing ordinary negligence as the appropriate standard, this is not altogether true. In fact, earlier cases had implied that the negligent act of a sports official could result in liability. See, e.g., Kerby v. Elk Grove Union High Sch. Dist., 36 P.2d 431, 434 (Cal. Ct. App. 1934) (dicta).

41. Some commentators have referred to *Carabba* in these terms. See Parvin, *supra* note 10, at 11. This Comment argues that the case should not hold such stature.

able to move due to the severance of a major portion of his spinal cord resulting in permanent paralysis of all voluntary functions below the level of his neck.⁴²

After trial, the jury returned a verdict in favor of the school district and the court rejected plaintiff's requests for a judgment notwithstanding the verdict and a new trial. The trial court then dismissed the action. On appeal, the Washington Supreme Court reversed the trial court and remanded the matter for a new trial.⁴³

In terms of the applicable standard of care owed by the referee to the participants, the court affirmed the lower court's application of the reasonableness test.⁴⁴ This holding has had its critics.⁴⁵

Other commentators take the position that the threshold for civil liability (in cases not involving intentional torts),⁴⁶ should focus on *recklessness* rather than reasonableness.⁴⁷ According to this

42. 435 P.2d at 939 (footnotes omitted).

43. The court reversed because of certain statements made by defense counsel during the trial which it characterized as prejudicial. *Id.* at 946. Beyond this narrow holding, the court's basis for reversal is unclear. It presumably found that the referee in this case was an agent of the school and hence, if the referee was found to have been negligent, then this negligence would be imputed to the school district. This conclusion is based upon the court's reliance and citation to a section from the Restatement of Agency which described a master's liability for its agent's failure to protect others from risks of harm when the master was under a duty to do so. *Id.* at 947-48 (quoting RESTATEMENT (SECOND) OF AGENCY § 214 (1957)). However, the court also found that "it is clear that the wrestling matches were conducted 'under the auspices' of the respondent school districts." *Id.* at 947 (footnote omitted). It acknowledged plaintiff's argument that the school had a "nondelegable duty" to protect the participants from harm. *Id.* at 946. Thus, the court's basis for holding the school district liable for the referee's actions remains a mystery. As was examined *supra* at notes 27-37, there are several exceptions to the general rule that a school district or municipality is not liable for the acts of independent contractors. However, in the case of sports officials, the general rule has been that schools or municipalities *are not* liable for the official's acts.

44. *Id.* at 938 (noting that during deliberations, jury had requested instruction on proper standard of care and that such standard was that of "the reasonably prudent man or that of an ordinary prudent referee."). See also *id.* at 948 (concluding trial court's instruction on negligence of referee was proper).

45. See, e.g., Cameron Jay Rains, *Sports Violence: A Matter of Societal Concern*, 55 NOTRE DAME L. REV. 796, 808 (1980) (opining that *Carabba's* ordinary negligence standard was inappropriate).

46. The "intentional" torts include assault, battery, and infliction of emotional distress. See RESTATEMENT (SECOND) OF TORTS §§ 13 and 18 (battery), § 21 (assault), § 35 (false imprisonment), and § 46 (outrageous conduct causing emotional distress) (1965).

47. See Lewis & Forbes, *supra* note 2, at 693 n.117. However, these same commentators also state that:

[t]he ordinary and prudent official should at least have knowledge of the rules of the sport which he or she officiates. Such officials should also be versed in the officially sanctioned interpretations of those rules. An official who lacks sufficient knowledge of the rules breaches the official's general duty to know the rules. Where the breach of this duty proximately causes harm to the plaintiff, the tort

school of thought, an official is liable only for his or her reckless acts or omissions. The state legislatures in those states which have enacted statutes to deal with sports officials' civil liability, including such states as Arkansas,⁴⁸ Georgia,⁴⁹

of negligence has occurred. In the instance of misapplication of a rule, the problem is not the official's lack of knowledge of the rules, but rather his administration of the rules' provisions. If the ordinary, reasonable and prudent official, under similar circumstances, would not have made the error, a breach of the standard of care occurs. This is often the situation in player injury cases where sports officials are sued for malpractice.

Id. at 692 (footnotes omitted).

48. The Arkansas statute provides:

(a) Except as otherwise provided by this chapter, no member of any board, commission, agency, authority, or other governing body of any governmental entity and no member of the board of directors of a nonprofit corporation that holds a valid federal income tax exemption issued by the Internal Revenue Service shall be held personally liable for damages resulting from:

- (1) Any negligent act or omission of an employee of the nonprofit corporation or governmental entity; or
- (2) Any negligent act or omission of another director or member of the governing body of the governmental entity.

(b) The same immunity provided by this chapter shall be extended to any athletic official during the officiating of an interscholastic, intercollegiate, or any other amateur athletic contest being conducted under the auspices of a nonprofit or governmental entity. No official shall be held personally liable in any civil action for damages to a player, participant, or spectator as a result of his acts of commission or omission arising out of officiating duties and activities. Nothing in this subsection shall be deemed to grant immunity to any person causing damage by his malicious, willful, wanton, or grossly negligent act.

ARK. CODE ANN. § 16-120-102 (Michie Supp. 1993).

49. The Georgia statute provides:

(a) Sports officials who officiate amateur athletic contests at any level of competition in this state shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

(b) For the purposes of this Code section, the term "sports officials" means:

- (1) Those individuals who serve as referees, umpires, linesmen, and those who serve in similar capacities but may be known by other titles and are duly registered with or are members of a local, state, regional, or national organization which is engaged in part in providing education and training to sports officials; and
- (2) Those individuals who render service without compensation as manager, coach, instructor, or assistant manager, coach, or instructor in any system of supervised recreation established pursuant to Chapter 64 of Title 36.

(c) Nothing in this Code section shall be deemed to grant the protection set forth in subsection (a) of this Code section to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, willful, wanton, reckless, malicious, or grossly negligent.

GA. CODE ANN. § 51-1-41 (Michie Supp. 1993).

Indiana,⁵⁰

50. The Indiana statute provides, in pertinent part:

Sec. 1. As used in this chapter, "compensation" does not include the following:

- (1) Reimbursement or payment of reasonable expenses incurred for the benefit of a sports or leisure activity.
- (2) Any award, meal, or other gift that does not exceed one hundred dollars (\$100) in value and is given as a token of appreciation or recognition.
- (3) Any per diem payment that does not exceed fifty dollars (\$50) for personal services as a referee, umpire, judge, or assistant to a referee, umpire, or judge.

Sec. 2. As used in this chapter, "sports or leisure activity" means:

- (1) an athletic or sports competition, exhibition, or event; and
- (2) an activity conducted for a recreational purpose.

Sec. 3. As used in this chapter, "volunteer" means an individual who, without compensation, engages in or provides other personal services for a sports or leisure activity such as baseball, basketball, football, soccer, hockey, volleyball, cheerleading, or other similar sports or leisure activities involving children who are less than sixteen (16) years of age.

Sec. 4. This chapter does not grant immunity from civil liability to a person who engaged in intentional, willful, wanton, or reckless behavior. . . .

Sec. 6. A volunteer is not liable for civil damages that are proximately caused by a negligent act or omission in the personal services provided by:

- (1) the volunteer; or
- (2) another person selected, trained, supervised, or otherwise under the control of the volunteer;
in the course of a sports or leisure activity.

IND. CODE ANN. §§ 34-4-11.8-1 to 11.8-4 and 34-4-11.8-6 (West Supp. 1993).

(1) Reimbursement or payment of reasonable expenses incurred for the benefit of a sports or leisure activity.

(2) Any award, meal, or other gift that does not exceed one hundred dollars (\$100) in value and is given as a token of appreciation or recognition.

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- (1) the volunteer; or
- (2) another person selected, trained, supervised, or otherwise under the control of the volunteer;
in the course of a sports or leisure activity.

IND. CODE ANN. §§ 34-4-11.8-1 to 11.8-4 and 34-4-11.8-6 (West Supp. 1993).

Louisiana,⁵¹ Illinois,⁵²

51. The Louisiana statute provides:

A. Except as provided in Subsection B of this Section, no person shall have a cause of action against any volunteer athletic coach, manager, team physician, or sports team official for any loss or damage caused by any act or omission to act directly related to his responsibilities as a coach, manager, team physician, or official, while actively directing or participating in the sporting activities or in the practice thereof, unless the loss or damage was caused by the gross negligence of the coach, manager, team physician, or official.

B. Subsection A of this Section shall not be applicable unless the volunteer athletic coach, manager, team physician, or sports team official has participated in a safety orientation and training program established by the league or team with which he is affiliated. Participation in a safety orientation and training program by a coach, manager, team physician, or sports team official may be waived by the league prior to the individual's participation in the sporting activities or in the practice thereof upon submission of appropriate documented evidence as to that individual's proficiency in first aid, and safety. A person who has been tested or trained, and sanctioned or admitted by a recognized league or association, shall be deemed to be in compliance with this Subsection. However, compliance with the requirements of this Subsection shall not be construed to create or impose on the volunteer any additional liability or higher standard of care based on participation in safety orientation and training or evidence of proficiency in first aid and safety.

C. The receipt of a small stipend or incidental compensation for volunteer services shall not exclude any person, who is otherwise covered, from the limitation of liability provided in Subsection A.

LA. REV. STAT. ANN. § 2798 (West 1991).

52. The Illinois statute provides:

Section 1. Manager, coach, umpire or referee negligence standard.

(a) General rule. Except as provided otherwise in this Section, no person who, without compensation and as a volunteer, renders services as a manager, coach, instructor, umpire or referee or who, without compensation and as a volunteer, assists a manager, coach, instructor, umpire or referee in a sports program of a nonprofit association, shall be liable to any person for any civil damages as a result of any acts or omissions in rendering such services or conducting or sponsoring such sports program, unless the conduct of such person falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such services or conducting or sponsoring such sports programs, and unless it is shown that such person did an act or omitted the doing of an act which such person was under a recognized duty to another to do, knowing or having reason to know that such act or omission created a substantial risk of actual harm to the person or property of another. It shall be insufficient to impose liability to establish only that the conduct of such person fell below ordinary standards of care.

(b) Exceptions.

(1) Nothing in this Section shall be construed as affecting or modifying the liability of such person or a nonprofit association for any of the following:

.....

(ii) acts or omissions relating to the care and maintenance

Maryland,⁵³

of real estate unrelated to the practice or playing areas which such persons or nonprofit associations own, possess or control.

(2) Nothing in this Section shall be construed as affecting or modifying any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the standard of negligence established by this Section.

(c) Assumption of risk or comparative fault. Nothing in this Section shall be construed as affecting or modifying the doctrine of assumption of risk or comparative fault on the part of the participant.

(d) Definitions. As used in this Act the following words and phrases shall have the meanings given to them in this subsection:

"Compensation" means any payment for services performed but does not include reimbursement for reasonable expenses actually incurred or to be incurred or, solely in the case of umpires or referees, a modest honorarium.

"Nonprofit association" means an entity which is organized as a not-for-profit corporation under the laws of this State or the United States or a nonprofit unincorporated association or any entity which is authorized to do business in this State as a not-for-profit corporation under the laws of this State, including, but not limited to, youth or athletic associations, volunteer fire, ambulance, religious, charitable, fraternal, veterans, civic, county fair or agricultural associations, or any separately chartered auxiliary of the foregoing, if organized and operated on a nonprofit basis.

"Sports program" means baseball (including softball), football, basketball, soccer or any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (36 U.S.C. 371 et. seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for the physically handicapped or mentally retarded.

(e) Nothing in this Section is intended to bar any cause of action against a nonprofit association or change the liability of such an association which arises out of an act or omission of any person exempt from liability under this Act.

ILL. ANN. STAT. ch. 745, para. 80/1 (Smith-Hurd 1993).

53. The Maryland statute provides, in pertinent part:

(a) Definitions. . . .

(4) "Athletic official" means an individual who officiates, referees, or umpires an interscholastic, intercollegiate, or any other amateur athletic contest conducted by a nonprofit or governmental body.

(d) Liability of athletic official.—(1) Except as provided in paragraph (2) of this subsection, an athletic official is not personally liable in damages in any civil

Massachusetts,⁵⁴

action brought against the athletic official by a player, a participant, or a spectator by virtue of the athletic official's act or omission arising out of the athletic official's duties and services performed while acting in the capacity of athletic official.

. . . .

(2) An athletic official is personally liable for damages in any civil action brought against the athletic official in which it is found that the damages were the result of the athletic official's willful, wanton, or grossly negligent act or omission.

Md. CODE ANN., CTS. AND JUD. PROC. § 5-313 (1989).

54. The Massachusetts statute provides:

As used in this section, unless the context requires otherwise, the following words shall have the following meanings:

"Compensation," shall not include reimbursement for reasonable expenses actually incurred or to be incurred or, in the case of umpires or referees, a modest honorarium.

"Nonprofit association," an entity which is organized as a nonprofit corporation or nonprofit unincorporated association under the laws of the commonwealth or the United States or any entity which is authorized to do business in the commonwealth as a nonprofit corporation or unincorporated association under the laws of the commonwealth.

"Sports program," baseball, softball, football, basketball, soccer and any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of . . . the Amateur Athletic Union or the National Collegiate Athletic Association. It shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are eighteen years of age or younger whose nineteenth birthday occurs during the year of participation or the competitive season, whichever is longer; provided, however, that there shall be no age limitation for programs operated for the physically handicapped or mentally retarded.

Except as otherwise provided, in this section, no person who without compensation and as a volunteer, renders services as a manager, coach, umpire or referee or as an assistant to a manager or coach in a sports program of a nonprofit association . . . shall be liable to any person for any action in tort as a result of any acts or failures to act in rendering such services or in conducting such sports program. The immunity conferred by this section shall not apply to any acts or failures to act intentionally designed to harm, or to any grossly negligent acts or failures to act which result in harm to the person. Nothing in this section shall be construed to affect or modify any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the immunity conferred by this section.

Nothing in this section shall be construed to affect or modify the liability of a person or nonprofit association for any of the following:

(i) acts or failures to act which are committed in the course of activities primarily commercial in nature even though carried on to obtain revenue for maintaining the sports program or revenue used for other charitable purposes.

(ii) any acts or failures to act relating to the transportation of participants in a sports program or others to or from a game, event or practice.

Minnesota,⁵⁵ Mississippi,⁵⁶ Nebraska,⁵⁷ Nevada,⁵⁸ New Jersey,⁵⁹

(iii) acts or failures to act relating to the care and maintenance of real estate which such persons or nonprofit associations own, possess or control and which is used in connection with a sports program and or any other nonprofit association activity.

MASS. GEN. LAWS ANN. ch. 231, § 85V (West 1993).

55. The Minnesota statute provides:

Subdivision 1. Grant. No individual who provides services or assistance without compensation as an athletic coach, manager, or official for a sports team that is organized or performing under a nonprofit charter, and no community-based, voluntary nonprofit athletic association, or any volunteer of the nonprofit athletic association, is liable for money damaged to a player, participant, or spectator as a result of an individual's acts or omissions in the providing of that service or assistance.

This section applies to organized sports competitions and practice and instruction in that sport.

For purposes of this section, "compensation" does not include reimbursement for expenses.

Subd. 2. Limitation. Subdivision 1 does not apply:

- (1) to the extent that the acts or omissions are covered under an insurance policy issued to the entity for whom the coach, manager, or official serves;
- (2) if the individual acts in a willful and wanton or reckless manner in providing the services or assistance;
- (3) if the acts or omissions arise out of the operation, maintenance, or use of a motor vehicle;
- (4) to an athletic coach, manager, or official who provides services or assistance as part of a public or private educational institution's athletic program; and
- (5) if the individual acts in violation of federal, state, or local law.

The limitation in clause (1) constitutes a waiver of the defense of immunity to the extent of the liability stated in the policy, but has no effect on the liability of the individual beyond the coverage provided.

MINN. STAT. ANN. § 604.08 (West 1994).

56. The Mississippi statute provides:

(1) Sports officials who officiate athletic contests at any level of competition in this state shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

(2) For purposes of this section, sports officials are defined as those individuals who serve as referees, umpires, linesmen and those who serve in similar capacities but may be known by other titles and are duly registered members of a local, state, regional or national organization which is engaged in part in providing education and training to sports officials.

(3) Nothing in this section shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, willful, wanton, reckless, malicious or grossly negligent.

(4) The provisions of this section shall apply only to actions the cause of which accrued on or after July 1, 1988.

MISS. CODE ANN. § 95-9-3 (1993).

57. The Nebraska statutes provide, in pertinent part:

25-21, 195. Legislative findings. The Legislature finds and declares it is in the public interest that there be adequate nonprofit sports programs available within the State of Nebraska.

25-21, 196. Terms, defined. . . . [U]nless the context otherwise requires:

- (1) Compensation shall not include:
 - (a) Gifts not exceeding a total value of one hundred dollars in any twelve consecutive months; or
 - (b) Any reimbursement for any reasonable expense incurred for the benefit of a nonprofit sports program;
- (2) Duty shall mean any activity normally performed by an individual while acting as a member of the qualified staff;
- (3) Member of the qualified staff shall mean any individual who:
 - (a) Is a manager, coach, umpire, or referee; or
 - (b) Is an assistant to a manager, coach, umpire, or referee; or
 - (c) Prepares any playing field for any practice session or any formal game;
- (4) Negligent act or omission shall not include any reckless, willful, wanton, or grossly negligent act or omission;
- (5) Nonprofit sports program shall mean any program, whether or not it is registered with or recognized by this state or any political subdivision of this state:
 - (a) That is a sports program organized for recreational purposes and the activities of which are principally for such purposes; and
 - (b) No part of the net earnings of which inures to the benefit of any person; and
- (6) Person shall include bodies politic and corporate, societies, communities, the public generally, partnerships, individuals, joint-stock companies, and associations.

25-21, 197. Member of the qualified staff; liability for damages; immunity. Any individual who renders services without compensation as a member of the qualified staff of a nonprofit sports program shall not be liable under the laws of this state for civil damages resulting from any negligent act or omission of such qualified member occurring in the performance of any duty of such qualified member.

25-21, 198. Liability statement; furnish to participant. Any person who sponsors, organizes, or causes a nonprofit sports program to operate shall give the parent or guardian of any minor who participates in such a program a written statement in the following form:

Coaches, managers, umpires, referees, their assistants, or anyone who prepares any playing field shall NOT be liable for the injury or death of any participant in (name of activity or program) which results from the negligence of any of the above-listed individuals.

The provisions of section 25-21,197 shall not apply to any individual unless a copy of such statement signed by the parent or guardian is retained by the person who sponsors, organizes, or causes the affected sports program to operate.

NEB. REV. STAT. §§ 25-21, 195, 196, 197, 198 (1989).

58. The Nevada statute provides:

1. A sports official who officiates a sporting event at any level of competition in this state is not liable for any civil damages as a result of any unintended act or omission, not amounting to gross negligence, by him in the execution of his officiating duties within the facility where the sporting event takes place.
2. As used in this section:

- (a) "Sporting event" means any contest, game or other event involv-

ing the athletic or physical skills of amateur or professional athletes.

(b) "Sports official" means any person who serves as a referee, umpire, linesmen or in a similar capacity, whether paid or unpaid.

NEV. REV. STAT. ANN. § 41.630 (Michie 1993).

59. The New Jersey statutes provide:

2A:62A-6. a. Notwithstanding any provisions of law to the contrary, no person who provides services or assistance free of charge, except for reimbursement of expenses, as an athletic coach, manager, or official, other than a sports official accredited by a voluntary association as provided by P.L. 1979, c. 172 (C.18A:11-3) and exempted from liability pursuant to P.L. 1987, c. 239 (C.2A:62A-61), for a sports team which is organized or performing pursuant to a nonprofit or similar charter or which is a member team in a league organized by or affiliated with a county or municipal recreation department, shall be liable in any civil action for damages to a player or participant or spectator as a result of his acts of commission or omission arising out of and in the course of his rendering that service or assistance.

b. The provisions of subsection a. of this section shall apply not only to organized sports competitions, but shall also apply to practice and instruction in that sport.

c.

(1) Nothing in this section shall be deemed to grant immunity to any person causing damage by his willful, wanton, or grossly negligent act of commission or omission, nor to any coach, manager, or official who has not participated in a safety orientation and training skills program which program shall include but not be limited to injury prevention and first aid procedures and general coaching concepts.

(2) A coach, manager, or official shall be deemed to have satisfied the requirements of this subsection if the safety orientation and skills training program attended by the person has met the minimum standards established by the Governor's Council on Physical Fitness and Sports in consultation with the Bureau of Recreation within the Department of Community Affairs in accordance with rules and regulations adopted pursuant to the "Administrative Procedure Act", P.L. 1968, c. 410 (C.52:14B-1 et seq.).

d. Nothing in this section shall be deemed to grant immunity to any person causing damage as the result of his negligent operation of a motor vehicle.

e. Nothing in this section shall be deemed to grant immunity to any person for any damage caused by that person permitting a sports competition or practice to be conducted without supervision.

f. Nothing in this act shall apply to an athletic coach, manager, or official who provides services or assistance as part of a public or private educational institution's athletic program.

2A:62A-6.1. Notwithstanding any provisions of law to the contrary, a person who is accredited as a sports official by a voluntary association as provided by P.L. 1979, c. 172 (C.18A:11-3) and who serves that association, a conference under the jurisdiction of the association, or a public entity as defined in Title 59 of the New Jersey Statutes in the capacity of a sport official, whether or not compensated for his services, shall not be liable in any action for damages as a result of his acts of commission or omission arising out of and in the course of his rendering the services. Nothing in this act shall be deemed to grant immunity to any person causing damage by his willful, wanton, or grossly negligent act of commission or omission, nor to any person causing damage as the result of his negligent operation of a motor vehicle.

N.J. STAT. ANN. §§ 2A:62A-6, 2A:62A-6.1 (West Supp. 1994). New Jersey's statute was

North Dakota,⁶⁰ Pennsylvania,⁶¹ Rhode Island,⁶²

prompted “[i]n evident response to the increasing cost of liability insurance and, in some instances the unavailability of liability insurance, for volunteer athletic coaches, managers and officials of nonprofit sports teams” *Byrne v. Boys Baseball League*, 564 A.2d 1222, 1223 (N.J. Super. Ct. App. Div. 1989) (citation and footnote omitted). See also, Christopher A. Terzian, *Tort Liability—Athletic Coaches and Officials—Volunteers—Civil Immunity from Liability—to be codified at N.J. Stat. Ann. § 2A:62A-6*, 10 SETON HALL LEGIS. J. 332 (1987).

60. The North Dakota statute provides:

1. Any person who provides services or assistance free of charge, except for reimbursement of expenses, as an athletic coach, manager, or official for a sports team which is organized or performing pursuant to a nonprofit or similar charter is immune from civil liability for any act or omission resulting in damage or injury to a player or participant if at the time of the act or omission all the following are met:

- a. The person who caused the damage or injury was acting in good faith, in the exercise of reasonable and ordinary care, and in the scope of that person’s duties for the sports team.
- b. The act or omission did not constitute willful misconduct or gross negligence.
- c. The coach, manager, or official had participated in a safety orientation and training program established by the league or team with which the person is affiliated.

2. This section does not grant immunity to:

- a. Any person causing damage as the result of the negligent operation of a motor vehicle.
- b. Any person for any damage caused by that person permitting a sports competition or practice to be conducted without supervision.
- c. Any athletic coach, manager, or official providing service as a part of a public or private educational institution’s athletic program.

N.D. CENT. CODE § 32-03-46 (1993).

61. In pertinent part, the Pennsylvania statute provides:

(a) General Rule.—Except as provided otherwise in this section, no person who, without compensation and as a volunteer, renders services as a manager, coach, instructor, umpire or referee or who, without compensation and as a volunteer, assists a manager, coach, instructor, umpire or referee in a sports program of a nonprofit association, and no nonprofit association, or any officer or employee thereof, conducting or sponsoring a sports program, shall be liable to any person for any civil damages as a result of any acts or omissions in rendering such services or in conducting or sponsoring such sports program, unless the conduct of such person or nonprofit association falls substantially below the standards generally practiced and accepted in like circumstances by similar persons or similar nonprofit associations rendering such services or conducting or sponsoring such sports programs, and unless it is shown that such person or nonprofit association did an act or omitted the doing of an act which such person or nonprofit association was under a recognized duty to another to do, knowing or having reason to know that such act or omission created a substantial risk of actual harm to the person or property of another. It shall be insufficient to impose liability to establish only that the conduct of such person or nonprofit association fell below ordinary standards of care.

42 PA. CONS. STAT. ANN. § 8332.1(a) (1993).

62. The Rhode Island statute provides:

Immunity from civil liability - sports teams.

and Tennessee,⁶³ all agree with this view. They uniformly take the

(a) Notwithstanding any provisions of law to the contrary, except as otherwise provided in subsection(c) of this section, no person, who, without compensation and as a volunteer, renders services as a manager, coach, instructor, umpire, referee or official or who without compensation and as a volunteer, assists a manager, coach, instructor, umpire, referee or official in a youth sports program organized and conducted by or under the auspices of a non-profit corporation, and no director, trustee, officer, or employee of a non-profit corporation which organizes, conducts, or sponsors a youth sports program, shall be liable to any person for any civil damages as a result of any acts or omissions in the rendering of such services or assistance or in the organization, conduct or sponsorship of such youth sports program unless the acts or omissions of such person were committed in wilful, wanton or reckless disregard for the safety of the participants in such youth sports program. It shall be insufficient to impose liability upon any such person to establish only that the conduct of such person fell below ordinary standards of care.

(b) Notwithstanding any provisions of law to the contrary except as otherwise provided in subsection (c) of this section, no person who renders services as a manager, coach, instructor, umpire, referee or official or who assists a manager, coach, instructor, umpire, referee or official in an interscholastic or intramural sports program organized and conducted in accordance with and subject to the rules, regulations and jurisdiction of the Rhode Island Interscholastic League, the Committee on Junior High School Athletics, and/or the Board of Regents for Elementary and Secondary Education shall be liable to any person for any civil damages as a result of any acts or omissions in the rendering of such services or assistance unless the acts or omissions of such person were committed in wilful, wanton or reckless disregard for the safety of the participants in such interscholastic or intramural sports program.

(c) Nothing in this section shall be deemed to grant immunity to any person, corporation or to another entity who or which causes injury or damage as the result of the negligent operation of a motor vehicle.

(d) For purposes of this section: . . .

(ii) The term "compensation" shall not include reimbursement for reasonable expenses actually incurred or to be incurred or, solely in the case of umpires, referees, or other game officials, a modest honorarium.

(iii) The term "non-profit corporation" shall include any non-profit corporation or non-profit association organized under the law of this state, or of any other state, or of the United States, which is authorized to do business in this state.

R.I. GEN. LAWS § 9-1-48 (1993).

63. The Tennessee statutes provide:

62-50-201. As used in this part, unless the context otherwise requires, "sports official" means any person who serves as referee, umpire, linesman or in any similar capacity in supervising or administering a sports event and who is registered as a member of a local, state, regional or national organization which provides training and educational opportunities for sports officials.

62-50-202. A sports official who administers or supervises a sports event at any

position that the civil threshold for liability should either be *gross negligence* or *recklessness*.⁶⁴

The National Association of Sports Officials, a leading organization advocating the rights of sports officials, also supports the gross negligence/recklessness standard, and has vigorously argued for adoption of similar legislation by all states.⁶⁵ As the preceding

level of competition is not liable to any person or entity in any civil action for damages to a player, participant or spectator as a result of the sports official's act of commission or omission arising out of the sports official's duties or activities.

62-50-203. Nothing in this part grants civil immunity to a sports official who intentionally or by gross negligence inflicts injury or damage to a person or entity.

TENN. CODE ANN. §§ 62-50-201, 202, 203 (1990).

64. For a definition of "gross negligence," see *supra* note 16. "Recklessness," with regard to tort liability, can be defined as follows:

The usual meaning assigned to "willful," "wanton," or "reckless," according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. . . .

The result is that "willful," "wanton," or "reckless" conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.

PROSSER & KEETON, *supra* note 16, at 213, 214 (footnotes omitted).

As is clear from these definitions, the two terms are nearly synonymous, and both contemplate a considerable departure from the norms of "ordinary" negligence. *Id.* at 214 ("As a result there is often no clear distinction at all between such [reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning, of an aggravated form of negligence, differing in quality rather than in degree from ordinary lack of care." (footnote omitted)).

65. The National Association of Sports Officials (NASO) has promulgated model legislation dealing with various issues affecting sports officials. For example, NASO offers model legislation relating to the criminal offenses committed against sports officials. Specifically the model legislation provides:

Section 1. Any person who physically assaults any sports official at any level of competition, within the confines or immediate vicinity of the athletic facility at which the athletic contest in which a sports official was an active participant shall be guilty of a crime (misdemeanor, felony, etc.) which shall be punishable by a fine of \$10,000 and/or imprisonment to a maximum of three year(s).

National Association of Sports Officials, Model Legislation on Criminal Offenses to Physically Assault Sports Officials (on file with the *University of Miami Entertainment & Sports Law Review*).

With respect to the civil liability of sports officials, NASO has suggested the following model statute:

Section 1. Sports officials who officiate athletic contests at any level of competition in this State shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

Section 2. Sports officials are defined as those individuals who serve as referees, umpires, linesman, and those who serve in similar capacities that may be known

statutes make clear, their campaign appears to be successful.

Recent case law addressing claims against sports officials for negligent supervision or control⁶⁶ further supports gross negligence or recklessness as the proper standard to be applied to such claims.⁶⁷ *Kline v. OID Assocs., Inc.*⁶⁸ illustrates the application of a gross negligence or recklessness standard.

In *Kline*, a soccer player, who was kicked by another player while he held the ball, sued soccer officials⁶⁹ for their negligence and reckless conduct. At trial, the defendants succeeded in obtaining a summary judgment. The plaintiff appealed this decision to the Ohio Court of Appeals, arguing that the trial court erroneously applied a recklessness or intentional-acts standard of care in granting the summary judgment.⁷⁰ The Ohio Court of Appeals rejected the claimant's argument based on the following test for

by other titles and are duly registered or members of a local, state, regional or national organization which is engaged in part in providing education and training to sports officials.

Section 3. Nothing in this law shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, wilful, wanton, reckless, maliciously or grossly negligent.

National Association of Sports Officials, Model Legislation on Criminal Offenses to Physically Assault Sports Officials (on file with the *University of Miami Entertainment & Sports Law Review*).

66. In negligent supervision or negligent control cases:

A sports official may be liable for injuries to a participant by failing to observe that the participant is seriously injured or in danger of being seriously injured and not stopping the athletic contest. This is especially true in the strong contact sports of boxing, wrestling and football. Other liabilities may include negligent supervision and failure to control the contest.

SPORTS AND LAW, *supra* note 10, at 200.

67. Of course, negligent supervision or control is not the only basis for claims against sports officials. Various theories of negligence against sports officials have been alleged, including:

failing to supervise athletes resulting in injury - producing fights or rough play; failing to enforce safety rules, such as prohibition of ban equipment or the use of manipulated equipment, and starting or continuing a game when whether or field conditions are not safe, for instance, when a field is muddy or rocky, a court slippery or like in present [have also been alleged] . . . [additionally,] there is also another form of negligent conduct which has been alleged which is [a failing to warn participants of their risk of injury].

Brooks, *supra* note 6, at 763.

With respect to an official's duty to inspect a participant's equipment, see *Collins v. Resto*, 746 F. Supp. 360 (S.D.N.Y. 1990) (rejecting a claim that a boxing referee had a duty to inspect boxers' gloves beyond that provided under New York law).

68. 609 N.E.2d 564 (Ohio Ct. App. 1992).

69. The claimant had also sued player who had committed the injury, the owner of the facility where the game had been played as well as the league organizer. *Id.* at 565.

70. *Id.*

claims of negligent supervision:

In a case involving one player against another, the Supreme Court of Ohio determined that before a party may proceed with a cause of action involving injury resulting from a recreational or sports activity, reckless or intentional misconduct must exist.⁷¹ Whether the game is organized, unorganized, supervised or unsupervised, the standard of liability remains the same. Such a standard strikes a balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players. *The same logic and standard should apply to nonparticipants involved in the game, unless there is evidence of negligent supervision. To successfully state a cause of action under the theory of negligent supervision, the party must produce evidence such as a defendant allowing a player with a known propensity toward violence to play or allowing a team to play when there was a total absence of management.*⁷²

In applying this standard to the facts of the case, the court concluded, with respect to the claims against the referee, that the plaintiff had “failed to provide any evidence that [the] [r]eferee . . . had superior knowledge [compared to that of the claimants, or the other players, of the aggressiveness of the game or the propensity of one player to engage in violence] . . . and either recklessly or negligently allowed the game to be continued.”⁷³ Additionally, the court found that the plaintiff had assumed the risk of injury arising from the ordinary course of the game, which in this case involved, by definition, kicking.⁷⁴

Therefore, *Kline* stands for the proposition that when a plaintiff sues a sports official for his or her negligence in failing to properly supervise or control a game or sporting event, the standard of

71. Here, the court was referring to the Ohio Supreme Court’s decision in *Marchetti v. Kalish*, 559 N.E.2d 699, *reh’g denied*, 562 N.E.2d 163 (Ohio 1990). In *Marchetti*, the plaintiff, a 13-year-old girl, had broken her leg while playing the popular children’s game “kick the can.” At trial the defendant, a minor girl who had collided with the plaintiff during the game, was successful in getting her motion for summary judgment granted under the premise that the plaintiff could not recover for her injuries without a showing of “an intentional tort.” *Id.* at 700. The Ohio Court of Appeals reversed and remanded the cause for a finding as to whether the plaintiff consented to the conduct which caused her injury. On appeal to the Ohio Supreme Court, the court reversed and held that “we join the weight of authority . . . and require that before a party may proceed with a cause of action involving injury resulting from a recreational or sports activity, reckless or intentional conduct must exist.” *Id.* at 703 (footnote omitted).

72. 609 N.E.2d at 565 (citations omitted, emphasis added).

73. *Id.* at 566.

74. *Id.*

liability is recklessness or gross negligence. This standard has been upheld in similar claims brought against coaches.⁷⁵

C. Additional Plaintiffs

In certain circumstances, spectators will have a cause of action against sports officials.⁷⁶ Potential liability for spectator injuries has been a problem for quite some time.⁷⁷ For example, there is a plethora of case law involving spectators who have been injured at such events as auto racing,⁷⁸ baseball,⁷⁹ basketball,⁸⁰ bowling,⁸¹

75. See, e.g., *Brown v. Day*, 588 N.E.2d 973 (Ohio Ct. App. 1990) (per curiam) (applying similar test as in *Kline*, finding that plaintiff had failed to establish prior examples of attacker's violent behavior or coach's prior knowledge of such behavior, and thus holding coach not liable for plaintiff's injuries); *Nydegger v. Don Bosco Preparatory High Sch.*, 495 A.2d 485, 486 (N.J. Super. Ct. Law Div. 1985) (holding that absent evidence of coach's "instruction" to players to commit wrongful act, coach was not liable for injuries). Cf. *Laiche v. Kohen*, 621 So.2d 1162, 1165 (La. Ct. App. 1993) (per curiam) (holding elementary school football coach not liable for injuries sustained to eighth grade player who weighed 110 pounds by another eighth grade player who weighed 270 pounds during scrimmage because coach did not act unreasonably).

76. Although this discussion pertains to spectators' claimed physical injuries, commentators note that spectator suits based on economic injury are also plausible. See, e.g., *Lewis & Forbes*, *supra* note 2, at 674. However, as discussed, these lawsuits have not been successful. See *supra*, note 19 and accompanying text.

77. See, e.g., *Walter T. Champion, Jr., "At the Ol' Ball Game" and Beyond: Spectators and the Potential for Liability*, 14 J. TRIAL ADVOC. 495 (1991); *Bruno Colapietro, Comment, The Promoters' Liability For Sports Spectator Injuries*, 46 CORNELL L.Q. 140 (1960); *Gerald Dworkin, Injuries To Spectators In The Course Of Sporting Activities*, 25 MOD. L. REV. 738 (1962); *Howard Jeffers, Note, Theaters And Shows—Amusements—Negligence*, 11 NOTRE DAME L. REV. 93 (1935); *John Hall, Torts—Voluntary Assumption Of Risk—Contributory Negligence—Injuries To Patrons At Places Of Amusement*, 10 S. CAL. L. REV. 67 (1936); *Hugh F. Mullin, Note, The Perils Of Being A Spectator*, 2 LINCOLN L. REV. 75 (1966); *Sanford M. Pooler et. al., Note, A Survey Of The Law On Injuries To Spectators*, 39 B.U. L. REV. 53 (1959); *Gary E. Siskind, Note, Liability For Injuries To Spectators*, 6 OSGOOD HALL L. J. 305 (1968); *Carlos Solis, Sports Spectators—The Uncompensated Injury Victims*, 2 U.S.F. L. REV. 114 (1967); *Carl Zollmann, Injuries From Flying Baseballs To Spectators At Baseball Games*, 24 MARQ. L. REV. 198 (1940); *Recent Cases—Negligence—Landowners—Duty Of Baseball Club To Protect Invitees From Injurious Acts Of Third Parties*, 12 VAND. L. REV. 299 (1958); *Current Topics And Notes—The Baseball Fan And The Duty To Protect Him*, 54 AM. L. REV. 433 (1920); *Note and Comment, Negligence—Theaters and Shows—Assumption Of Risk—Spectators At A Baseball Game*, 17 MICH. L. REV. 594 (1919); *Note, Duty Of Proprietors Of Theaters, Amusement Gardens, etc., As To Safety Of Patrons*, 69 CENT. L. J. 250 (1909).

78. See, e.g., *Brown v. Flying Wheels Motorcross Club*, 569 So.2d 313 (Ala. 1990); *East Bay Raceway v. Parham*, 497 So.2d 719 (Fla. 2d DCA 1986); *Pack v. Santa Fe Enters., Inc.*, 568 N.E.2d 360 (Ill. App. Ct. 1991); *Merritt v. Nickelson*, 287 N.W.2d 178 (Mich. 1980) (drag racing); *Cortwright v. Brewerton Int'l Speedway, Inc.*, 539 N.Y.S.2d 599 (N.Y. App. Div. 1989).

79. See, e.g., *Bellezzo v. State*, 851 P.2d 847 (Ariz. Ct. App. 1993); *Neinstein v. Los Angeles Dodgers, Inc.*, 229 Cal. Rptr. 612 (Cal. Ct. App. 1986); *Rudnick v. Golden West Broadcasters*, 202 Cal. Rptr. 900 (Cal. Ct. App. 1984); *Brown v. San Francisco Ball Club*, 222 P.2d 19 (Cal. Ct. App. 1950); *Ratcliff v. San Diego Baseball Club*, 81 P.2d 625 (Cal. Ct. App.

demolition derby,⁸² dog racing,⁸³ football,⁸⁴ golf,⁸⁵ horse racing,⁸⁶ ice hockey,⁸⁷ jai alai,⁸⁸ tennis,⁸⁹ polo,⁹⁰ rodeo riding,⁹¹ snowmobiling,⁹² soap box derby,⁹³ and wrestling.⁹⁴ Defendants in these cases include the sponsors of the events, proprietors, players, and even a team.⁹⁵ Theories of liability include premises liability, design defect, negligent maintenance, and tortious breach of duty to provide

1938); *Coronel v. Chicago White Sox, Ltd.*, 595 N.E.2d 45 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 449 (Ill. 1992); *Yates v. Chicago Nat'l League Ball Club*, 595 N.E.2d 570 (Ill. App. Ct. 1992); *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318 (Mo. 1942); *Olds v. St. Louis Nat'l Baseball Club*, 119 S.W.2d 1000 (Mo. Ct. App. 1938); *Clapman v. City of New York*, 468 N.E.2d 697 (N.Y. 1984); *Akins v. Glen Falls Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981); *Starke v. Town of Smithtown*, 547 N.Y.S.2d 383 (N.Y. App. Div. 1989); *Uzdavines v. Metro. Baseball Club*, 454 N.Y.S.2d 238 (N.Y. Civ. Ct. 1982); *Dent v. Texas Rangers, Ltd.*, 764 S.W.2d 345 (Tex. Ct. App. 1989); *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572 (Tex. Ct. App. 1987) (error refused n.r.e.); *McNiel v. Fort Worth Baseball Club*, 268 S.W.2d 244 (Tex. Ct. App. 1954); *Leek v. Tacoma Baseball Club*, 229 P.2d 329 (1951).

80. See, e.g., *Borushek v. Kincaid*, 397 N.E.2d 172 (Ill. App. Ct. 1979); *McFatrige v. Harlem Globe Trotters*, 365 P.2d 918 (N.M. 1961).

81. See, e.g., *Altorfish v. Massachusetts Bonding & Ins. Co.*, 171 So.2d 705 (La. Ct. App. 1965).

82. See, e.g., JEFFREY K. RIFFER, *SPORTS AND RECREATIONAL INJURIES* 439-40 (1985).

83. *Id.* at 440.

84. See, e.g., *Cimimo v. Yale University*, 638 F. Supp. 952 (D. Conn. 1986); *Cadieux v. Bd. of Educ. of City Sch. Dist.*, 566 N.Y.S.2d 895 (N.Y. App. Div. 1966); *Johnson v. Woodland Hills Sch. Dist.*, 582 A.2d 395 (Pa. Commw. Ct. 1990); *Perry v. Seattle Sch. Dist.*, 405 P.2d 589 (Wash. 1965).

85. See, e.g., *Richardson v. Muscato*, 576 N.Y.S.2d 721 (N.Y. App. Div. 1991); *Thomas C. Logan, Fore! Liability To Spectators at Golf Tournaments*, 13 AM. J. TRIAL ADVOC. 1207 (1990). Compare *McDonald v. Huntington Crescent Club, Inc.*, 543 N.Y.S.2d 155 (N.Y. App. Div. 1989) (golf caddy struck by golfball); *Taylor v. Churchill Valley Country Club*, 228 A.2d 768 (Pa. 1967) (same).

86. See, e.g., *Richoux v. Hebert*, 449 So.2d 491 (La. Ct. App. 1983).

87. See, e.g., *Uline Ice, Inc. v. Sullivan*, 187 F.2d 82 (D.C. Cir. 1950); *Riley v. Chicago Cougars Hockey Club, Inc.*, 427 N.E.2d 290 (Ill. App. Ct. 1981); *Rosa v. County of Nassau*, 544 N.Y.S.2d 652 (N.Y. App. Div. 1989); *Gilchrist v. City of Troy*, 494 N.E.2d 1383 (N.Y. 1986); *Pestalozzi v. Philadelphia Flyers Ltd.*, 576 A.2d 72 (Pa. Super. Ct. 1990); *Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329 (R.I. 1977).

88. See, e.g., *Fazio v. Alai Palace, Inc.*, 473 So.2d 1345 (Fla. 4th DCA 1985); *West Flager Assocs. v. Jackson*, 457 So.2d 587 (Fla. 3d DCA 1984).

89. See, e.g., *Chareas v. Township of High Sch. Dist.*, 553 N.E.2d 23 (1990); *Thomas A. Scutti, Note, Tort Law: McEnroe Tries A Different Court: No Injury From A Big Mac Attack*, 7 LOY. L.A. ENT. L.J. 465 (1987).

90. See, e.g., *Douglas v. Converse*, 93 A. 955 (1915); *Cases of Interest—Liability of Polo Player to Spectator Injured While Watching Game*, 19 LAW NOTES 73 (1915).

91. See, e.g., *Creel v. Washington Parish Fair Assoc.*, 597 So.2d 487 (La. Ct. App. 1992).

92. See RIFFER, *supra* note 82, at 441-42.

93. *Id.* at 442.

94. See, e.g., *Johnson v. Mid-South Sports, Inc.*, 806 P.2d 1107 (Okla. 1991); *Frick v. Ensor*, 557 So.2d 1022 (La. Ct. App. 1990); *Silvia v. Woodhouse*, 248 N.E.2d 260 (Mass. 1969).

95. See also WEISTART, *supra* note 19, § 8.03.

reasonable care.

A fact scenario might arise such that a spectator could assert and maintain a lawsuit based upon a sports official's failure to properly control the participants or even the spectators. To illustrate:

A frequent and aggravating problem in baseball, due to the open air arrangement of most fields, is the encroachment of spectators into live ball areas. This is something that always has been and always will be a source of difficulty. You [as sports official] must emphasize to coaches (and athletic directors, if available), that it is incumbent upon them to make arrangements to supervise the spectators in such a way that they will not be standing or seated or walking bicycles in an area where the baseball, if it goes there, is still in play. If you don't, once again an injured party may well try to send the bill to you [as sports official] in the form of a lawsuit.⁹⁶

Furthermore, injured spectators, caught in suddenly-frantic crowds, may then look to the sports official for recovery.⁹⁷ Finally, a spectator assaulted by an official may bring suit.⁹⁸

The legal rules for spectator suits against officials, as in a premises liability suit or failure to control claim, remain untested. Some states' statutory provisions give sports officials immunity from claims of ordinary negligence.⁹⁹ Despite the immunity, sports officials still face the possibility of lawsuits coming from all angles. An overzealous and uncontrolled fan who, absent control or restraint, could cause injuries either to him or herself or others, still presents quite a problem for the sports official.¹⁰⁰

96. GOLDBERGER, *supra* note 10, at 46. Cf. Mel Narol, *Fan vs. Ump: Potential Liability for Fan Injury*, 10 REFEREE 59, 59 (Dec. 1985) (describing California case where spectator recovered damages against baseball umpire after spectator had been struck by foul ball).

97. As one commentator has noted:

[A]nother aspect of possible litigation that seems to have implications for officials: the rowdy and uncontrolled crowd behavior at some athletic contests. Several officials with whom I have talked have stated emphatically that if the organization responsible for control of the fans and the well-being of the officials did not take the necessary action to ensure their safety, they would definitely take legal action. The uncontrolled, boisterous conduct of more and more spectators at games is one of the major concerns of officials.

SPORTS AND LAW, *supra* note 10, at 14.

98. One Canadian Court has encountered this exact situation. See *Foy v. Lourenco*, 3 A.C.W.S.3d 211 (Ont. Dist. Ct. 1987) (suit by spectator for assault by referee with court reducing referee's liability by forty percent based on finding of extreme provocation by spectator).

99. See *supra* notes 51-66 and accompanying text.

100. This Author recently witnessed the following scenario: Two rival boys ice hockey teams were in the midst of an emotional and close game when one team developed a "two

D. The Sports Official As Plaintiff

Sports officials, more and more, are bringing lawsuits to recover for *their* injuries. For example, officials have brought suit for injuries sustained from tortious battery,¹⁰¹ defamation,¹⁰² assault,¹⁰³ defective products,¹⁰⁴ tortious interference with economic relations,¹⁰⁵ as well as other tort claims.¹⁰⁶

on one" breakout heading into the other team's defensive zone. Despite efforts by one of the defending team's players to prevent the attacking player from getting a shot on goal, one of the attacking players was successful in getting off a shot which the goalie stopped. However, the goalie was unable to control the rebound and by pure accident one of the defensive players shot the puck into his own goal. Visibly upset with his mistake, this player skated to a corner of the rink where he suddenly and violently swung his stick at the plexiglass panels surrounding the rink. Two spectators were standing directly in front of the panels and fortunately neither of the panels shattered. By this time, the two officials on the ice took notice of the player's extreme disposition and began to skate towards him. However, before the officials met up with the player, he had swung his stick in a rotary fashion and then released it into the crowd. Fortunately, the player's stick missed a spectator (but just barely). Had the stick struck a spectator there was a good chance that a serious injury would have been incurred. Had a spectator been hit by this stick could the spectator have maintained an action against the officials for failing to control the players?

101. See, e.g., *Baugh v. Redmond*, 565 So.2d 953 (La. Ct. App. 1990).

102. See *Parks v. Steinbrenner*, 520 N.Y.S.2d 374 (N.Y. App. Div. 1987). When considering a cause of action for defamation on behalf of a sports official, one commentator, Mel Narol, an expert in the area of sports law involving sports officials, advocates resolution of the following issues: (1) what was said about the official; (2) whether the declarant may take advantage of any defenses including "fair comment;" (3) whether the sports official is a "public figure;" and (4) whether the statement was defamatory *per se*. See Narol, *Defamation*, *supra* note 9, at 43. Of these factors, Narol considers the "public figure" one to be most critical in light of the attendant proof problems applying to such figures. *Id.* See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1037-038 (4th ed. 1991) (stating requirement for successful defamation action where person defamed was a "public official" is showing that such statement was made with actual malice). According to Narol, professional sports officials would probably qualify as "public figures;" however, "sports officials at lower competition levels" may not. Narol, *Defamation*, *supra* note 9, at 44 (footnote omitted). The factors which may help determine whether the non-professional sports official is a "public figure" include (1) [the] level of competition being officiated; 2) [the] number of years the sports official has been officiating; 3) whether the athletic contest was broadcast on radio or television; and 4) the sports official's notoriety in the particular sports community." *Id.*

103. See *Toone v. Adams*, 137 S.E.2d 132 (N.C. 1964). See also *SPORTS AND LAW*, *supra* note 10, at 191-92; *BALEY*, *supra* note 10, at 6 (stating referee has cause of action for defamation where a "publication exposes an official to destruct, hatred, contempt, ridicule, or shame or when the comments tend to be injurious to the person's office, occupation, business or employment, as seen in the minds of a substantial segment of the community").

104. See *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717 (Minn.), *cert. denied*, 474 U.S. 1006 (1985) (umpire brought suit against batting weight manufacturer after being struck by the weight during a softball game).

105. See *Beck v. Croft*, 700 P.2d 697 (Or. Ct. App.), *review denied*, 299 Or. 583, 704 P.2d 513 (Or. 1985).

106. See, e.g., *Hickey v. Nat'l League of Professional Baseball*, 565 N.Y.S.2d 65, 66 (N.Y. App. Div. 1991), where a fiancee brought an action for negligent and intentional inflic-

With regard to officials' *non-intentional* injuries sustained during the course of the game, some courts have denied an official's recovery because he or she had been guilty of contributory negligence,¹⁰⁷ or had assumed the risk of injury.¹⁰⁸ This proposition has been expressed as follows:

Players, coaches, managers, referees and others who, in one way or another, voluntarily participate must accept the risks to which their roles expose them. Of course, this is not to say that actionable negligence can never be committed on a playing field. Considering the skill of the players, the rules and nature of the particular game, and risks which normally attend it, a participant's conduct may amount to such careless disregard for the safety of others as to create risks not fairly assumed. But it is nevertheless true that what the scorekeeper may record as an "error" is not the equivalent, in law, of negligence.¹⁰⁸

tion of emotional distress on behalf of a deceased baseball umpire on the theory that the league subjected the umpire to a "grueling" schedule.

107. See, e.g., *Hanna v. State*, 258 N.Y.S.2d 694 (N.Y. Cl. Ct. 1965). In *Hanna*, the plaintiff, a participant who had volunteered to be an umpire for a game of baseball, stood behind the catcher and also behind a backstop which was in place to prevent balls which had either been foul tipped or missed by the catcher. The plaintiff, while standing within the netted backstop, was subsequently struck by a foul tip which he claimed came through the backstop's netting. He then sued the college where the game had been played (and who also was the owner of the backstop) for negligence. In holding for the college, the trial court found that the plaintiff was barred from recovering because he was "aware that there purposely was slack in the netting of the backstop and was chargeable with knowledge that to stand with his face too close to the net would be dangerous, and that his act in doing so constituted contributory negligence . . ." *Id.* at 698.

108. See, e.g., *Dillard v. Little League Baseball Inc.*, 390 N.Y.S.2d 735 (N.Y. App. Div.), *appeal denied*, 364 N.E.2d 1345, (N.Y. 1977). Cf. *Davis v. Jones*, 112 S.E.2d 3, 6 (Ga. Ct. App. 1959) (holding wrestling timekeeper who was injured when wrestler fell upon him was "charged with knowledge that danger or harm might result to one sitting within three feet of the ring"). In *Davis*, the timekeeper had sought to hold the event's promoters liable for their failure to warn of the danger complained of. Additionally, the plaintiff alleged other negligent acts on the part of the promoters. In respect to the timekeeper's claim that the promoters had breached their duty to warn, the court noted:

The only duty we can think of which was owed by the defendants to the plaintiff, . . . was the duty to warn of any unusual dangers which the defendant[s] had reason to anticipate. The contention of the plaintiff that the defendants should have anticipated the behavior attributed to the defendant Dizzy Davis [the wrestler who fell on the timekeeper] and should have warned the plaintiff thereof is wholly without merit because to our minds the defendants, in order to have anticipated such behavior, would not only have had to be clairvoyant but would have had to be equipped with supernatural powers beyond the capacity of common man. The defendants owed the plaintiff only a limited duty, and like the duties of ordinary care, it encompassed only the probable, not the possible, unexpected or unascertainable.

Id.

109. *McGee v. Bd. of Educ. of the City of New York*, 226 N.Y.S.2d 329, 331-32 (N.Y. App. Div.) (per curiam), *appeal dismissed*, 190 N.E.2d 537, (N.Y.), *appeal denied*, 240

In such cases, the courts have also applied the familiar "recklessness" standard to bar a sport official's recovery where the tortfeasor's conduct rose only to the level of ordinary negligence. For example, one New York court recently stated:

We hold that the decedent's [a tennis umpire] injuries and subsequent death [from being struck by a tennis ball] were not the proximate result of a breach of duty owed by defendant to the decedent. As a matter of law, a participant in a sporting event assumes the risk of injuries normally associated with the sport. Being hit by a tennis ball is surely a risk normally associated with the sport as far as umpires are concerned. In our view, this case is controlled by the rule . . . that by participating in a sporting event, the plaintiff had consented that the extent of the duty owed to him by the defendant-appellant was no greater than merely to avoid *reckless or intentionally harmful conduct*. Here, the decedent was fully aware of the risk of being hit by a ball traveling at a rate of speed in excess of one hundred and twenty miles per hour.¹¹⁰

In the case of a sports official suing for *intentional* torts incurred during a sporting event, the key inquiry is whether in fact the sports official *consented* to the alleged tortious conduct. Additionally, a court must ask whether the conduct in question occurred in the normal course of the game.¹¹¹

N.Y.S.2d 242 (N.Y. App. Div.), *appeal denied*, 193 N.E.2d 644 (N.Y. 1963). In *McGee*, a high school teacher, "assigned by the school principal" to assist the coach during the practice, 226 N.Y.S.2d at 330, sustained injuries from being struck by a baseball thrown while the teacher was standing behind the pitcher's mound. The teacher sued, arguing that the coach had wrongfully directed practice on a "diamond of nonregulation size," and that the coach had negligently departed from the routine practice procedure. *Id.* at 331. Although the teacher obtained a favorable verdict at trial, the appellate court reversed the judgment and dismissed the teacher's complaint. Interestingly, the court rejected the plaintiff's argument that the "nonregulation size" had "materially increased the hazards to which the plaintiff was exposed." *Id.* at 332. The court stated that the teacher, as "participant," assumed the risk of playing field "even though it does not meet 'official' or 'regulation' standards." *Id.* (citations omitted). Whether this same finding would be sustained in the case of a sports official allowing a game or sports event to take place on a "nonregulation" field remains to be seen.

110. *Wertheim v. U.S. Tennis Ass'n, Inc.*, 540 N.Y.S.2d 443, 444 (N.Y. App. Div.), *appeal denied*, 547 N.E.2d 101, (N.Y. 1989) (citations omitted, emphasis added). The New York "rule" the court was referring to was the court's holding in *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986).

111. This standard is explained as follows:

A sports official may bring suit seeking damages for an injury intentionally inflicted while officiating. In these assault and battery cases, the major questions are whether or not the official has consented to the physical contact inherent in the sport and whether or not it occurred as "part of the game." . . .

Like a player, a sports official consents by implication only to those inten-

Whatever the officials' theory of liability, the official can only be thought to have assumed the risk, or consented to those acts, which are a "part of the game."¹¹² As such, a sports official does well to show that the tortfeasor acted beyond the scope of the athletic event; this counters the tort defendant's assumption-of-the-risk (or consent) argument.¹¹³

PART II: CRITIQUE OF THE STATE OF THE LAW AND A SUGGESTED APPROACH

A. *The Need For A Proper Standard*

It becomes necessary to reiterate the importance of defining the proper legal standard governing sports officials. Sports law tests an increasingly varied group of claims (which are brought against coaches, schools, governmental entities, and teams). Inevitably, sports officials will get sued with greater frequency. As is the case with the other types of defendants, the difference in the standard of liability will usually determine the outcome of the suit.

Courts must uniformly apply a gross negligence or recklessness standard, and refrain from imposing liability based on ordinary negligence.

Recent cases affecting coaches and athletic supervisors illustrate the danger in allowing the threshold for the sports official's liability to fall below the level of gross negligence or recklessness. For example, in *Parisi v. Harpursville Cent. Sch. Dist.*,¹¹⁴ a plaintiff survived a motion for summary judgment in a negligence claim which alleged a coach's failure to provide protective equipment. A school's softball player (the catcher) sued her school district, the coach and her assistant, for serious injuries sustained when she was struck by a pitch. The girl was hit during a practice pitching session, when she momentarily looked away towards the scoreboard (as she customarily did). Plaintiff's theory was that neither the

tional acts that are "part of the game." A football official understands that he might be in the path of a player who may run into and injure him during the course of a play. When a player or coach becomes upset and shoves or strikes an official, clearly that behavior is not "part of the game;" in this case recovery is possible.

SPORTS AND LAW, *supra* note 10, at 189.

112. See Narol, *Kill the Umpire*, *supra* note 10, at 33.

113. *Id.* at 34 ("The defense of assumption of the risk can be overcome in an appropriate case through close analysis of the facts and the sport to determine what actually constitutes [a] 'part of the game.'").

114. 553 N.Y.S.2d 566 (N.Y. App. Div. 1990).

coach nor her assistant instructed her to wear a mask while catching on this day, and that this failure to instruct constituted a breach of duty.

In sustaining the trial court's denial of the defendants' motion for summary judgment, a New York appellate court held that a jury question existed as to "whether the failure to supply a face mask for plaintiff's use or to instruct or require her to use a face mask was a breach of sound coaching practice."¹¹⁵

The court's interpretation of a state high school athletic association rule, which required catchers in that particular league to wear a "helmet and mask" as well as protective equipment, makes *Parisi* potentially applicable (and of concern) to sports officials.¹¹⁶ Conceivably, *Parisi* can form the basis for a negligence claim against a sports official based on the official's failure to ensure that a participant is wearing the proper protective equipment. However, to the extent that in *Parisi* the coach's failure to tell her catcher to wear a mask may be an instance of *gross* negligence, the case is not tremendously troubling for sports officials.¹¹⁷

Parisi stands as a troublesome decision, however, in the instance where a particular league or sport makes the protective equipment (or a portion thereof), which some may deem "essential," optional. The rule in such cases should be that a sports official will not be liable for failing to require any player to wear more equipment than is required under the rules. The reasoning behind this conclusion is that it would be unfair to impose liability upon an official who has no power to require a player to wear the equipment in the first place.

Current sports law tests other types of negligence claims, such as player mismatching. *Benitez v. New York City Bd. of Educ.*¹¹⁸ illustrates this negligence theory. In *Benitez*, a high school football player sued the New York City Board of Education and the Public Schools Athletic League after sustaining a broken neck during a football game. Prior to the game in question, school officials elevated plaintiff's team to a more competitive league over the team's objection. The team opposed the move because of the greater risk of injury accompanying the increased competition level.¹¹⁹ The

115. *Id.* at 567 (citation omitted).

116. *Id.*

117. The court's conclusion would not be reached in all sports. For example, in some sports, such as womens' lacrosse, helmets are, actually forbidden. Beth Krodell, *Women's Game Tries to Head Off Helmet Flap*, USA TODAY, June 13, 1991, at 9C.

118. 541 N.E.2d 29 (N.Y. 1989).

119. Specifically, the plaintiff's team objected to its elevation as follows:

school principal also rejected the coach's request for reconsideration, which came just prior to this game.¹²⁰

Plaintiff argued that the defendants acted negligently in placing his team in the more competitive division, and allowing them to play the game "in the face of an obvious mismatch"¹²¹ Additionally, the plaintiff claimed exposure to harm as a result of being allowed to play "virtually the entire first half of the game without adequate rest."¹²²

A jury returned a verdict for the plaintiff, finding the defendants negligent in allowing (a) such an obvious mismatch, and (b) plaintiff's continued participation given his fatigued state.¹²³ The intermediate appellate court affirmed the decision.

However, New York's Court of Appeals found that the trial court instructed the jury to apply an incorrect standard of care, and reversed.¹²⁴ According to the *Benitez* court, the trial judge

GW [plaintiff's team] had been placed in Division A prior to the 1982 season [the plaintiff sustained his injury in the 1983 season] by the Football Committee of the PSAL [i.e., defendant Public Schools Athletic League]. The PSAL determined, pursuant to established guidelines, that GW was better suited for Division A competition than the less competitive Division B league where GW had been dominant the three previous seasons. GW exhausted its administrative appeals, arguing throughout that Division A competition was "potentially dangerous to the safety and welfare of the team" and that the players might "suffer serious injuries." Before the start of the 1983 season, GW again sought to be assigned to Division B, citing among its grounds safety concerns and the injury toll suffered by the team during the 1982 season. Under PSAL administrative guidelines and because the injuries suffered by GW players were akin in number and degree with those of other Division A teams, this request for reassignment was also denied.

Id. at 31.

120. Specifically, the coach warned that the playing of the game "was a mismatch and should not be played because of the high risk of injury." *Id.* At trial, the coach testified that despite the principal's rejection of the coach's plea and the coach's self-viewed "responsibility to pull a team off the field in the face of unsafe competition," the coach did not "unilaterally cancel the game because he feared it might cost him his job." *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* At the trial level, the court instructed the jury "that a school owes a student voluntarily competing in an interscholastic high school football game the more protective duty and standard of care of a prudent parent." *Id.* at 32 (citations omitted). Later New York cases have described the "prudent parent" standard. In *Shante D. by Ada D. v. City of New York, Bd. of Educ. Local Sch. No. 5*, 598 N.Y.S.2d 475, 478 (N.Y. App. Div.), *leave to appeal to the Court of Appeals*, 603 N.Y.S.2d 722 (N.Y. App. Div. 1993) (citation omitted), the court stated "[s]chool boards generally have a duty to supervise their students with the same degree of care as a parent would exercise in the same circumstances." Thus, the test is whether the person or entity "exercised the same degree of care in supervising [someone] . . . as would a reasonably prudent parent." *Id.* See also *Homer v. Bd. of Educ. of LaFayette, LaFayette Cent. Schs.*, 577 N.Y.S.2d 1009, 1010 (N.Y. App. Div. 1991) (same); *Snyder*

should have instructed the jury to apply a duty of "ordinary reasonable care."¹²⁵ The court further found that the plaintiff assumed the risk of injury,¹²⁶ thereby precluding the defendants' breach of a duty to guard the plaintiff from any "unassumed, concealed or unreasonably increased risks."¹²⁷ Contrary to plaintiff's assertion, his assumption of the risk was *not* negated by any "inherent compulsion."¹²⁸

Although the *Benitez* court found no liability on the part of the defendants, different facts might yield a different result.¹²⁹

v. *Morristown Cent. Sch. Dist. No. 1*, 563 N.Y.S.2d 258, 258 (N.Y. App. Div. 1990) (same).
125. 541 N.E.2d at 32 (citations omitted).

126. The court held:

Fatigue and, unfortunately, injury are inherent in team competitive sports, especially football. Benitez was concededly an excellent athlete, properly equipped and well-trained. He was playing voluntarily in the same manner as he had for the previous year and one half against Division A competition and had not requested rest or complained. Within the breadth and scope of his consent and participation, plaintiff put himself at risk in the circumstances of this case for the injuries he ultimately suffered. On his own proof, he thus failed to meet the burden of showing some negligent act or inaction, referenced to the applicable duty of care owed by him by these defendants, which may be said to constitute "a substantial cause of the events which produced the injury." The injury in this case, in sum, was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics.

Id. at 34 (citations and quotation omitted).

127. *Id.* at 33 (emphasis added).

128. *Id.* According to New York law, there is an important "legal distinction[] . . . [to be] drawn between compulsory physical education courses and voluntary participation in interscholastic athletic activity, as well as between professional and amateur status," the important distinction being that the former conduct can be referred to as an "inherent compulsion" that effectively negates, in whole or part, the assumption of risk defense. *Id.* at 32 (citations omitted). The *Benitez* court further explained the doctrine as follows.

The theory of inherent compulsion provides that the defense of assumption of the risk is not a shield from liability, even where the injured party acted despite obvious and evident risks, when the element of voluntariness is overcome by the compulsion of a superior. Two factors are generally present to sustain a finding of liability on an inherent compulsion theory despite the injured party's knowledge of the risk, "a direction by a superior to do the act" and "an economic compulsion or other circumstance which equally impels" compliance with the direction. Though the risk is foreseen, an assurance of safety generally implicit in the supervisor's direction supplants the plaintiff's assumption of the risk by requiring action despite prudent cautionary concerns.

Id. at 33 (citations and quotations omitted).

Based on this test, the court found that the plaintiff failed to present evidence which showed that he "had no choice but to follow the coach's direction to play despite his concern over enhanced risk factors known by or communicated to the coach." *Id.* at 34 (citation omitted).

129. In fact, a recent New Jersey case demonstrates that negligent mismatching can lie as a viable claim. See *Zipper v. Ocean Ice Palace*, No. 4200-89 (N.J. Super. Ct. Law Div., Dec. 6, 1993). In *Zipper*, the 13-year-old plaintiff sued the hockey arena where he had sustained injury from a 19-year-old's slap shot. Plaintiff asserted a negligent mismatch theory,

Such a result would certainly have a negative implication for sports officials. In fact, the court's phrasing of the standard of care, whereby the defendants owed athletes an *ordinary reasonable duty of care*, remains troubling in itself. While the court found no liability, the standard of care it applied, under a different set of facts, offers sports officials too low a threshold of liability. To reiterate this Comment's position, no liability should attach unless the plaintiff shows that the defendants (i.e., sports officials) acted recklessly or in a grossly negligent manner.

B. *Substantiating The Proper Standard*

Several legal justifications support the imposition of civil liability on an official only where his or her action (or inaction) constitutes either reckless or grossly negligent conduct. These arguments are addressed below.

Some courts and commentators note that "the duty of care owed by a player to an umpire during the course of a game is the same as that owed to another player;"¹³⁰ it makes logical and equitable sense to apply this rule in the converse situation (referring to the official's duty to a player).¹³¹ Since participants owe fellow players a duty to not act *recklessly*,¹³² recklessness and not ordi-

noting first that he was paired with other players 16 and 18 years old, and secondly that in the "all star" game where he was injured, his team played a group of counselors and instructors. At trial, the plaintiff presented expert testimony to the effect that his shin pads could not have contained more padding to prevent the injury. Plaintiff's experts also testified to the hazards created by such a mismatch in age and skill level. The jury returned a plaintiff's verdict in the amount of \$500,000. 14 N.J. VERDICT REV. 3, 4 (Dec. 1993). Subsequently, however, following a motion for a new trial, the case was reversed as to damages. Telephone Interview with Bruce H. Stern, Esq., Plaintiff's Counsel (Mar. 10, 1994).

130. See, e.g., *Stewart v. D & R Welding Supply Co.*, 366 N.E.2d 1107, 1108 (Ill. Ct. App. 1977) (citations omitted); *CHAMPION*, *supra* note 9, § 4:1, at 78 (declaring "the duty of care owed by a participant to an official during the course of the game is the same as that owed to another player." (footnote omitted)).

131. At least one commentator argues that such a rationale is flawed:

Legal commentators have suggested that the duty owed by a referee to an athlete can be found by examining the duty owed by one sports participant to another. The duty owed by a referee, then, would be to refrain from affirmative misconduct. The problem with such a view, however, is that it fails to recognize that a significant difference exists between the conduct of the referee-defendant and that of the participant-defendant. In the participant liability cases the defendant's affirmative misconduct results in the injury of a fellow participant. Whether a referee's negligence can be defined as affirmative misconduct is an open question. Arguably, the negligent referee is culpable not because of a failure to act in a proper manner, but rather because of a failure to act at all.

Davis, *supra* note 2, at 943 (footnote omitted).

132. See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979); *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989); *Turcotte v. Fell*, 502

nary negligence should define the sports official's duty.

In applying this standard to sports officials, at least when they are sued by sports participants (i.e., players), one commentator suggests the following formulation:

N.E.2d 964, 968 (N.Y. 1986); *Kabella v. Bouschelle*, 672 P.2d 290 (N.M. Ct. App. 1983); *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975). See also LAW OF PROFESSIONAL AND AMATEUR SPORTS § 14.01[4], at 14-6 (Gary A. Uberstine ed., 1990); 2 STUART M. SPEISER et al., THE AMERICAN LAW OF TORTS § 9:43, at 1328-29 (1985); Mel Narol, *Sports Participant with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29, 30 (1991) [hereinafter Narol, *Emerging Standard*]; Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 195, 198 (1990); Lawrence P. Rochefort, *A Course of Action for Florida Courts to Follow When Injured Sports Participants Assert Causes of Action*, 4 U. MIAMI ENT. & SPORTS L. REV. 257, 262 (1987); Mel Narol, *Sports Torts: A Standard of Care Issue*, 134 N.J. LAW. 41 (May/June 1990). But see Lazaroff, *supra*, at 213-14 (questioning propriety of recklessness standard for contact sports such as boxing, football, and ice hockey).

For a short period of time, it appeared that New Jersey had abandoned the majority rule in favor of an ordinary negligence standard. See, e.g., *Crawn v. Campo*, 630 A.2d 368 (N.J. Super. Ct. App. Div. 1993), *aff'd as modified*, 643 A.2d 600 (N.J. 1994). In *Crawn*, a New Jersey appellate court surveyed other case law from a majority of states that applied the reckless standard to suits between participants, and rejected this standard. Specifically, the court held that "negligent conduct" was sufficient to establish liability as between participants. 630 A.2d at 375 (footnote omitted). The court also stated:

[a]mong the factors that might bear on the issue of reasonable care in a sports event are: what sport was involved; whether it was a professional game or an amateur contest; what equipment was involved in the sport, and what was its purpose; whether the sport was conducted pursuant to a recognized set of rules, an informal set of rules, or no rules at all; whether the injurious conduct violated a rule of the contest and, if so, whether the rules was designed for the participants' safety; what was the ultimate purpose of the game and what were the customary methods of winning it; what the ages, physical characteristics and skills of the participants; what knowledge of the rules and customs of the game the participant possessed; what degree of competitiveness the activity involved; and what relationship the participants' conduct bore to the ultimate purpose of the contest.

Id. at 376 (citations omitted).

However, the New Jersey Supreme Court disagreed. The court cited various policy considerations and legal practicalities, arriving at the conclusion that a "heightened standard" should apply:

[W]e hold that the duty of care in establishing liability arising from informal sports activity should be based on a standard that requires, under the circumstances, conduct that is reckless or intentional. Our conclusion that a recklessness standard is the appropriate one to apply in the sports context is founded on more than a concern for a court's ability to discern adequately what constitutes reasonable conduct under the highly varied circumstances of informal sports activity. The heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport yet leaving free from the supervision of the law the risk-laden conduct that is inherent in sports and more often than not assumed to be "part of the game."

643 A.2d at 607.

[A] player claimed to have been injured by a[] . . . sports official . . . during the course of a game may recover only if the player can show that the defendant acted in reckless disregard for his safety. Once this standard is adopted, then the inquiry must focus upon whether the defendant participant's conduct was "part of the game." If it was, then the defendant not having acted with reckless disregard will win, if it is not, then the plaintiff will win. Analysis of whether the act was "part of the game" must deal with such factors as competition level, skill level, sport involved, when during the game the incident occurred, the type of play involved, manner in which the play evolved, rules of the sport and interpretations of the rules of the sport.¹³³

Nevertheless, imposing a recklessness/gross negligence standard for sports officials may cause confusion in those states that have adopted comparative negligence.¹³⁴ Where it has occurred (in

133. See Narol, *Emerging Standard*, *supra* note 132, at 39-40. Other commentators also indicate support for a recklessness standard which affords consideration to the rules of the sport. One author, referring to player versus player lawsuits decided under a recklessness standard, phrased the proper test in a similar fashion, incorporating tortious recklessness and rule violations:

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

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

Lazaroff, *supra* note 132, at 223.

134. As one commentator has noted:

Most courts considered gross negligence different from ordinary negligence in degree only, and not in kind. Nevertheless, in order to avoid the "all or nothing" effect of the doctrine of contributory negligence, some courts declined to bar a contributorily negligent plaintiff's recovery when the defendant was grossly negligent. There remains some question as to the status of the "gross negligence" distinction in comparative negligence jurisdictions which formerly recognized it as a valid limitation on the defense of contributory negligence. Most of the cases which have considered the issue have held that the adoption of comparative negligence has, at least by implication, abolished the common-law concept of "gross negligence." The courts have reasoned that since gross negligence is but one of many different degrees of negligence, comparative negligence should be applicable in apportioning damages no matter how great the differences. Also, jurisdictions which have chosen to compare fault when the defendant's conduct can be characterized as "willful, wanton, or reckless," usually apportion damages in cases of gross negligence.

the context of general tort principles), the results vary. In Pennsylvania, the courts do not treat wilful and wanton misconduct (arguably differing in degree, but not in kind, from gross negligence) "as a form of negligence, and thus will not apply comparative negligence principles where such conduct is found."¹³⁵ In other states such as New Jersey, "if both parties were engaged in wilful and wanton conduct, the plaintiff will be precluded from recovering damages, despite the comparative negligence statute."¹³⁶ Despite the potential confusion caused by application of a recklessness standard in some states, this perhaps remains the standard's only drawback.

Adversarial fairness demands consideration of the assumption-of-risk defense, a concept intimately related to the contributory/comparative negligence question. As illustrated,¹³⁷ the assumption of risk doctrine serves as a significant obstacle to a sports official's cause of action.¹³⁸ Lawsuits brought *against* sports officials merit the same scrutiny. Assuming this were the case, the assumption of risk defense would eliminate those suits where the danger was either known or obvious to the injured participant(s).¹³⁹

Strong public policy concerns also militate against imposing liability on the sports official for his or her (non-reckless) negligent acts.

Few men and women would be willing to officiate athletic contests if their mere negligence could result in incurring personal liability for injuries sustained by players. Courts have endeavored to avoid discouraging the free participation in sports. Similarly, a balance should be drawn so that officials are held accountable for reckless conduct while not discouraging their participation. The duty required of an official to avoid such tortious liability should be the diligent enforcement of all safety rules. This does not mean that an official would incur liability if

1 ARTHUR BEST, *COMPARATIVE NEGLIGENCE* § 4.30[3], at 4-97 to 4-99 (1994 rev. perm. ed.) (footnotes omitted).

135. JOHN JAMES PALMER AND STEPHEN M. FLANAGAN, *COMPARATIVE NEGLIGENCE MANUAL* §1.240 (Supp. 1993) (footnote omitted).

136. *Id.* (footnote omitted).

137. *See supra* notes 108-110 and accompanying text.

138. "Sports officials have a difficult time recovering damages for injuries that are judged to be the result of an inherent risk in an activity. The doctrine of assumption of risk usually prevents the official from recovering damages, since the court assumes that the official was aware of the risk and engaged in the activity with the knowledge that he could be injured." *SPORTS AND LAW, supra* note 10, at 190.

139. *See, e.g.,* *Russini v. Incorporated Village of Mineola*, 584 N.Y.S.2d 622, 622 (N.Y. App. Div. 1992) (barring softball player's lawsuit against village where hole in which player tripped and fell was not "concealed" therefore player assumed risk of injury).

he fails to call every violation that occurs on the field. An official would be held liable only when he acts in willful or reckless disregard of his duty to enforce that safety rules [sic] of the particular game.¹⁴⁰

The practical effect of a low liability threshold for sports officials—endangered sports activities—underscores the need for a more forgiving standard.

Because the willingness of volunteers to participate in organized youth activities is clearly affected by the threat of liability, both actual and perceived, one enormous cost of tort liability is to place in jeopardy the legion of volunteers that run most organized youth activities. Moreover, the quality of the relationships between the participants, their families, and the volunteers in these activities is undermined by the threat of tort claims. For volunteers, when the willingness to participate is so elastic, the choice is not between careful and careless volunteers. It is between protected volunteers and no volunteers at all.

. . . .

[T]he most obvious effect [of potential tort liability] has been to discourage many volunteers from undertaking or continuing volunteer services. A majority of 8,000 executives of volunteer associations surveyed recently indicated that fear of liability exposure and of litigation in general is damaging their efforts at volunteer recruitment. Although the number of lawsuits against volunteers is difficult to quantify, the publicity of such cases has nevertheless had a significant impact. To compound matters, the cost of liability insurance for volunteers has been prohibitive, and is often simply not obtainable.¹⁴¹

Putting aside the argument for a recklessness/gross negligence standard, non-legal solutions (to the problem of official's threatened liability) demand consideration as well. For example, leagues should tighten the playing rules of their particular sport to give sports officials more control over the game.¹⁴² Indeed, officials

140. Rains, *supra* note 45, at 808 (footnote omitted).

141. Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf" Tiddlywinks*, 53 OHIO ST. L.J. 683, 685, 689 (1992) (footnotes omitted).

142. Such action was recently taken by the national governing body of amateur ice hockey, which implemented numerous changes to the "Abuse of Officials" rule. See *USA Hockey Rules*, *supra* note 2, Rule 601. However, some commentators have posited that the exact opposite occurs, i.e., that sports officials *do not* enforce safety or playing rules to control the game or, more importantly, the safety of the participants:

In an effort to curb violence once the players reach the field, game officials should enforce the rules more strictly. Despite the need for having a "tight game" called in the NFL [National Football League], the opposite has been the

often use player-safety or equipment rules to prevent injury from occurring.¹⁴³

Case studies of certain player-safety rules, however, show that sometimes such rules may be too difficult to apply.¹⁴⁴ On a more fundamental level, certain sports themselves do not facilitate player-safety rules.¹⁴⁵ These practical realities tend to mitigate the effect that non-legal solutions will have on the problem. Thus, it is again suggested that the law uniformly adopt a recklessness/gross negligence standard of sports officials' liability.

While a more stringent legal standard remains the best solution, the sports official can help his or her own cause and possibly prevent liability by taking some obvious—yet easily overlooked—steps. For example, he or she needs to ensure that the playing field is in good condition. This would include both pre-game and game-time inspections.¹⁴⁶ In the sport of baseball, the

case. According to one NFL coach, "As you progress up the ladder from high school to pro, you see officials grow more liberal in their interpretation of the rules, and that is a dangerous thing." Actually, because the potential for violence seems to increase with the level of competition, common sense suggests that the rules be enforced more stringently in professional sport than at lower levels.

Rains, *supra* note 45, at 811 (footnote omitted). See also JAMES A. BAILEY ET AL., LAW AND LIABILITY IN ATHLETICS, PHYSICAL EDUCATION AND RECREATION 140 (1988) (stating that "officials must crack down on the playing fields and floors by blowing their whistles and throwing flags more often, giving bigger and more frequent penalties, and tightening up the game from the point of view of enforcement of the rules, especially safety rules.").

143. See, e.g., Vince Kowalick, *Colonial Classic Notebook: Valley-Area Neighbors Stage Florida Showdown*, L.A. TIMES, Mar. 31, 1988, at part 3, page 18, col. 4 (describing baseball tournament event wherein umpires halted game because the players of one team were wearing cleats made of illegal material).

144. See, e.g., Don Pierson, *On Pro Football - Rule may be Dropped Because NFL Refs Can't Seem to Grasp It*, CHI. TRIBUNE, Feb. 17, 1991, at 11 (describing NFL referees' difficulties with implementing the "in the grasp" rule).

145. Ice hockey illustrates this fact. The sport's rules (amateur and/or professional hockey, depending on the rule) provide for penalties for such things as elbowing, slashing (striking another player with a stick), tripping, and "cross-checking" (checking a player with both hands on the stick with the stick not touching the ice surface). By their very nature, these rules are implemented *after the infraction has occurred*. There are no rules from either amateur or professional hockey which permit a referee to penalize or discipline a player *before* the injurious act occurs, much less prevent him or her from playing. Thus, it is difficult to conceive how commentators can posit that sports officials should be liable for permitting the tortious acts of others to occur. Simply put, in some sports the official may have no authority to control or prohibit the tortious activity *before* it happens. Likewise, an official's failure to assess a penalty against a player who commits a legally tortious act, where the official had a reasonable belief that no penalty had been committed, should not render the official liable because even if the official had made the call, the injury preceded any official's acts and therefore, speaking in tort terminology, the official's acts were neither the cause in fact nor the proximate cause of the player's injuries.

146. See SPORTS AND LAW, *supra* note 10, at 198-202. *But see* Rooney v. Franklin Park Park Dist., 628 N.E.2d 674 (Ill. App. Ct. 1993), *appeal denied*, 633 N.E.2d 14 (Ill. 1994). In

umpire(s) need to make continuous, visible inspections of the field. For basketball, "referees [should] make sure that there are no loose balls around the gym on which a player might trip, that the backboard has padding around it and that the court and surrounding area are clear for players."¹⁴⁷ Pre-game inspections, in particular, should take into account weather conditions.¹⁴⁸

Besides inspecting the playing field or surface, the sports official should stay in "good shape." Safe competition demands a healthy referee or umpire.¹⁴⁹

C. *The Problem With Ordinary Negligence*

Finally, any discussion of an appropriate standard of sports officials' liability must point out the shortcomings of the *perceived prevailing standard*, i.e., ordinary negligence. According to some commentators, such a standard imposes liability on a sports official

Rooney, a player in a floor game (one played in gymnasiums with plastic sticks and a plastic puck) sued a local park district and two referees it employed after the player fell and injured himself on floor mats that had been used to prevent pucks from going underneath bleachers in the gymnasium where the game was played. *Id.* at 674-75. The court held that under Illinois law, the referees could only be liable if it could be shown they had acted in a willful and wanton manner. *Id.* at 675. The court, in applying this standard, held in favor of the referees, finding that "[a]t worst, defendants' conduct amounted to negligence." *Id.* at 676. Despite the finding of non-liability in *Rooney*, diligent and thorough pre- and post-game inspections of the playing surface or field is strongly recommended. Admittedly, had the court applied a different standard in *Rooney*, liability may have attached.

147. See *SPORTS AND LAW*, *supra* note 10, at 198.

148. Game-time weather conditions are a real issue. One author explains:

In deciding whether to begin play when the weather is bad the officials must first inspect the condition of the playing surface. On one occasion in New Jersey, high school football officials were sued for permitting a game to be played on a field that was allegedly extremely muddy after a heavy rain and therefore unsafe. As a player attempted to make a tackle, he fractured two vertebrae, resulting in partial paralysis from the neck down. The player not only sued his coach and school for failure to provide proper training and safe headgear, but also named as defendants the game officials, alleging the condition of the field contributed to his injury. The case was eventually dismissed against the officials, and a settlement reached with the other defendants for approximately one million dollars.

Id. at 198.

149. See *Rains*, *supra* note 45, at 811-12, where the author argues that:

[t]he various leagues should impose more stringent age and physical condition requirements on game officials. Effective supervision by referees must be a component of any plan to combat sports violence. In setting forth referee "fitness" requirements, cognizance must be taken of the player/official ratio and age and physical ability disparities between player and officials. Referees are trying to control contests in which the player to official ratio ranges from four to one in football to six to one in hockey. Each of these players are in better physical condition and possess athletic abilities which greatly exceed that of the official. If the league, therefore, has any hope of controlling this fast-paced action and the violence which it has bred, the officials must be in "top shape."

in the following situation:

Since there is a duty to perform equivalent to acceptable norms, if the [sports official's] error falls below that norm, then there would be a breach of duty. If any of these types of mistakes are made, and it is determined that there has been a breach of the duty of care, an action in negligence may lie.¹⁵⁰

In these terms, commentators explaining the negligence standard define an "error" as an official's misidentifying facts. Such errors may include an illegal catch ruled legal by mistake, misinterpreting rules, or misadministering penalties.¹⁵¹ Under a negligence standard, then, the law intends to hold sports officials liable for their officiating errors.

This position is unsound for several reasons. First, it clashes head-on with the established principle that courts will not interfere with a sports official's officiating decision unless it is found to have been based on corruption, bad faith, or fraud.¹⁵² Second, the prevailing standard assumes that a causal connection exists between a player's *physical injury* and an official's misinterpretation or misapplication of a rule.¹⁵³

Any sports official wants to make the proper call and prevent injury. However, the presence of an ordinary negligence standard forces the official to "not only . . . perform his or her tasks in such a manner so as to reduce the risks of physical injuries, but also to reduce the risk of errors which may deprive a team of a victory or monetary gain."¹⁵⁴ This focuses the official's attention on the wrong thing—the ramifications of a call or ruling *beyond the confines of the playing field*. In many instances, it is difficult enough to focus on making the proper call *as that call pertains to the game*, much less ponder the future legal effects of that call.

150. Lewis & Forbes, *supra* note 2, at 694 (footnotes omitted).

151. *Id.* at 694 n.119.

152. *See supra* note 19.

153. Previously, this Comment suggested that imposing liability on sports officials for personal injuries sustained, after the misapplication or misinterpretation of a rule of the game, would be improper in certain sports. *See supra* note 145 and accompanying text. In fairness to the school of thought advocating the opposite position, it should be noted that there *are* certain situations where the failure of the sports official to apply a rule would be the cause (or contributing cause) of the player's injury:

For example, the rules of baseball require that a batter wear a helmet. Generally speaking, it is safe to assume that if you permit a player to bat without a helmet and he is struck in the head with a pitched ball, liability could attach to your actions. Strong evidence of your liability could be found in the rule book.

GOLDBERGER, *supra* note 10, at 25.

154. *See Lewis & Forbes, supra* note 2, at 695.

A negligence standard, in reality, pits the sports official against another official: the prudent, reasonable official. Unfortunately, this forces the typical official to become cautious in his calls or non-calls when facing the threat of legal culpability for making the wrong decision. This, in turn, negatively impacts the particular game's dynamics.

Many jurisdictions follow a public policy not to emasculate the sports official's ability, but to free it up so that competitive athletics prosper.¹⁵⁵ To the extent that a negligence standard inhibits the sports official, which in turn hampers competitive athletics, the standard should be abandoned. Rather, the courts should only permit recovery against a sports official who has acted recklessly or in a grossly negligent manner.

CONCLUSION

Despite recent commentary to the effect that ordinary negligence is the appropriate legal threshold for holding a sports official liable,¹⁵⁶ negligence is the wrong standard. The school of thought advocating this reasonableness standard displays incorrect presumptions and flawed reasoning.

Admittedly, the true "state" of sports official malpractice is somewhat difficult to gauge, since the vast majority of cases settle out of court.¹⁵⁷ Nevertheless, the overwhelming weight of the au-

155. Many commentators agree with this position. *See, e.g., Parvin, supra* note 10, at 19.

156. *See, e.g., RIFFER, supra* note 82, at 42 (Supp. 1993) (stating "commentators have concluded that sports officials have a duty to use reasonable care . . ." (citations omitted)).

157. One of the famous "unpublished" cases (by reason of settlement) that stood to be a precedent-setting decision involved former Dallas Cowboy All-Pro Linebacker "Bubba" Smith. The facts of the case were as follows:

On August 26, 1972, the Baltimore Colts and the Pittsburgh Steelers played a preseason game in Tampa, Florida. The National Football League provided the officiating crew for the game, but the people handling the down chain markers were from the local area. Edward Marion was the head linesman that day and Robert Lastra attended one of the down markers. Playing defensive end for the Colts was Bubba Smith who, at 27 years of age, had just been named All-Pro and NFL lineman of the year.

Late in the game, Smith's teammate, Rick Volk, intercepted a Terry Bradshaw pass and returned the ball upfield. As Volk was running toward and along the sideline where Marion and Lastra were positioned, Smith was running at full speed trying to block for Volk. As the play reached the sideline, Smith claimed he leaped over fallen players and struck the aluminum down marker, which he claimed was still stuck in the ground. In his \$2.5 million negligence lawsuit against the National Football League, the Tampa Sports Authority, Edward Marion, and Robert Lastra, Smith alleged that the collision with the marker caused a serious knee injury that cut short his career.

thority which has been written on the subject strongly suggests the propriety of either a recklessness or gross negligence standard of care. This Comment joins that position.

Perhaps the most logical and effective solution to implementing the "gross negligence" approach would be for those states who have not done so to adopt statutory provisions similar to those previously outlined.¹⁵⁸ Although this solution has been questioned,¹⁵⁹ it most effectively offers the sports official the necessary immunity.¹⁶⁰ Officials need qualified immunity to function effectively (and possibly to participate at all) in their roles as guardians of safe, competitive play. Without it, competitive athletics as an institution suffers.

For these reasons, the law must embrace a recklessness, rather than negligence-based, liability standard. Under such a standard, uniformly applied, a sports official's civil liability becomes the exception and not the rule. Enforcing *that* rule, i.e., qualified immunity, constitutes a "good call."

Narol, *Potential Liability*, *supra* note 10, at 20. Although the case was tried twice, a jury returned a verdict in favor of the defendants, however, as one commentator noted, "[d]espite the verdict, this case is significant . . . because the judge allowed the case to go to the jury, establishing for the first time that a sports official could possibly be found liable for negligence during an athletic contest." *Id.* at 21.

158. See *supra* notes 48-63 and accompanying text.

159. See King, *supra* note 141, at 709 (arguing for the use of exculpatory agreements over statutory provisions because statutory provisions are ineffective because they do not "directly inform participants of the limitations on liability until they are confronted with a defense after litigation is commenced."). Exculpatory agreements, however, carry great administrative burdens. Moreover, the possibility of unsuccessful second-level litigation (as to the validity to such agreements) offers sports officials a strong *disincentive*. See SCHUBERT, *supra* note 10, at 217 (stating "[e]xculpatory agreements are not favored by courts. If an agreement is ambiguous or covers a definite time, place, or risk, it will not be interpreted to absolve a tort-feasor of liability for harm caused at another time and place, or in a different manner.").

Alternatively, one commentator suggests that a possible source of liability would be a sports official's breach of an *affirmative* duty created by statute. See Davis, *supra* note 2, at 944-46 (describing boxing referee's liability under California statute requiring referee to stop a fight when "a marked superiority" is present or one boxer is "apparently outclassed." (citation omitted)). Unfortunately, this reasoning ignores the special relationship (in terms of regulation) that states enjoy with the sport of boxing. See, e.g., *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 700 (N.Y. Sup. Ct. 1953) (stating the "unsavory history of professional boxing . . . reveals why boxing matches . . . are by legislative policy . . . made subject to the most inexorable and meticulous regulation . . ." (citation omitted)). It is inconceivable that a state could (or would), for example, pass a similar statute requiring a hockey official, for example, to suspend a player for fighting or injuring another player with his stick. Thus, such a theory of liability appears limited to sports such as boxing and horse racing.

160. Furthermore, the legislature could tailor the rule of law to be applied to such conduct, *vis-a-vis* comparative negligence, if that particular jurisdiction follows such a scheme. See *supra* notes 134-136 and accompanying text.