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Tort Law - Reckless Misconduct in Sports

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TORT LAW—RECKLESS MISCONDUCT IN SPORTS—The United States Court of Appeals for the Tenth Circuit has allowed a professional athlete to recover for an injury caused during a game by the reckless misconduct of an opponent in violation of game rules and customs.

Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

On September 16, 1973, the Denver Broncos and the Cincinnati Bengals were engaged in a professional football game in Denver, Colorado. During the game, a Bronco intercepted a pass intended for Charles "Booby" Clark, a Bengal fullback. After the interception, Dale Hackbart, a Bronco, unsuccessfully attempted to block Clark by throwing his body in front of Clark. Clark, acting out of anger and frustration, approached Hackbart from behind and struck him on the back of the head with a forearm.[1] Clark's conduct violated a National Football League rule which specifically prohibits players from striking an opponent's head or neck with a hand, forearm, or elbow.[2] Because the referees had not witnessed the act, they did not call a penalty. A physical examination revealed that Hackbart had sustained a serious neck fracture.[3]

Hackbart initiated a suit in the United States District Court for the District of Colorado to recover damages from Clark and Clark's employer, the Cincinnati Bengals.[4] The plaintiff claimed reckless misconduct or, alternatively, negligence.[5] The district court held that it would be inappropriate to apply traditional tort concepts to a case involving injuries sustained during a professional football game.[6] Furthermore, the court held that tort recovery based upon negligence or reckless misconduct was precluded by the doctrine of assumption of risk.[7]

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1. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 519 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979).

2. *Id.* at 521. The official league sanction for a violation of the rule is a 15 yard penalty and disqualification from the game. R. TREAT, THE ENCYCLOPEDIA OF FOOTBALL 681 (13th ed. 1975).

3. 601 F.2d at 519.

4. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977).

5. *Id.* at 355.

6. *Id.* at 358. The district court determined that the violent character of football precluded a standard of reasonableness from being applied to game conduct. *Id.* at 356. The court stated that it was not competent to determine the standard governing professional football. Additionally, the court expressed concern about the impact judicial intervention would have on the game, concluding that any such intervention must come from the legislature, not the judiciary. *Id.* at 358.

7. *Id.* at 356. The doctrine of assumption of risk has been surrounded by much controversy and confusion. Assumption of risk is a voluntary consent by the plaintiff, either

The United States Court of Appeals for the Tenth Circuit reversed[8] the district court's decision and rejected the notion that tortious conduct which occurs during a professional football game should be removed from the restraints of law.[9] In an opinion written by Judge Doyle, the court examined the jurisdiction of the district court,[10] the appropriate theory of recovery, and the possible defenses.[11]

The court concluded that the evidence at trial did not support the district court's assumption that even though Clark's conduct normally would result in the imposition of civil or criminal sanctions it should be excepted because it occurred during a football game.[12] The court also stated that certain tortious conduct could not be ignored simply because it occurred during a game which was violent or difficult to administer.[13]

In allowing the recklessness action, the court determined that intentional injury is prohibited by the written rules[14] and customs of professional football.[15] Declaring that the rules and customs of the game establish reasonable boundaries designed to prevent a participant from intentionally inflicting serious injury on another participant, the court concluded that reason has not been abandoned and that the victim of an unlawful blow is not limited to retaliation as his sole remedy.[16] No principles of law exist which permit a court to rule out tort recovery because a game is rough or difficult to administer.[17]

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express or implied, to accept the dangers of a known and appreciated risk. It acts to relieve the defendant of any duty to exercise care, thereby precluding recovery if an injury results from negligence or reckless misconduct. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 68 (4th ed. 1971) [hereinafter cited as PROSSER] for a general discussion of the doctrine of assumption of risk. If injury results from an intentional tort, the appropriate analysis centers around the doctrine of consent. Consent is a willingness to allow an act to occur, thereby negating any wrongful element of the defendant's act and precluding recovery. *See id.* § 18. *See generally* James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

8. 601 F.2d at 527.

9. *Id.* at 520.

10. *Id.* at 521-24. The court addressed as a jurisdictional question what the district court had analyzed as a question of the existence of a cause of action for injuries sustained in professional football. 435 F. Supp. at 357-58.

11. 601 F.2d at 520.

12. *Id.*

13. *Id.*

14. NATIONAL FOOTBALL LEAGUE, OFFICIAL RULES OF PROFESSIONAL FOOTBALL, art. 1, item 1(c) (1973) provides: "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." 601 F.2d at 521.

15. 601 F.2d at 521. Testimony by other professional football players supported the proposition that Clark's conduct was not accepted by the customs of the game. *Id.*

16. *Id.*

17. *Id.* at 520.

The court stated that where jurisdiction properly lies in a federal district court, that court has a duty to take jurisdiction of a case presented to it for resolution.[18] Noting that although there are situations in which a district court can deny jurisdiction,[19] Judge Doyle concluded that the case at bar did not conform to any of those exceptions[20] and likewise found no applicable restrictions to the jurisdiction in Colorado law.[21] The court concluded that it is the duty of the judiciary to protect individual rights under the law, and that the trial court did not have the discretion to deny Hackbart jurisdiction simply because the injury occurred during a professional football game.[22]

The court next addressed which theory of recovery should be applied to Hackbart's action.[23] The court distinguished recklessness from the intentional torts of assault and battery.[24] Recklessness involves a

18. *Id.* at 522. There are two bases for federal jurisdiction: Federal questions and diversity of citizenship. Federal question jurisdiction exists when the matter in controversy arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331(a) (1976). Diversity of citizenship jurisdiction exists when a controversy is between citizens of different states. 28 U.S.C. § 1332 (1976). As the court in *Hackbart* noted, in a diversity of citizenship case the federal district court sits as a state trial court and it must apply the laws of the forum state. 601 F.2d at 522. Accordingly, the *Hackbart* court determined that, absent state policy or law, a federal district court cannot outlaw certain activities on an independent basis. *Id.* at 523.

19. The political question and abstention doctrines are two examples of such limitations. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The political question doctrine holds that certain matters which are political in nature are better resolved by political entities than by judicial review. *See* Baker v. Carr, 369 U.S. 186 (1962). The abstention doctrine holds that when a constitutional issue rests on an unsettled interpretation of state law, a federal court may decline to exercise jurisdiction in favor of resolution of the matter in state court. *See* Railroad Comm'r v. Pullman Co., 312 U.S. 496 (1941).

20. 601 F.2d at 522.

21. *Id.* at 523-24. The court relied upon COLO. CONST. art. 2, § 6, and the protection against harm that it provides for individual rights, and the liberal construction given COLO. CONST. art. 6, § 9, cl. 1, in conferring unlimited jurisdiction on district courts. *See* Cruz v. Morley, 77 Colo. 25, 234 P. 178 (1924).

22. 601 F.2d at 520.

23. Although the plaintiff claimed negligence at the district court level, on appeal the plaintiff did not rely upon a negligence theory because of his recognition that the essence of negligence, subjecting another to an unreasonable risk of harm, is inherent in the game of football. Brief for Appellant at 9-11.

24. Assault and battery is the appropriate theory of recovery for intentional acts. To be liable for a civil battery, the defendant must do some positive act which is intended to cause, and does cause, a harmful or offensive contact with another person. If the defendant, acting with the same intent present in a battery, places another in imminent apprehension of a harmful contact, he is liable for assault. Therefore, to establish liability for assault and battery, the plaintiff must prove the elements of both an assault and a battery. *See* PROSSER, *supra* note 7, §§ 9-10. *See, e.g.*, Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955) (defendant held liable for assault and battery for intentional misconduct during a basketball game).

choice of a course of action either with knowledge of the danger it presents, or under circumstances which a reasonable man would know to be dangerous. It requires a risk substantially greater in magnitude than is necessary for negligence.[25] Assault and battery involves an intent to do an act and an intent to do a particular harm, while recklessness requires an intent to do a particular act but without an intent to cause a particular harm.[26] The court determined that because the facts of the case fit perfectly into the recklessness framework it was the appropriate theory of recovery.[27]

Finally, the court addressed the admissibility of certain films as evidence. Films of other professional football games which depicted acts of violence were deemed to be irrelevant and inadmissible because the game of football was not on trial.[28] Films showing Hackbart violating the rules of the game were also held to be irrelevant unless he was shown to have been the aggressor in the incident at issue.[29]

Concluding that Hackbart was entitled to an assessment of his rights and whether they had been violated, the court reversed and remanded the case to the district court for reconsideration of the evidence.[30]

The *Hackbart* decision is the most recent judicial pronouncement of the tort liability[31] of professional athletes for misconduct occurring in professional sporting events and continues a trend toward expanding the liability of athletes for game misconduct.[32] Previously courts had

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25. *See* RESTATEMENT (SECOND) OF TORTS §. 500, Comment g (1965).

26. 601 F.2d at 524.

27. *Id.* at 525. Having decided that the proper theory of recovery was recklessness, the court concluded that the appropriate statute of limitations for recklessness was the six-year period provided in COLO. REV. STAT. § 13-80-110 (1973), rather than the one-year period for assault and battery under COLO. REV. STAT. § 13-80-102 (1973). Thus, Hackbart, who failed to initiate his suit within a year of his injury, could maintain his action under the six-year statute of limitations. 601 F.2d at 525.

28. 601 F.2d at 526.

29. *Id.* If Hackbart was the aggressor, the films may have been relevant to prove his character. However, a determination that Hackbart was the aggressor had not been made in the lower court.

30. *Id.* at 526-27.

31. The development of the criminal liability of a participant for sports injuries has also been slow. However, Canadian courts recently have addressed the problem of violence in sports at a criminal level. *See* Regina v. Maki, 14 D.L.R.3d 164 (Ont. Prov. 1970); Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. 1970). Both cases involved an altercation between players engaged in a professional hockey game in 1969. Canadian officials brought charges against both players for criminal assault against the other. However, the defendants were acquitted. *See* Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148 (1976); Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, for an analysis of the criminal responsibility of an athlete.

32. Most of the tort litigation has been based upon misconduct in amateur athletics. *See, e.g.*, Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955) (liability based on

been reluctant to become involved in this area because of a fear of disrupting the development of sports and encouraging an unmanageable volume of litigation.[33]

The doctrine of assumption of risk has presented the greatest obstacle to tort recovery for injuries sustained during sports participation.[34] Generally, a participant assumes all the ordinary and inherent risks attendant to a sport.[35] An assumed risk precludes the existence of a duty and thereby relieves the defendant of any legal wrong for his conduct.[36] Courts have developed exceptions to the defense of assumption of risk when the participant's injuries result from unexpected occurrences such as unsportsmanlike conduct[37] or risks not inherent to the sport.[38]

Jurisdictions that have restricted or abolished the doctrine of assumption of risk have focused on the duty owed by one participant to another.[39] The courts have used varying standards to define a participant's duty. In *Nabozny v. Barnhill*,[40] an Illinois appellate court

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assault and battery for injuries sustained during an amateur basketball game); McGee v. Board of Educ., 16 A.D.2d 99, 226 N.Y.S.2d 329 (App. Div. 1962) (suit alleging negligence for injuries incurred at a high school baseball practice); Carabba v. Anacortes School Dist., 72 Wash. 2d 939, 435 P.2d 936 (1967) (recovery for negligence resulting in injuries during a high school wrestling match).

33. *See, e.g.*, Gaspard v. Grain Dealers Mutual Ins. Co., 131 So. 2d 831 (La. Ct. App. 1961).

34. Where the injury results from intentional conduct, consent rather than assumption of risk, is the chief obstacle. *See* note 7 *supra*.

35. *See* Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929); Vendrell v. School Dist. No. 26C, Malheur County, 233 Or. 1, 376 P.2d 406 (1962). In *Murphy* the plaintiff was denied recovery for injuries sustained from an amusement park ride. The court held that where the dangers of a sport are obvious and necessary the participant assumes the risk of such dangers. Similarly, in *Vendrell* recovery was denied for injuries sustained from ordinary tackling in a football game. Such contact was held to be an assumed risk and, therefore, not actionable. *See also* Arnold v. Schmeiser, 34 A.D.2d 568, 309 N.Y.S.2d 699 (App. Div. 1970) (child playing game assumed the obvious and necessary risks of the game); Jenks v. McGranaghan, 32 A.D.2d 989, 299 N.Y.S.2d 228 (App. Div. 1969) (golfers assume the risk of injury inherent in golf).

36. PROSSER, *supra* note 7, § 68.

37. *See* Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976). In *Bourque* the court stated that although the plaintiff assumed the ordinary risks involved in a softball game, he did not assume the risk of reckless or unsportsmanlike conduct. *Id.* at 42. *See also* Jolley v. Chicago Thoroughbred Enterprises, Inc., 275 F. Supp. 325 (N.D. Ill. 1967) (injuries sustained because of the bad faith actions of fellow jockeys were not assumed risks).

38. *See* Oberheim v. Pennsylvania Sports and Enterprises, Inc., 358 Pa. 62, 55 A.2d 766 (1947). In *Oberheim* the court held that a skater did not assume the risk of injury from dangerous conditions which were not ordinary or foreseeable effects of skating, and, therefore, not inherent risks of the sport. *Id.* at 68, 55 A.2d at 769.

39. *See* Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976).

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

stated that a participant has a duty to refrain from conduct proscribed by safety rules as opposed to conduct contrary to game rules.[41] Reasoning that a person violating a safety rule exhibits a reckless disregard for the safety of other participants, the *Nabonzy* court held that failure to refrain from such conduct gives rise to a cause of action for the injured player.[42] A Louisiana appellate court, in *Bourque v. Duplechin*,[43] held that players have a duty to play a game in ordinary fashion without unsportsmanlike conduct.[44] The duty analysis employed by these courts narrows the scope of inherent risks of a game to those risks not created by breach of duty.[45] Because assumption of risk is applied to inherent risks, the duty analysis approach has begun to limit its application.[46]

The *Hackbart* court did not expressly rely on an assumption of risk or duty analysis. Although the district court had held that Hackbart had assumed the risk of injury from Clark's conduct,[47] the court of appeals did not address this issue.[48] Rather than discussing assumption of risk, the *Hackbart* court engaged in a detailed discussion of the jurisdictional question.[49] Because the court did not set out a clear conceptual framework for its decision, the implications of the opinion for future litigation in the area are uncertain. Nevertheless, because the court did determine that the rules and customs of the game are an appropriate standard to be used in determining whether liability should be imposed for an athletic injury,[50] the practical effect of the court's decision is to limit the assumption of risk defense to injuries resulting from conduct which conforms to the rules and customs of the sport. In essence, this establishes a participant's duty to refrain from conduct outside the reasonable boundaries established by the sport's rules and customs.

In relying upon the rules and customs of the game as a measure of

41. *Id.* at 215, 334 N.E.2d at 261. Sports are built upon a comprehensive set of rules. Safety rules are designed to protect participants from injury. Game rules are promulgated to secure the better playing of the game as a test of skill. *Id.* at 215, 334 N.E.2d at 260.

42. *Id.* at 215, 334 N.E.2d at 261.

43. 331 So. 2d 40 (La. Ct. App. 1976).

44. *Id.* at 42.

45. *See id.*

46. Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); Bourque v. Duplechin, 331 So. 2d at 42.

47. 435 F. Supp. at 356.

48. 601 F.2d at 520. The court of appeals did discuss the applicability of a contributory fault defense to the action; however, the court did not decide the issue because the trial court did not consider it. *Id.*

49. *Id.* at 521-24.

50. *Id.* at 521.

liability, the *Hackbart* court did not distinguish between game rules and safety rules. Because Clark's conduct violated a safety rule, however, the court's decision may be interpreted as imposing liability only upon players who violate safety rules. Because game rules are instituted to achieve a more organized and controlled game, game rule violations would seem to be an ordinary and inherent risk to which all participants consent. In contrast, safety rules are specifically designed to protect participants from harm. Certainly a participant does not consent to a violation of safety rules.[51]

The *Hackbart* court decided that reckless misconduct was the appropriate theory of recovery under the facts of the case. In prior cases, negligence[52] and assault and battery[53] had been the theories of recovery relied upon. While dicta in prior decisions indicated that reckless misconduct could be actionable,[54] *Hackbart* recognized such a cause of action.

A negligence claim places a burden on the plaintiff to show that the defendant exposed him to an unreasonable risk of harm.[55] Because exposure to an unreasonable risk of harm is inherent in the violent nature of football, negligence is not an appropriate standard.[56] The plaintiff's burden in a negligence action is too light. On the other hand, an intentional tort theory requires the plaintiff to overcome the difficult burden of proving both an intent to act and an intent to harm.[57]

Recklessness represents a middle ground between negligence and assault and battery.[58] Unlike a plaintiff complaining of assault and bat-

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51. The RESTATEMENT (SECOND) OF TORTS § 50, Comment b (1965) provides a workable solution for determining the extent of a participant's consent to game conduct. Comment b to § 50 states:

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

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

52. *See, e.g.*, Carabba v. Anacortes School Dist. No. 103, 72 Wash. 2d 939, 435 P.2d 936 (1967); McGee v. Board of Educ., 16 A.D.2d 99, 226 N.Y.S.2d 329 (App. Div. 1962).

53. *See, e.g.*, Griggas v. Clauson, 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955).

54. *See* Bourque v. Duplechin, 331 So. 2d at 42; Nabozny v. Barnhill, 31 Ill. App. 3d at 214, 334 N.E.2d at 261.

55. *See* PROSSER, *supra* note 7, § 31. Recognizing this, the plaintiff in *Hackbart* did not rely on a negligence theory on appeal.

56. 601 F.2d at 520. *See also* Vendrell v. School Dist. No. 26C, Malheur County, 233 Or. 1, 15, 376 P.2d 406, 412-13 (1962).

57. *See* note 33 *supra*.

58. *See* notes 16-20 and accompanying text *supra*.

tery, the plaintiff in a recklessness action does not have the burden of proving that the defendant intended the resulting harm.[59] However, the plaintiff has the burden of proving more than negligence: he must show that the defendant consciously chose to commit an unreasonable act with disregard for the great risk it presented.[60] Thus, a recklessness theory affords a better balance between protection from harm and the desire to avoid meddling with sports.

The result in *Hackbart* should be applauded as another step toward recognition of a duty of care owed by athletes to competitors, and the limitation of assumption of risk and consent as general defenses to actions in this area. By acknowledging that the rules and customs of football set the reasonable boundaries for a participant's conduct, the *Hackbart* court has also established what conduct is unreasonable. Consequently, the limits of a participant's duty have been outlined. *Hackbart* has pointed to recklessness as the appropriate theory for recovery rather than the broader theory of negligence or the more restrictive theory of assault and battery. This will present an injured participant with a more realistic opportunity to recover for injuries sustained during a game, while at the same time, it will not unduly burden the continuation of the sport.

Because tort law condemns unreasonably dangerous activity off the playing field, it is inconsistent to give someone license to completely disregard the safety of another merely because the two are involved in a sporting event. Condoning a system where, in the name of athletic competition, a person is permitted to recklessly inflict an injury on another is contrary to one of the goals of tort law, compensation of the injured party. The *Hackbart* decision is a judicial recognition of the notion that legal duties accompany a player into a game.

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59. *See* RESTATEMENT (SECOND) OF TORTS § 500, Comment f (1965).
60. *Id.* Comment g.