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Violence in Athletics: A Judicial Approach

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COMMENT

VIOLENCE IN ATHLETICS: A JUDICIAL APPROACH

"Pro football is like nuclear warfare.
There are no winners, only survivors."[1]

Frank Gifford recognized, as do the majority of professional athletes, that certain athletic activities are violent and dangerous. Violent physical contact is inherent in both hockey and football. A brief observation of either will reveal "violence and intimidation in excess of that permitted by the rules . . . becoming integral parts of strategy"[2] and thus truly a part of the games.

Although some people object to the presence of any violence in professional sports, most sports fans tolerate, and some even enjoy legitimate aggressive play and the attendant violent physical contact. Conversely, few people would contend that unlimited violence is appropriate in athletic competition. "The mere act of putting on a uniform and entering the sports arena should not serve as a li-

1. R. FITZHENRY, BARNES & NOBLE BOOK OF QUOTATIONS 278 (2d ed. 1986) (quoting former football star Frank Gifford).

2. Note, *Tort Liability for Players in Contact Sports*, 45 UMKC L. REV. 119, 129 (1976).

cense" to injure, maim, or kill your opponent.[3] The agreement at these polar extremes, however, masks the difficulties that arise when one attempts to demarcate the boundary between legitimate aggressive play and excessive violence.

Law suits pertaining to injuries sustained during athletic competition are not a particularly recent phenomenon. A 1915 case, *Douglas v. Converse*,[4] involved a suit for an injury incurred by a spectator during a polo match. Violence in sports recently has received increased attention in the legal community because of the dramatic increases in sports-related injuries.[5] Currently, over seventeen million Americans sustain athletic injuries requiring medical attention each year.[6] As the number of injuries grows, the number of sports violence cases before the courts also grows, creating an acute need for more refined doctrines.[7]

This article will examine the problem of violence in sports generally and, in particular, the defenses used to avoid liability.[8] The author will first consider the assumption of risk doctrine, and conclude that the doctrine is not an appropriate defense to excessive violence during an athletic competition.[9]

The author will then consider the consent doctrine as applied to sporting events, and evaluate some of the scope of consent tests that courts and plaintiffs have proposed.[10] Finally, the author will propose a two-stage consent test: First, the test screens out certain egregious acts and creates for them a rebuttable presumption of liability; second, a traditional foreseeability test is then applied with specific guidelines to the remaining acts.[11]

I. Defenses to Liability

Before one analyzes legal defenses to liability for tort-related sports injuries, one must consider whether courts should apply the same doctrines that they apply to most other tortious acts. People view athletics as qualitatively different from other activities and as

3. Flakne & Caplan, *Sports Violence and the Prosecution*, Trial, Jan. 1977, at 33, 35.
4. 248 Pa. 232, 93 A. 955 (1915).
5. Horrow, *Violence in Professional Sports: Is it Part of the Game?*, 9 J. Legis. 1 (1982).
6. Peterson & Smith, *The Role of the Lawyer on the Playing Field*, Barrister, Summer 1980, at 10, 10.
7. Horrow, *supra* note 5, at 1, 2.
8. *See infra* notes 12-67 and accompanying text.
9. *See infra* notes 21-23 and accompanying text.
10. *See infra* notes 34-67 and accompanying text.
11. *See infra* notes 68-70 and accompanying text.

being subject to a different set of rules.[12] Judges frequently defer to sports industry standards or league sanctions as the appropriate measure of liability for injuries incurred during athletic competition.[13] Although athletic events are different from most other activities, courts should apply basic tort concepts, e.g. reasonableness, to behavior on the field as well as off.[14] Actions occurring during an athletic event must be considered in that context but tort doctrines take into account the circumstances surrounding an incident. Tort doctrines have evolved over hundreds of years and embody the wisdom of many famed jurists; they are flexible enough to adequately address the concerns of injured athletes.

The courts' failure to rigorously apply the appropriate legal doctrines to tortious behavior in the sports arena has caused their opinions to be unclear. Judges mention legal doctrines, but do not apply them in a manner that will enable another judge to resolve a future dispute efficiently. Most actions against one who injures another in a sporting event are for negligence or battery and are either civil or criminal. Nonetheless, courts discuss assumption of risk, a defense to negligence, and consent, a defense to battery, interchangeably. *Hackbart v. Cincinnati Bengals*[15] was a case in which the defendant injured the plaintiff by deliberately striking him on the head, a battery, yet the court focused on assumption of risk.[16]

If the defendant is accused of negligence, then the plaintiff must prove the standard elements of negligence: duty, breach of the duty, cause in fact, proximate cause, and injury. If the defendant is accused of battery, the plaintiff must prove that the defendant intended to inflict a harmful or offensive touching and actually did inflict a harmful or offensive touching.[17] The harmful or offensive touching is usually easy to prove in the sports injury cases, but the intent to harm or offend is not. Athletes need to be emotionally excited to perform well, and fact-finders have difficulty distin-

12. *See* Bodine, *Rudy T Alters Rules of the Game*, NAT'L L.J., Sept. 3, 1979, at 3, 3.

13. See Note, *Compensating Injured Professional Athletes: The Mystique of Sport Versus Traditional Tort Principles*, 55 N.Y.U. L. REV. 971, 973 (1980); Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 GEO. L.J. 771, 772 (1972).

14. *See* Note, *supra* note 13, at 973; Comment, *supra* note 13, at 772.

15. 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

16. *Id.* at 356.

17. RESTATEMENT (SECOND) OF TORTS, § 13 (1965). See also W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 9 (5th ed. 1984) [hereinafter cited as W. KEETON].

guishing between the intent to win and the intent to injure.[18] Furthermore, the events occur so rapidly that witnesses, and even participants, cannot recount their sequence accurately.[19]

Once the plaintiff or prosecutor has succeeded in proving that the defendant acted negligently or had the requisite intent, the defendant has numerous defenses. In criminal trials, defendants frequently assert self-defense to avoid liability. In civil suits, defendants have several possible defenses, including assumption of risk, consent, and contributory negligence. Although the assumption of risk doctrine is currently in scholarly disfavor, courts have focused upon it in some of the leading cases in sports liability.[20]

II. Assumption of Risk

The basis of the assumption of risk defense is that the plaintiff knew of a danger before it occurred and voluntarily assumed the risk that the danger would occur.[21] The assumption of risk doctrine has been explained as follows: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[22] When confronted with a suit for an injury inflicted during an athletic competition, a defendant must argue that the plaintiff assumed the inherent dangers of the sport, and thereby relieved the defendant of certain obligations toward the plaintiff.[23]

Hackbart v. Cincinnati Bengals,[24] probably the most renowned case on sports violence, involved the assumption of risk doctrine as applied to an incident in a professional football game. Five seconds after the referee had whistled a play dead, Cincinnati Bengal fullback "Booby" Clark struck Denver Bronco safety Dale Hackbart in the back of the head with his forearm. The blow broke three of Hackbart's vertebrae, caused other severe damage, and effectively ended Hackbart's career. The district court ruled that professional football players assumed the risk of such injuries. It

18. Note, *Tort Liability in Professional Sports: Battle in the Sports Arena*, 57 Neb. L. Rev. 1128, 1134 (1978).

19. *See, e.g.*, Regina v. Maki, 14 D.L.R.3d 164 (Ont. 1970); Regina v. Green, 16 D.L.R.3d 137 (Ont. 1970) (containing different and confused accounts of the same event).

20. *See* Hackbart v. Cincinnati Bengals, 435 F. Supp. at 356; Bourque v. Duplechin, 331 So.2d 40, 42-43 (La. Ct. App. 1976); Rutter v. Northeastern Beaver Cty. Sch., 283 Pa. Super. 155, 164, 423 A.2d 1035, 1040 (1980), *rev'd*, 496 Pa. 590, 437 A.2d 1198 (1981).

21. W. Keeton, *supra* note 17, § 68, at 480.

22. Restatement (Second) of Torts, § 496A.

23. Horrow, *supra* note 5, at 7.

24. 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

noted that many similar fouls were overlooked (and, indeed, no foul was called when Clark struck Hackbart) and that such incidents were common. The Tenth Circuit reversed, finding that the trial court should have rigorously applied tort law doctrines: "[T]here are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game . . . ."[25] The court concluded that Hackbart had not assumed the risk of conduct that was intended to injure and was outside the customs of the game of football.

The Louisiana Supreme Court applied the assumption of risk defense to an incident in a softball game in *Bourque v. Duplechin*.[26] During a softball game, Duplechin intentionally ran into Bourque, the second baseman, to prevent a double play. Such conduct would normally be within the rules or custom, but the second baseman was standing five feet from second base at the time of the collision. In affirming the trial court, the appeals court held that, although Bourque may

> have assumed the risk of an injury resulting from standing in the base path and being spiked by someone sliding into second base . . . . Bourque did not assume the risk of Duplechin going out of his way to run into him at full speed when Bourque was five feet away from the base.[27]

The court limited the risks that participants assume to "risks incidental to that particular activity which are obvious and foreseeable,"[28] and specifically excluded the risk that opponents would act "in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating."[29]

In *Rutter v. Northeastern Beaver County School District*,[30] the Pennsylvania Supreme Court abolished the assumption of risk doctrine entirely. Howard Rutter, a sixteen year old boy, was blinded in one eye while playing jungle football under the supervision of his high school football coach. The court found that Rutter had not contemplated losing sight in one eye, and, thus, did not assume that risk. The court also found that his decision to participate in the game of jungle football was not voluntary; Rutter voluntarily decided to play high school football, but the coach com-

25. 601 F.2d at 520.
26. 331 So.2d at 41.
27. *Id.* at 42.
28. *Id.*
29. *Id.*
30. 496 Pa. 590, 437 A.2d 1198 (1981).

pelled him to play jungle football. After finding that the assumption of risk doctrine did not apply to Rutter, the court proceeded to abolish the doctrine entirely.[31] In the court's opinion, the assumption of risk doctrine merely duplicated the concepts of scope of duty and contributory negligence. Furthermore, the doctrine was confusing to apply. The court concluded that "[b]ecause of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury, it is bound to create confusion. It should therefore be discarded."[32]

Pennsylvania is not alone in discarding the assumption of risk doctrine; at least nineteen other states have abolished the doctrine and others have restricted its use.[33] The reasons usually cited are similar to those listed in *Rutter*; the doctrine is confusing and does not add much to contributory negligence. If the risk posed by defendant's conduct is unreasonable, then accepting that risk is unreasonable, and the plaintiff was contributorily negligent. If a reasonable person would have accepted the risk, then the defendant should not be liable. In states that have adopted comparative negligence, assumption of risk causes additional harm by defeating the legislative intent to apportion liability among partially blameworthy parties.

The misleading nature of the assumption of risk doctrine becomes apparent when one examines its implications. If person A assumes certain risks attendant with proposed conduct by person B, A is agreeing to relieve B of liability for that conduct. Assuming A is a reasonable person, he intends only to authorize B to act reasonably. If B acts reasonably, however, then he should not be liable at all, and should not need to assert the assumption of risk defense. If, on the other hand, B acts unreasonably, then he should not be able to avoid liability.

Thus, courts should avoid analyzing sports violence cases under the assumption of risk doctrine. Although the doctrine may produce a desirable result when applied correctly, such skillful application is rare. The elements of the doctrine, knowledge of the risk and voluntary assumption of it, are subjective and therefore

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31. *Id.* at 606, 437 A.2d at 1209.

32. *Id.* (quoting Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 72 (1943) (Frankfurter, J., concurring)).

33. Other states to abolish assumption of risk are: Alaska, California, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Texas, Washington, Wisconsin, and Wyoming. *Rutter*, 496 Pa. at 613 n.5, 437 A.2d at 1209 n.5; *See also* W. KEETON, *supra* note 17, § 68, at 496 n.56.

difficult to prove.

III. CONSENT

The logical way to evaluate sports injury cases is in terms of consent. Certainly, when one decides to participate in an athletic competition, one consents to any touching that is permitted by the rules. When one participant's conduct strays outside of the rules, however, the consent of the other participants becomes less certain. The major problem confronting the courts in sports violence cases is determining the scope of the participant's consent.

For example, if one person were walking along a wall and a stranger lowered his shoulder and drove the first person into the wall, the stranger would probably have committed a battery. If, on the other hand, a hockey player did that same act, he might not be liable for the battery because hockey players consent to being checked according to the rules. To determine whether the hockey player had consented, a court would have to examine hockey rules. If the act violated the rules, the court would then have to evaluate whether a hockey player's consent included the act in question.

Commentators and courts have proposed numerous solutions to the consent problem. Each has some advantages and some disadvantages, but none has gained widespread acceptance. The following section contains a description of the leading proposals.

A. Scope-of-Consent Test

Dean Prosser limits the defendant's privilege to "the conduct to which the plaintiff consents, or at least to acts of a substantially similar nature."[34] Participants consent to physical contact that is normally part of the game, or to similar contact. If the defendant engages in intentional conduct that is substantially different from that to which the plaintiff consented, then he may be liable for the resulting injury. In determining the scope of consent, the court should consider such factors as whether the sport was a contact sport and whether the defendant's conduct was of the type normally occurring in that sport.[35]

Although the scope-of-consent test seems logical and sensible, it does little but restate the problem. The court still must determine whether the plaintiff consented to the particular act of the defendant. Although the plaintiff's consent to participate might be

34. W. KEETON, *supra* note 17, § 18, at 103.
35. Horrow, *supra* note 5, at 9.

explicit, any consent to the defendant's behavior must be implied. The test provides little objective criteria for determining whether a particular act was within the scope of the plaintiff's consent.

B. Rules-of-the-Game Test

The rules-of-the-game test is embodied in section 50 of the Restatement of Torts, which states:

> Taking part in a game manifests a willingness to submit to such bodily contacts . . . as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.[36]

After separating the rules into safety rules and playing rules, the test uses the safety rules as a strong indication of the parameters of consent. An Illinois court applied the rules-of-the-game test in *Nabozny v. Barnhill.*[37] The defendant and the plaintiff were both participants in a soccer game. The plaintiff, a goalie, was kneeling in the penalty area holding the ball when the defendant kicked him in the head. The rules of the game expressly prohibited any player from making contact with the goalkeeper when he is in possession of the ball in the penalty area. In finding the defendant liable for the plaintiff's injuries, the court established the bright line standard that when the rules contain "a safety rule . . . which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule."[38]

The rules-of-the-game test has the advantage of being objective. Before entering a game, players can determine to what they are consenting, and courts can evaluate actions consistently and efficiently. The problem with the test is that it oversimplifies the problem. One could violate a safety rule without intentionally trying to injure one's opponent or without being negligent. For example, the prohibition against clipping in football is a safety rule designed to prevent leg injuries. Clipping frequently occurs in professional football games, often without malice and sometimes with-

36. RESTATEMENT (SECOND) OF TORTS, § 50 comment b (1965).

37. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

38. 31 Ill. App. 3d at 215, 334 N.E.2d at 260-61. *See generally* Horrow, *supra* note 5, at 10.

out carelessness. Thus, a rule that imposes liability for every clip would be overinclusive. Nonetheless, the rules-of-the-game test provides a good indication of whether an act is within the participant's implied consent.

C. *Scope-of-Team-Goals Test*

One commentator[39] proposed a variation of the scope-of-the-rules test employed in *Nabozny v. Barnhill.*[40] This test questions whether the violent act was in furtherance of one of the team's objectives with respect to the sport involved. The commentator offers two examples to illustrate the proposed test. The spearing of an offensive ball carrier in a football game after the referee has blown the play dead would result in liability because no team objective is furthered by a hit after the play is over. Conversely, a reckless clipping during a play would not result in liability because a block during a play is in furtherance of team objectives.[41]

In support of this proposal, the commentator offers two rationales.[42] First, actions in furtherance of team goals, even if reckless, are foreseeable and inherent risks of sports.

> Second, a professional athlete does not assume the risk of reckless conduct in violation of a safety rule which is not in furtherance of team or player goals with respect to the game. Rather, such conduct is only a personal and flagrant disregard of the duty each player owes to one another to refrain from needless violence.[43]

This test provides a good indication of whether a participant consents to a particular violent act. The problem with the rule is that a strict application will often yield unjust results. Intentionally injurious or grossly reckless acts should create liability regardless of the team's objectives. Conversely, an accidental injury should not automatically become the source of liability merely because it did not further a team objective.

D. *Magnitude-of-the-Act Test*

The Provincial Court of Ottawa-Carleton adopted the magni-

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39. Note, *Judicial Scrutiny of Tortious Conduct in Professional Sports: Do Professional Athletes Assume the Risk of Injuries Resulting From Rule Violations? Hackbart v. Cincinnati Bengals, Inc.*, 17 CAL. W.L. REV. 149 (1980).

40. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

41. Note, *supra* note 39, at 165-66.

42. *Id.* at 166.

43. *Id.*

tude-of-the-act test in *Regina v. Maki*.[44] This test implies that players consent to a threshold level of violence, both within and outside of the rules. Violence that exceeds this level results in liability for the actor. "[A]ll players, when they step onto a playing field or ice surface, assume certain risks and hazards of the sport . . . . [b]ut . . . there is a question of degree involved, and no athlete should be presumed to accept malicious, unprovoked or overly violent attack."[45] Judge Bastin applied a similar test in *Agar v. Canning*,[46] reasoning that any injury inflicted in circumstances showing an intent to cause serious injury to another, even under provocation and in the excitement of the game, should fall outside the scope of the consent.[47]

As with the scope-of-consent test, the magnitude-of-the-act test does little more than restate the problem. The court in *Canning* admitted that "[e]ach case must be decided on its own facts so it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance."[48] The court correctly recognized that no single rule can yield an easy solution to every situation that arises. However, the court should not conclude that every judge should, in effect, develop his own criteria for every case. The magnitude-of-the-act test is a good formulation of the problem, not a solution.

E. Magnitude-of-the-Harm Test

In 1970, the U.S. National Commission on Reform of Federal Criminal Laws proposed a solution designed to "provide a defense to criminal prosecution whenever the injury inflicted or risked is a 'reasonably foreseeable hazard' of a sports competition."[49] The Commission's proposal suggested that an athlete consented to acts that were reasonably foreseeable.[50]

Richard Horrow, the chairman of the American Bar Association Task Force on Sports Violence, criticized the magnitude-of-the-harm test proposed by the Commission as being inadequate.[51] According to Horrow, professional athletes are under great pres-

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44. 14 D.L.R.3d 164 (1970).
45. *Id.* at 167. *See generally* Horrow, *supra* note 5, at 10.
46. 54 W.W.R. 302 (Q.B. Man. 1965), *aff'd*, 55 W.W.R. 384 (C.A. 1966).
47. 54 W.W.R. at 304.
48. *Id.*
49. Horrow, *supra* note 5, at 10 (quoting from U.S. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS, 851 (1970)).
50. *See* Horrow, *supra* note 5, at 10.
51. *Id.*

sure to be violent while on the field, and under equally great pressure not to complain about violent acts that they suffer. Horrow states that because of this pressure, "an athlete may enter a game with knowledge of potential harm, but be powerless to do anything about it. Surely he cannot be deemed to consent to exceptional violence merely because he can foresee it."[52]

Although Horrow's criticism of the magnitude-of-the-harm test at first seems reasonable, one could argue that he has misinterpreted the test. Horrow contends that one should not be deemed to consent to violent contact *because* one can foresee it; the test really states that *if* one can foresee the violent act, then one consents *when* one decides to play in spite of the known risk. When Horrow states that the athlete is "powerless" to do anything about the risk, he is wrong; the athlete can abstain from participation. Athletes decide to participate in athletic events voluntarily. If they want to avoid a risk that is the foreseeable result of the decision to play a particular sport, then they should decline to play. If an athlete feels that the sport is too dangerous, then he should try to change the nature of the game or change the rules. He should not be able to participate, then complain that the predictable risk did, in fact, occur.

To illustrate the distinction, imagine that everyone who played hockey had his nose broken. A broken nose would be an entirely foreseeable result of the decision to play hockey. Someone who desired very much to play hockey may decide that the pleasure was worth a broken nose, and play in a game. Although he regrets that he will suffer a broken nose, he knows the future for his nose when he enters the game. He may abhor the violence, but he should not be able to sue when the inevitable occurs. Unless the plaintiff outwardly manifests his lack of consent to specific conduct, the defendant should be able to assume that the plaintiff consents to all reasonably foreseeable contact.

Another attribute of the Commission's proposal is that it focuses on objective criteria. Some tests focus on the implied consent of the plaintiff, or at least of a reasonable plaintiff. The only objective indications of the acts to which the plaintiff impliedly consents are the acts that normally occur during that sport. Thus, the focus of the test should be the game itself, not the plaintiff's state of mind when participating.

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52. *Id.*

F. *Effectiveness-of-Consent Test*

When the state charges the defendant with criminal battery, the defendant's right to assert the consent defense may be limited by the effectiveness-of-consent test. In some instances, states refuse to allow persons to consent to certain crimes in order to control serious crime or to ensure the protection of the victims.[53] The Court of Appeals of New Mexico in *State v. Fransua* held that the public interest in preventing violent acts justified eliminating entirely the consent defense to the crime of aggravated battery.[54] Similarly, in *Regina v. Maki*, the Ottawa-Carleton Provincial Court held "[n]o sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution."[55]

Rather than a definition of a player's implied consent, the effectiveness-of-consent test allows a court to disregard the consent element and instead, focus on the egregiousness of the violent act. No matter how violent an activity typically is, participants cannot view their opponent's decision to play as a license to commit crimes. This doctrine promotes important principles, and simplifies the court's analysis when presented with a particularly violent act; the court can merely find the act too violent to consent to, and avoid analyzing the particular sport for its customary violence.

IV. Other Defenses

A. *Self-Defense*

A person is generally privileged to use such force as reasonably appears necessary to defend himself against an apparent threat of imminent unlawful violence.[56] The availability of self-defense depends on the facts of each case, but a defendant will probably fail if a significant amount of time elapses between the initial violence or threat and the defendant's retaliation or retreat. Furthermore, while most courts permit the self-protection defense where retreat is not feasible, application of the doctrine to athletic competitions is dubious because retreat is possible in most situations which occur on the playing field.[57] Even if the situation does permit the use

53. The most common example is the doctrine preventing defendants from asserting the consent defense to statutory rape.

54. 85 N.M. 173, 510 P.2d 106 (N.M. Ct. App. 1973).

55. 14 D.L.R.3d at 167.

56. W. Keeton, *supra* note 17, § 19, at 125.

57. *See, e.g.*, People v. Freer, 86 Misc. 2d 280 (1976); W. Keeton, *supra* note 17, § 19, at 127.

of force for self-protection, the defendant is limited to the minimum amount of force necessary to avoid the bodily harm.[58]

The defendants in *Regina v. Maki* and *Regina v. Green* successfully employed the self-defense doctrine in criminal prosecutions arising out of an incident in a hockey game between the Boston Bruins and the St. Louis Blues.[59] The fight started when Wayne Maki grabbed Ted Green's jersey; soon after the players were swinging their sticks at each other. In *Regina v. Maki*,[60] the court held that once Maki claimed self-defense, he could be convicted only if there was no doubt that he was not acting in self-defense. The court found that the evidence was confusing, and consequently, that the prosecution did not prove Maki's guilt beyond a reasonable doubt.[61] Having found Maki authorized to defend himself, the court next examined the amount of force Maki used. The court was lenient to Maki; although he raised his stick above his head and swung it down on Green's head, the court found that Maki merely "fail[ed] to measure with nicety the degree of force necessary to ward off the attack and inflict[ed] serious injury thereby."[62] In *Regina v. Green*, the court did not analyze the self-defense claim in detail, but held it did "not think Mr. Green was doing anything more in the circumstances than protecting himself."[63] Thus, the self-defense doctrine is flexible enough that a court can exercise considerable control over the outcome of a case by varying the rigor of its analysis. The defendant's success may depend more on the reasoning of the court than on the actual facts.

B. Provocation Defense

Few jurisdictions recognize the provocation defense, but occasionally a defendant contends that the plaintiff provoked his violent acts.[64] Those jurisdictions that recognize the provocation defense generally consider the doctrine as a mitigating factor only.[65]

The better approach is to limit consideration of the plaintiff's provocative behavior to that sufficient to invoke the self-protection

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58. W. KEETON, *supra* note 17, § 19, at 125-26.

59. Regina v. Maki, 14 D.L.R.3d 164 (Ont. 1970); Regina v. Green, 16 D.L.R.3d 137 (Ont. 1970).

60. 14 D.L.R.3d 164 (1970).

61. *Id.* at 166.

62. *Id.*

63. Regina v. Green, 16 D.L.R.3d 137, 142 (Ont. 1970).

64. *See* Horrow, *supra* note 5, at 1, for a discussion of the provocation defense.

65. *Id. See also* Fraser v. Berkley, 7 Car. & P. 621, 624, 173 E.R. 272, 273, 274 (1836).

defense. Just as the self-protection defense is limited to the minimum amount of force necessary to protect oneself from bodily harm, the provocation defense should not defeat liability unless the provoking behavior is so violent that the defendant fears for his safety. If that is the case, the self-protection defense will adequately shield the defendant from liability. As the Manitoba court held in *Agar v. Canning*, "[I]njuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even where there is provocation" should result in liability.[66]

C. *Involuntary Reflex Defense*

Some defendants have been more successful using the involuntary reflex defense than they have been using the provocation defense.[67] To defeat the *mens rea* or intent element of criminal or tortious battery, defendants argue that their violence was an involuntary reflex, not a deliberate act.[68] The defense succeeds because intent is the most difficult element to prove in sports violence cases. Sports violence is considered by participants as part of the game and non-criminal. The high-pressured, emotional nature of competitive sports is conducive to a player's losing control of himself.[69]

The policies embodied in the involuntary reflex defense are just; one should not be liable for a reflexive reaction to some of the volatile situations that arise in sporting events. However, these policies are satisfactorily advanced by the traditional analyses. The typical negligence test is whether the defendant acted as a reasonable person would have under the circumstances. Thus, if the defendant's reflexive reaction was reasonable, he can avoid liability. If not, he should be liable. In a battery action, liability hinges upon a showing of intent. The defendant's claim of involuntary reflex should be a factor considered by the fact finder, not a determinative element.

V. PROPOSAL

Sports violence encompasses a narrow group of situations. It seems like the ideal area for a well-evolved doctrine, and the courts have had numerous cases in which to develop one. Nonetheless,

66. 54 W.W.R. 302, 304 (Q.B. Man. 1965), *aff'd*, 55 W.W.R. 384, 386 (C.A. 1966).

67. A defendant successfully used the defense to disprove *mens rea* in State v. Forbes, No. 63280 (Minn. Dist. Ct., 4th Jud. Dist., Aug. 12, 1975) (judgment for mistrial entered).

68. *Id.*

69. Horrow, *supra* note 5, at 11.

the courts have produced several vague and confusing opinions without a satisfactory solution. A court today faced with a sports violence case would have little guidance; it would essentially have to create its own doctrine.

An examination of the solutions proposed by commentators or employed by the courts reveals that they fall into one of two categories. The first group merely restates the problem in slightly different terms but is so general that it provides no guidance to future courts. The scope-of-consent test and the magnitude-of-the-act test fail in this category. The second group makes the opposite error and is too specific or narrow. Unfortunately, a test that makes the fine distinction between an act that is within the implied consent of all participants and an act that is outside of that implied consent cannot be a simple "yes" or "no" test. Such tests as the rules-of-the-game test or the scope-of-team-goals test will inevitably be both underinclusive and overinclusive.

A compact, black-letter law approach in handling sports violence cases is neither obtainable nor desirable. Determining the precise range of acts to which a participant impliedly consents when he steps onto the playing field is a difficult task. Instead of proposing a consent test with a single element or question to be answered in the positive or the negative, the courts need to develop a reasoned analysis that will ultimately affect desired behavior.

This paper proposes that the analysis consist of two levels. At the first level, the test would create a presumption of liability under certain circumstances. This presumption would arise under either of two situations. The first is when the challenged act violated a safety rule. A court would apply this test in a similar manner to the rules-of-the-game test, except that a finding of a safety rule violation does not automatically produce liability, only a rebuttable presumption of liability. In this manner, the defendant has the opportunity to show that he acted neither intentionally nor negligently and should not be liable.

The second situation occurs when the defendant's act did not further team objectives, employing the concepts of the scope-of-team-goals test. A finding that the challenged act did not further team goals would create a rebuttable presumption of liability. The defendant could defeat this presumption only by showing that he acted neither intentionally nor negligently.

Courts would apply the second level of analysis only if neither element of the first level triggers a rebuttable presumption of liability or if the defendant rebuts the presumption if one is trig-

gered. At the second level, the court examines the act to determine how foreseeable it was, i.e., how much was it a normal part of the activity. In order to aid future courts and to help participants govern their behavior and limit their exposure, the courts could develop a nonexclusive list of factors that they will consider in determining whether an act is foreseeable. Some examples of factors courts could use are: whether the play was in progress when the contact occurred, or if not, how much time had elapsed since the end of the play; whether the activity directly preceding the contact was frenzied and somewhat violent; how violent the sport is in general; how frequently the particular type of contact occurs; and how similar the contact is to contact that is within the rules.

The policy objective of the test is to create an efficient and objective analysis so that both courts and athletes can understand the law and act accordingly. The first level of the analysis identifies the "easy" cases and avoids a lengthy consideration of the sport in general. The test recognizes, however, that rigid application of the first level elements may sometimes result in injustice. Thus, it creates only a presumption and allows the defendant an opportunity to exculpate himself. The second level structures the arguments of the parties and simplifies the comparison for the bench. A list of factors will focus the parties' arguments on the factors that the particular court considers important. The court can then evaluate each side's argument, factor by factor, and more easily recognize the stronger position.

The test should not be static at either level. If courts or commentators recognize another category of acts that should trigger the presumption of liability, the category should be included in the first level analysis. The more cases courts can resolve at the first level, the greater the judicial resources saved. Similarly, courts should continuously evaluate the list of factors at the second level.

Each time a court applies its version of the test to another case involving a particular sport, the analysis for that sport will become more refined. The previous court will have determined how dangerous the sport is, what kind of contact is inherent in that sport, and similar information for the other factors. Thus, future courts will benefit from the labor of earlier courts, instead of starting anew as they currently do.

VI. Application of Proposed Analysis

In order to illustrate the proposed analysis it will be applied to a well-known fact pattern. By varying the facts slightly, one can

see that the proposal quickly resolves the clearcut cases and structures the analysis for the more complicated factual situations.

The best known sports violence fact pattern describes the blow that "Booby" Clark struck to the back of Dale Hackbart's head.[70] Following an interception, Hackbart, who had been on defense, blocked Clark, who had been on offense. Hackbart fell to the ground following his block. He then arose from the ground to a kneeling position and watched the remainder of the play. Five seconds after the referee blew the whistle, Clark, in frustration but without the intent to injure, struck Hackbart on the back of the head with his forearm. Hackbart sustained serious injuries from the blow.

The proposed analysis would resolve this dispute quickly. Clark's behavior triggers the presumption of liability under both prongs of the first level of the test. First, the fact that the play had been over for a substantial period of time (five seconds) automatically indicates that the blow did not further any team objective. Second, the blow violated Article 1, Item 1, Subsection C of the National Football League's rules, providing that: "All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands."[71] This rule is clearly a safety rule; it does not control the flow of the game, and prohibits certain violent behavior at any time. Thus, the proposal would resolve efficiently the actual incident in *Hackbart* with the same result as that reached by the United States Circuit Court for the Tenth Circuit. Unless Clark produced strong evidence rebutting the liability presumption, a court would rule in favor of Hackbart, perhaps conducting a hearing only on the damages issue if the parties agreed on the facts.

If the play was still in progress when Clark struck Hackbart, and if the National Football League rules did not prohibit such blows explicitly, the outcome would probably be similar. A court would examine Clark's behavior to determine if he intended to further any team objective. The court would probably find that Clark's behavior did not further any team objective; Hackbart was kneeling on the ground and the ball was not near him. It was extremely unlikely that Hackbart would participate further in the play, so Clark's blow could not have achieved anything but

70. Hackbart v. Cincinnati Bengals, 435 F.Supp. 352 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). *See supra* notes 24-25 and accompanying text.

71. *Hackbart*, 601 F.2d at 521.

Hackbart's injury.

If, however, Hackbart had just moved from the ground to the kneeling position and was near the ball, a court might not create any presumption of liability. If the court determined that Clark's blow was reasonably intended to prevent him from re-entering the play, then it would further a team objective, and would not trigger the presumption of liability. Under those circumstances, the court would proceed to the second level of the analysis.

In the second level of the analysis, a court would compare Clark's blow to the customary level of violence in the National Football League, and thereby determine whether the blow was reasonably foreseeable. A court using the factors listed in the proposal discussed in the previous section would first determine whether play was in progress when the alleged battery occurred. Under the present hypothetical facts, play was in progress when Clark struck Hackbart. This factor would tend to exculpate Clark. Next, the court should consider whether the activity preceeding the blow was particularly frenzied. In our hypothetical situation, the activity was probably not frenzied; Clark walked over to Hackbart and deliberately struck him. If Clark had delivered the blow during a pile-up, the outcome of this factor might be different. Clark's blow in the open field would tend to inculpate him. Third, the court should assess how violent professional football is. Football is undoubtedly an extremely violent sport. The generally violent nature of football would tend to exculpate Clark. Fourth, the court should examine the frequency with which similar acts occur in professional football games. This is a factual question for which expert testimony is appropriate. Finally, the court would consider the similarity between Clark's blow and acts within the rules. The outcome under this factor is uncertain; much more powerful blows are routinely struck in football games, but not to the back of the head while the player is kneeling down and facing away.

After examining these individual factors, the court must then decide whether Hackbart should have foreseen that he might incur such an injury. Unfortunately, the court cannot merely count the factors militating for and against liability; the factors are not all of equal importance. Furthermore, a finding that a sport was extremely violent would be more significant than a finding that a sport was moderately violent, even though both findings would tend to exculpate the defendant. The court must balance and weigh the factors for each case.

The second level of the analysis seems complicated. In fact, it probably is complicated, but only because the hypothetical facts

were designed to make the analysis difficult. Even though the analysis was difficult, it had two important beneficial attributes. First, the court had a structured analysis to apply to a complicated situation. It had a list of factors and was unlikely to focus on one aspect of the case and ignore others. The attorneys for both parties would know which factors the court would consider, and would concentrate on those factors. The court would therefore have arguments from each party on each factor and could more easily evaluate the strengths of each argument.

Second, because future courts will apply the same factors, those courts can use the findings of earlier courts to avoid a lengthy analysis of some of the factors. The second court to try a case involving the National Football League may not need to hear expert testimony about the level of violence in professional football because it can refer to the transcript or opinion from the earlier trial.

VII. Conclusion

The analysis proposed in this paper is designed to achieve efficiency and consistency. It is efficient because it avoids a lengthy analysis where such an analysis is unnecessary. It promotes consistency because it enumerates factors to be applied to every case. Athletes, attorneys, and judges can determine what behavior almost automatically will result in liability, and they can determine what factors are important in evaluating less blatant behavior.

The proposed analysis probably would not greatly reduce the level of violence in professional athletics; a stricter judicial posture is unlikely to overcome the intense pressures on professional athletes to compete aggressively regardless of the injuries they incur or cause. Nonetheless, a consistent and explicit judicial doctrine will compensate those athletes who sustain injuries from the excessive violence of an opponent and might eliminate the more extreme examples of violent behavior. If players had a better sense of the limits of permissible behavior and a heightened awareness of the liabilities of exceeding those limits, they might curb their tempers and control their impulses.

The solution to violence in athletics cannot come solely from the courtroom; it must include a restructuring of the rules of the individual sports and an altering of the attitudes of the public, the league, and the players towards violence. Acts of violence occur regularly in sports only because of years of tolerance. To reduce the violence, society must first redefine the boundaries of accept-

able violence in athletic competitions. Only then can the courts impose sanctions on those who cross those boundaries.

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