

2017

Sports Torts: How Excessive Violence in Professional Ice Hockey Poses Unique Challenges for Courts and Claimants

Mark J. Feuerstein

Follow this and additional works at: http://scholarship.shu.edu/student_scholarship



Part of the [Law Commons](#)

Recommended Citation

Feuerstein, Mark J., "Sports Torts: How Excessive Violence in Professional Ice Hockey Poses Unique Challenges for Courts and Claimants" (2017). *Law School Student Scholarship*. 925.
http://scholarship.shu.edu/student_scholarship/925

Introduction

This article analyzes the viability of the National Hockey League Players Association's recklessness and negligence claims against the National Hockey League for its liability relating to traumatic brain injuries.¹ In doing so, Part I of this article explores the overtly physical and violent-laden culture that is deeply-rooted within the sport of professional ice hockey. Additionally, Part I will examine the general nature of the allegations contained within the National Hockey League Concussion Litigation. Following this brief overview, Part II of this article outlines the American legal perspectives relating to tortious liability for injuries sustained as a result of player to player conduct. To illustrate the potential application of such tort law principles with regards to professional ice hockey-related claims, this section will analyze various case law, as well as the events that occurred on January 27, 2016, in which NHL Linesman, Don Henderson, was forcefully struck in his neck/head by Calgary Flames defenseman, Dennis Wideman.² Thereafter, Part III discusses the implications of the legal standards depicted in Part II in an attempt to determine the general viability of the Players claims against the League.³ Additionally, this section

¹ See Complaint for Damages and Demand for Jury Trial, *Leeman, v. National Hockey League*, Civil Case No. 13-CV-1856 (U.S. Dist. Ct. D.C., Nov. 25, 2013), see e.g., Plaintiffs' Second Amended Consolidated Class Action Complaint, *In Re: National Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551 (SRN/JSM) (D. Minn.) (On November 25, 2013, the first of five proposed class action cases were filed by over two dozen former National Hockey League players against the National Hockey League [hereinafter "NHL" or "League"]. On August 19, 2014, the Judicial Panel on Multidistrict Litigation ordered that all similar cases by former players against the NHL were to be centralized and transferred to the District of Minnesota under the assignment of the Honorable Susan Richard Nelson); see also *In Re: National Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551 (SRN/JSM) (D. Minn.) available at: <http://www.nhlconcussionlitigation.com/information.html> (the National Hockey League Players Association [hereinafter "NHLPA" or "Players"] generally allege that the NHL, as evidenced by the League's promotion and glorification of unreasonable and unnecessary violence, acted negligently by failing to warn and adequately protect players from the adverse effects of repeated concussions and head trauma) [hereinafter "NHL Concussion Litigation"].

² See generally Josh Cooper, *NHL Linesman Don Henderson Had Neck Surgery From Dennis Wideman Hit: Report*, July 31, 2016 available at <http://sports.yahoo.com/news/nhl-linesman-don-henderson-had-neck-surgery-from-dennis-wideman-hit-report-192054868.html>.

³ The scope of section is specifically limited to the Players' tort-related negligence claims against the League. Accordingly, issues concerning labor law and the validity of scientific data relating to Chronic Traumatic Encephalopathy (hereinafter "CTE") and concussions will not be analyzed for purposes of this article.

explores the violent nature of professional ice hockey and how excessive violence within the sport of hockey poses unique challenges for claimants relating to causation and the doctrine of assumption of risk.

I. From the Ice to the Courts – A Glance into the Violent Culture of Ice Hockey

Professional ice hockey is arguably the most dangerous and violent sport ever created.⁴ While other professional contact sports are fixated on physical and often violent interactions between competitors, professional ice hockey is nevertheless more dangerous for three main reasons. First, the intrinsic elements of the game make professional ice hockey inherently more dangerous and violent than any other professional contact sport. Specifically, ice hockey is the only sport in which players compete on an enclosed ice surface, surrounded by steel-stiffened boards, all while attempting to body-check opponents at speeds upwards of twenty miles-per-hour.⁵ Moreover, ice hockey is the only sport in which participants are armed with light-weight composite sticks, plastic-reinforced padding and a helmet that often provides minimal to no facial protection. Given the physical nature of the game, its enclosed surface, ultra-fast pace, and minimal yet tactical equipment, the propensity for on-ice violence has become more prevalent than ever.⁶

⁴ See generally Jeff Yates and William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 Cornell J.L. & Pub. Pol’y 145, 150-60 (2002) (hereinafter “Yates & Gillespie”).

⁵ Reed Albergotti, *Setting a Speed Trap in Vancouver*, The Wall Street Journal, Feb. 26, 2010, available at: <http://www.wsj.com/articles/SB10001424052748704479404575087542656588862> discussing the average speed of an Olympic hockey player.

⁶ See Nicola Joyce, *Too Many Men on the Ice?: Why Criminal Prosecutors Should Refrain From Policing On-Ice Violence in the NHL*, The Harvard John M. Olin Fellow’s Discussion Paper Series, No. 9 (2007) (hereinafter “Joyce”). Suggesting the violent nature of professional ice hockey is in part due to the official NHL rules that permit forceful body-checking and fighting.

Second, unlike other professional athletes, ice hockey players are widely renowned for their extreme toughness and otherworldly pain threshold.⁷ As one commentator noted, “professional athletes are tough, but no athlete in the world is tougher than the professional ice hockey player [...] and hockey players prove that on a daily basis.”⁸ In fact, researchers recently concluded that from 2009 to 2012, more than 63 percent of the 1,307 NHL players missed at least one regular season game due to an injury sustained during the course of play.⁹ Additionally, such studies have also found a correlation between an increase in the total number of injuries per-season, specifically concussions, as the average players’ height and weight increased over the past few decades.¹⁰ Notwithstanding these alarming results, professional hockey players have become notorious for playing through the pain and continuing to compete, despite suffering gruesome facial lacerations, broken bones, dislodged teeth, and even concussions.¹¹

⁷ See generally Rich Clune, *The Battle*, The Players’ Tribune, July 1, 2015 available at: <http://www.theplayerstribune.com/rich-clune-hockey-nhl/>. Having formerly played at the professional level, Clune notes that hockey players “are programmed to never, ever admit to pain.” (hereinafter “Clune”)

⁸ Paul McCoun, *The 10 Greatest Examples of Hockey-Tough*, Jan. 12, 2010, available at: <http://bleacherreport.com/articles/324477-the-10-greatest-examples-of-hockey-tough>. Detailing numerous incidents in which players remained in the game or returned to play despite being severely injured during the course of the game. For example, during Game six of the 2003 Stanley Cup finals, Anaheim Mighty Ducks forward, Paul Kariya, was knocked unconscious by New Jersey Devils defenseman, Scott Stevens. Despite suffering a concussion, Kariya missed only 11 minutes of play before scoring a crucial goal to force game seven; Joe McDonald, *Gregory Campbell Breaks Leg*, Jun. 7, 2013 available at: http://www.espn.com/boston/nhl/story/_/id/9347725/2013-nhl-playoffs-gregory-campbell-boston-bruins-breaks-leg-done-postseason. Discussing an incident in which Boston Bruins Forward, Gregory Campbell sacrificed his body to block a slap shot. Despite shattering his right fibula, Campbell remained on the ice (skating) for over a minute and even recorded another blocked shot before exiting the game.

⁹ The Hockey News, *Injuries Cost NHL \$218 Million A Year in Lost Salaries, A Wallop to Bottom Line, Study*, The Canadian Press, Jan. 20, 2014 available at: <http://www.thehockeynews.com/news/article/injuries-cost-nhl-218m-a-year-in-lost-salaries-a-wallop-to-bottom-line-study>.

¹⁰ See generally Richard A. Wennberg and Charles H. Tator, *Concussion Incidence and Time Lost from Play in the NHL During the Past Ten Years*, 35 *Ca. J. of Neurol. Sci.* 647 (2008).

¹¹ See e.g., Brandon Prust, *Why We Fight*, The Players’ Tribune, Feb. 3, 2015 available at: <http://www.theplayerstribune.com/why-we-fight/>. Former Teammate Brandon Prust recalls New York Rangers forward, Derek Stepan, remained in the game despite suffering a broken jaw (hereinafter “Prust”); Joe Smith, *Tampa Bay Lightning’s Steven Stamkos Plays Through Bloody Nose After Being Hit in Face by Puck*, Tampa Bay Times, May 27, 2011 available at: <http://www.tampabay.com/sports/hockey/lightning/tampa-bay-lightnings-steven-stamkos-plays-through-bloody-nose-after-being/1172312>. Tampa Bay Lightning Forward, Steven Stamkos, was

Third and most notably, professional ice hockey is the only sport where fighting is openly recognized as a component of the sport but the outcome of the fight has no direct bearing on which team will be victorious.¹² Thus, by virtue of allowing players to fight, the National Hockey League “remains the only major league in which violence is, if not quite institutionalized, nevertheless actively encouraged.”¹³ Although technically a violation of the official rules in which those involved in an altercation serve a mere five-minute penalty,¹⁴ fighting is often demanded and even praised by fans and players alike.¹⁵ Yet aside from the fan-excitement generated when two players square-up in an attempt to beat one another to a bloody pulp, many critics have scrutinized the National Hockey League for refusing to acknowledge the dangers associated with fighting and allowing fighting to remain a part of today’s modern game.¹⁶

Nonetheless, many proponents for fighting contend that fighting is a natural consequence that arises in part because physicality and violence are inescapable elements of the game.¹⁷ Moreover, as the National Hockey League expanded and became more popular over time, it became apparent that not all fights were initiated as a result of such inescapable elements. Rather on-ice violence—in the form of fighting—was seen as a unique mechanism of self-policing, as

dubbed a “warrior” when he opted to return to the game despite suffering a broken nose and multiple stiches from a slap shot to the face.

¹² See e.g., Joyce, *supra* note 6; The Associated Press, *Bettman Says Safety in Hockey Is Issue, Not Fighting*, The New York Times, Mar. 27, 2007 available at: <http://www.nytimes.com/2007/03/27/sports/hockey/27nhl.html>.

¹³ See J.C.H Jones and Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, the Law and the Twist and McSorley decisions*, 12 Seton Hall J. Sport L. 165, at 167 (2002).

¹⁴ National Hockey League Official Rules 2015-2016, Rule 46, *Fighting*, available at: <http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf> (2015).

¹⁵ See Joyce, *supra* note 6 at 1.

¹⁶ See Carter Anne McGowan, *The Other Skate Drops: The NHL Concussion Lawsuit*, 25 NYSBA Entertainment, Arts and Sport L. J., at 26 (2014). Discussing the correlation between the violent nature of hockey, specifically fighting, in relation to an increase in the number of concussions suffered per-season.

¹⁷ Joyce, *supra* note 6 at 1-4; see e.g., Barbara Svoranos, *Fighting? It’s all in a Day’s Work on the Ice: Determining the Appropriate Standard of a Hockey Player’s Liability to Another Player*, 7 Seton Hall J. Sport L. 487, 490 (1997) [hereinafter “Svoranos”]; Gregory Schiller, *Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence: Regina v. Marty McSorley*, 10 Sports Law J. 241, 264-65 (2003).

well as a primary tactic used to intimidate, punish, and deter opponents from taking cheap-shots at the more talented and skillful players on one's team.¹⁸ As fighting developed as a method for instilling fear and justice upon opponents, many teams began employing larger, more aggressive players known as "enforcers."¹⁹ Generally, the enforcers were valued for their physicality and willingness to fight, rather than finesse or skill.²⁰ Comparable to on-ice body-guards, the enforcers presence alone gave teammates a sense of security while on the ice.²¹ Ordinarily, enforcers generally received minimal ice-time. But despite spending most of the game on the bench, enforcers were often times ordered onto the ice to instigate a momentum-changing fight or to "deliver preemptive or retributive hits for questionable actions of opposing players."²²

Despite the oxymoronic rationale of preventing violence via practicing violence, many current and former players have noted that fighting is needed in order to keep the game safe.²³ For example, if an opposing player were to take advantage of a smaller, better-skilled, or vulnerable player, the enforcer on the victim's team will often intervene by initiating a fight or responding with a retributive hit of his own. Thus, the enforcer's role is to physically inform the opposing team that their player's actions will not be tolerated, regardless of whether he acted within the confines of the rules. Consequently, the enforcer's deterrent effect will often times force the

¹⁸ See Stu Hackel, *The Morning Skate: HBO Makes 'Broad Street Bullies' a Love Story*, The New York Times (2010), available at: <http://slapshot.blogs.nytimes.com/2010/05/03/the-morning-skate-hbo-makes-broad-street-bullies-a-love-story/> (Characterized as a "tooth-less army of larger-than-life players including, Dave 'The Hammer' Schultz, Bobby Clarke, and Bernie Parent," the 1970's Philadelphia Flyers (known as "The Broad Street Bullies") employed an extremely aggressive style of play, "often punching first and not bothering with any questions later.") (hereinafter "Hackel")

¹⁹ See Matthew P. Barry, Richard L. Fox & Clark Jones, *Judicial Opinion on the Criminality of Sports violence in the United States*, 15 Seton Hall. J. Sports & Ent. L. 1, 7, 6-15 (2005) (discussing the role of the enforcer) [hereinafter "Barry, Fox & Jones"]; see e.g., Yates & Gillespie, *supra* note 4 at 150 (stating "enforcers are kept on teams primarily for the fighting ability and to intimidate opponents.") [hereinafter "Yates"].

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Prust, *supra* note 11.

opposition reconsider his course of action, given the fact he may have to answer to the other team's enforcer.

At the same time, however, the role of the enforcer has become more than just a fan-shared fetish or strategy for winning games and protecting teammates.²⁴ Instead, it has become a means to an end for less-talented, and otherwise marginally-skilled players to achieve their childhood dreams of playing in the National Hockey League.²⁵ Although most enforcers would prefer to have achieved their dream of playing in the NHL on merit of their hockey skills, many are willing, but few are successful in opening the inimitable side entrance into the NHL as an enforcer.²⁶ But one's willingness to forge a path to the NHL with his fists and accept this inherently dangerous role is not ideal, especially considering the detrimental effects and health risks associated with fighting.²⁷

As exemplified by the National Football League's recent concussion settlement, concerns regarding player-safety and excessive violence within the world of professional sports have become a highly contested and litigated issue.²⁸ In light of the tragic deaths of former NHL

²⁴ See Hackel, *supra* note 18. Discussing how the acceleration of fighting in the NHL brought positive nationwide attention to the sport, as well as grave concerns about the overly violent nature of the game and player safety that "have yet to evaporate."

²⁵ See Clune, *supra* note 7.

²⁶ See e.g., John Branch, *Derek Boogaard: Brain 'Going Bad'*, N.Y. Times (Dec. 6, 2011) available at <http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=5&emc=etal>); see also John Branch, *Boy On Ice – The Life and Death of Derek Boogaard*, 57-64 (2014) (Over six months, John Branch authored a novel and three-part series that examined the life and death of former NHL enforcer Derek Boogaard. Branch notes, "those who believe Boogaard loved to fight have it wrong. He loved what it brought: a continuation of an unlikely hockey career. And he loved what it meant: vengeance against a lifetime of perceived doubters and the gratitude of teammates glad that he would do a job they could not imagine") [hereinafter "Branch"].

²⁷ See Complaint at Law, *Nelson v. Nat'l Hockey League*, 20 F.Supp. 3d 650 (N.D. Ill. 2014), 2016 LEXIS 21028 (No. 13 C 4846) (Complaint filed by Derek Boogaard's family against the NHL) [hereinafter "Nelson v. NHL"].

²⁸ See Opinion of the Court, *In Re: National Football League Players Concussion Injury Litigation*, (No. 15-2206) (3rd Cir. 2016) available at <https://assets.documentcloud.org/documents/2804909/N-F-L-Settlement-Court-of-Appeals-Opinion.pdf> (On April 18, 2016 the United States Court of appeals for the Third Circuit approved a \$1 billion settlement to compensate current and former National Football League Players who have been diagnosed with concussion-related injuries).

enforcers such as, Bob Probert, Steve Montador, and Wade Belak, many commentators accused the NHL of fostering a culture of excessive violence.²⁹ But perhaps the most infamous of the recent tragedies was that of former NHL enforcer, Derek Boogaard.³⁰ At 270-pounds and nearly seven feet tall on skates, Boogaard understood from a young age, that his unusually large stature would hinder his dreams of becoming a glorified goal-scorer in the NHL.³¹ Yet unlike countless others who unsuccessfully came before him, Boogaard learned to utilize his size and toughness, and was able to fist his way through the ranks of junior hockey and ultimately the NHL.³²

Throughout his six-year tenure as an NHL enforcer, Boogaard dressed for a total of 277 games, scored only three goals, served 589 penalty minutes, and fought a record sixty-six times.³³ Nicknamed “the Boogeyman,” Boogaard was feared by opponent and respected by his teammates, thanks to his unmatched size and ability to overpower opponents.³⁴ But masked behind his intimidating grin and inspirational toughness were swollen knuckles, broken bones, countless concussions, and a secret addiction to alcohol and oxycodone.³⁵ At the age of 28 and in the prime of his career, Boogaard lost his final fight to addiction.³⁶ Subsequently, Boogaard’s estate filed a wrongful-death lawsuit against the National Hockey League, which alleged the NHL failed to adequately protect and treat Boogaard for his injuries and addiction.³⁷

²⁹ See, Melanie Romero, *Check to the Head: The Tragic Death of NHL Enforcer Derek Boogaard and the NHL’s Negligence – How Enforcers Are Treated as Second-class Employees*, 22 Jeffrey S. Moorad Sport. L. J. 271-275 (2015) (Current NHL Commissioner, Gary Bettman, is the only commissioner in major American professional sports to admit that fighting is a part of the game).

³⁰ *Id.* at 272.

³¹ See Branch, *supra* note 26.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Nelson v. NHL, *supra* note 27.

Unfortunately, Boogaard’s initial claims were deemed preempted under the federal Labor Management Relations Act, which requires all arbitration measures prescribed within the National Hockey League’s Collective Bargaining Act to be exhausted before commencement of a civil suit.³⁸ Notwithstanding this unfavorable ruling Boogaard’s estate filed a second amended complaint in September of 2016.³⁹ Consequently, the Boogaard lawsuit generated widespread attention regarding the League’s excessively violent culture and further illuminated the issue of whether fighting should remain a part of the game.⁴⁰ Above all, the Boogaard complaints played an arguably critical role in the recent class action filing by the National Hockey League Players’ Association against the National Hockey League.⁴¹

Separate from the Boogaard lawsuit, the National Hockey League Players’ Association (“NHLPA” or “Players”) similarly allege that the National Hockey League “has promoted unnecessary brutality and violence to become a dominant element of the game as played in the league.”⁴² Generally, the Players class contends that the League,

[r]ather than exercise reasonable care in fulfilling its voluntarily assumed duty of care to its players, pursued a long-running course of fraudulent and negligent conduct to maintain and improve its economic advantage, which included failing to make any statements of substance about concussions, MTBI, and other brain injuries.⁴³

³⁸ See *Nelson v. NHL*, *supra* note 27 at 1-5 (denying the Boogaard estate’s motion to remand to state court because §301 of the Labor Management Relations Act permits federal courts to entertain contract disputes between an employer and a labor organization that are governed by a collective bargaining agreement); *see e.g.*, 29 U.S.C.A. §185(a).

³⁹ See Second Amended Complaint at Law, *Boogaard v. National Hockey League*, 2016 U.S. Dist. LEXIS 134232 (N.D. Ill. 2016) (No. 13 C 4846) available at [https://dlbjbzgk95t.cloudfront.net/0846000/846404/170-main\[1\].pdf](https://dlbjbzgk95t.cloudfront.net/0846000/846404/170-main[1].pdf) (U.S. District Court Judge, Gary Feinerman, held that claims I through IV, which allege the League harmed Boogaard by promoting violence in the NHL and remaining silent on the dangers associated with head trauma were triable claims and not otherwise preempted under the Labor Management Relations Act).

⁴⁰ See *Romero*, *supra* note 29.

⁴¹ See *NHL Concussion Litigation*, *supra* note 1.

⁴² Plaintiffs’ Second Amended Consolidated Class Action Complaint, *In Re: National Hockey League Players’ Concussion Injury Litigation*, MDL No. 14-2551 at 67 (SRN/JSM) (D. Minn. 2016).

⁴³ *Id.* at 89.

Although the Players concede that there is an inescapable level of violence that exists within professional ice hockey, when compared to other professional sports leagues such as the National Football League and even the National Basketball Association, it is apparent that the “violent dynamic of the NHL is wholly unique to the NHL.”⁴⁴ For example, in both the National Football League and National Basketball Association, any player who fights, punches or attempts to punch another player, is to be immediately ejected from play and is often times subject to potential fines and suspensions.⁴⁵ More specifically, in both the International Ice Hockey Federation and the National Collegiate Athletic Association, fighting is strictly prohibited.⁴⁶ Therefore, if professional ice hockey is so obviously violent, why doesn’t the National Hockey League proscribe fighting altogether or enact specific measures that deter players from acting in an unnecessarily violent and hyper-aggressive manner?

The answer—as alleged in the NHLPA’s complaint —is that the NHL has “expressly and regularly acknowledged that it has capitalized on extreme violence, including fighting.”⁴⁷ For example, in 1989, then NHL President, John Ziegler stated, “fighting is an acceptable outlet for the emotions that build up during play [and] until otherwise, it’s here to stay.”⁴⁸ Moreover, in 2011, current NHL Commissioner, Gary Bettman noted that “fan support was a specific reason why fighting and other extreme violence persists in the NHL.”⁴⁹ If you have ever glanced at the

⁴⁴ *Id.* at 73.

⁴⁵ *Id.*

⁴⁶ *Id.* at 74.

⁴⁷ *Id.* at 76.

⁴⁸ *Id.* at 78; *see also* Mary Clarke and Pat Iversen, *The Most Interesting and Damning Details From the Unsealed Documents in the NHL Concussion Lawsuit*, SB Nation (2016) available at: <http://www.sbnation.com/nhl/2016/3/30/11333286/nhl-concussion-lawsuit-unsealed-emails-gary-bettman-colin-campbell> (the NHL released 297 documents as part of discovery in the concussion lawsuit. Included within were numerous emails from current NHL Commissioner Gary Bettman, as well as former League commissioners, presidents, responded to team owners’ concerns regarding player safety by labeling their players as “soft,” or “Greenpeace puked [...] that were responsible for their own injuries”).

⁴⁹ *See* NHL Concussion Litigation, *supra* note 1 at 78-79.

National Hockey League website, have seen one of its advertisements, or even played its officially licensed video game, violent hits and fights are prominently displayed and serve as a marketing tool for the League.

However, in addition to generating revenue, Bettman's rationale for violence and fighting is similar to those who believe it is a necessary mechanism for preventing and deterring further violence within the game.⁵⁰ Accordingly, Bettman even suggested that enforcers were comparable to a "hockey thermostat, that helps cool things down when tension run high."⁵¹ Nevertheless, the League contends it took adequate steps to protect its players. For example, in 1979, the NHL instituted a mandatory helmet rule, in which all players were required to wear a league-issued helmet and refrain from deliberately removing it prior to an altercation.⁵² In 1997, the NHL created a Concussion Program, in which team physicians were required to document, study and maintain records of all players that reportedly suffered in-game concussions.⁵³

Conversely, the NHLPA alleges the League's preventative measures were simply a ploy to make it seem as if they had a genuine interest in its players' health and safety. Accordingly, the results from the NHL Concussion Program, which took place over the course of seven regular seasons, from 1997 to 2004, were not disclosed to players until 2011.⁵⁴ After withholding the findings for nearly seven years, the NHL finally disclosed the report. Included within, team physicians recorded 559 concussions during the course of regular season play.⁵⁵ Most alarmingly,

⁵⁰ *Id.* at 79-82; *See* Yates, *supra* note 19.

⁵¹ *Id.*

⁵² *Id.* at 3.

⁵³ *Id.* at 3-6.

⁵⁴ *Id.* at 24-29; *see e.g.*, Brian W. Benson M.D. Ph.D., et al., A Prospective Study of Concussions Among National Hockey League Players During Regular Season Games: The NHL-NHLPA Concussion Program, 905-911, *CMAJ* (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3091898/pdf/1830905.pdf>.

⁵⁵ *Id.*

twenty percent or nearly 112 of those 559 players returned to play in the same game in which they suffered the concussion.⁵⁶ Moreover, the NHLPA contends that, “despite these findings, the report quickly sought to downplay their significance, concluding with the assurance that, essentially, no cause and effect relationship could be found between concussions and other head hits and the problems the Plaintiffs now experience.”⁵⁷

Notwithstanding the Players’ claims in light of their contentions that the NHL promoted a culture of excessive violence as a means to generate revenue, and failed to adequately warn and protect players from the neurological risks of head injuries suffered while playing in the NHL; the League has openly iterated their desire to pursue litigation and forgo any settlement discussions.⁵⁸ But perhaps the League should be more concerned with this ongoing suit. Unlike the initial claims brought by the Boogaard estate, in which a majority of the claims were preempted under federal law, the League’s previous motion to dismiss on the grounds of federal labor law preemption were swiftly set aside.⁵⁹

Before analyzing the potential likelihood of success of the NHLPA’s tort-specific negligence claims, Part II of this article outlines the existing landscape of American tort law as related to personal injuries suffered as a result of athletic participation. Accordingly, this overview

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Greg Wyshynski, *NHL Has ‘No desire’ to Settle Concussion Lawsuit, Says Internal Memo*, Yahoo Sports, (2015) available at <http://sports.yahoo.com/blogs/nhl-puck-daddy/nhl-has--no-desire--to-settle-concussion-lawsuit--says-internal-memo-165002717.html>.

⁵⁹ See Memorandum Opinion and Order, *In re: National Hockey League Players’ Concussion Injury Litigation*, MDL 14-2551, 18-41 (SRN/JSM) (D. Minn.) (2016) (on May 16, 2016, United States District Court Judge, Susan Richard Nelson, issued a memorandum opinion and order denying the NHL’s motion to dismiss the NHLPA’s negligence claims on the grounds of federal labor law preemption).

will provide a more educated prediction of whether the NHLPA will likely succeed in its class action suit against the NHL.

II. Conduct Giving Rise to Tort Liability in the Arena of Sports:

As the use of excessive force in the form of competitive violence has escalated within the arenas of professional and amateur sports, so too has the number of injured athletes who seek redress through civil courts.⁶⁰ However, many courts prefer to refrain from and often attempt to limit their involvement to the most egregious cases in an effort to avoid having to grapple with unsettled and non-uniform state tort law.⁶¹ Articulating basic tort law concepts such as intent, consent, assumption of the risk and the scope of liability can pose a significant challenge in cases involving violent sports like professional ice hockey. Especially considering most of the conduct that takes place on the ice could generally be subject to criminal or civil liability if taken place off the ice.⁶² Nonetheless, as excessive violence has become an increasingly common aspect of competitive sports, more and more claimants have opted to come to the courts for formal relief.

In the United States, the prevailing standard for recovery in sports-related tort claims is generally limited to injuries that occur as a result of intentional or reckless conduct.⁶³ Although claims based on the theory of negligence are commonly dismissed as an inappropriate basis for recovery, a small minority of courts have been willing to entertain such claims if they implicate

⁶⁰ Linda S. Calvert Hanson & Craig Dennis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the past Twenty Years?* (1996) 6 Seton Hall J. Sports L. 127

⁶¹ See Daniel S. Greene, *From the Ice to the Courtroom: Analyzing the Relationship Between Professional Ice Hockey and Tort Liability*, 23 Sport Law. J. 57, at 69 (2016) [hereinafter "Greene"].

⁶² See Greene, *supra* note 61 at 66; see e.g., Jeffrey A. Citron and Mark Ableman, *Civil Liability in the Arena of Professional Sports*, 36 U. Brit. Colum. L. Rev. 193, at 197 (2003) [hereinafter "Citron"]; Nicola Joyce, *Too Many Men on the Ice?: Why Criminal Prosecutors Should Refrain From Policing On-Ice Violence in the NHL*, Harvard John M. Olin Fellow's Discussion Paper Series, No. 9 (2009).

⁶³ See Citron, *supra* note 62 at 197.

organizational negligence or involve injuries suffered as a result of participation in a recreational sports league.⁶⁴ Additionally, many of these sports injury claims never reach fruition in part because of the maxim of *volenti non fit injuria* (no wrong is done to one who is willing to be injured).⁶⁵ Consequently, this maxim, otherwise known as the doctrine of voluntary assumption of the risk, is often the hardest hurdle for claimants to overcome.⁶⁶

A. Intentional Tort Theory – Assault and Battery

In the United States, claimants seeking redress for injuries that occur as a result of player to player conduct are generally required to assert something more than mere negligence.⁶⁷ Specifically, claimants generally must advance their claims on a theory of recklessness or assault and battery, *i.e.*, intentional torts.⁶⁸ Perhaps the most obvious theory giving rise to participant-to-participant liability are claims based on the theory of intentional torts. Under this theory, claimants generally allege that the defendant's conduct constituted an assault and or battery.⁶⁹ In short, a defendant can be held liable for a battery if he intentionally causes an unprivileged, harmful contact with the claimant, and such contact actually occurred.⁷⁰ Even if the harmful or offensive contact with the claimant did not occur, a defendant may be liable for an assault if the claimant

⁶⁴ See *e.g.*, Cameron J. Raines, *Sports Violence: A Matter of Societal Concern*, 55 Notre Dame L. Rev. 796 (1980); *Gauvin v. Clark*, 537 N.E.2d 94, 96-97 (Mass. 1989) (during a college hockey game, defendant speared the plaintiff in his midsection, causing serious injury to plaintiff. Although defendant's actions were prohibited in all levels of hockey as a violation of the rules, the Massachusetts Supreme required plaintiff to demonstrate that defendant acted with a reckless disregard because "vigorous and active participation in sporting events should not be chilled by the threat of litigation").

⁶⁵ See Keeton et. al., *Prosser and Keeton on the Law of Torts*, § 18 at 112 (5th ed. 1984); see also Restatement (Second) of Torts § 10 (1965).

⁶⁶ *Id.*

⁶⁷ See Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable*, 5 Seton Hall J. Sport L. 253, 256 (1995).

⁶⁸ See Yasser, *supra* note 67 at 254-256.

⁶⁹ *Id.*

⁷⁰ Restatement (Second) of Torts § 18 (1965) (defining "Battery: Offensive Contact").

can prove the defendant's intentional conduct placed him in "imminent apprehension" of his life or safety.⁷¹

In *Averill v. Lutrell*,⁷² plaintiff was a semi-professional baseball player.⁷³ While at bat, the opposing pitcher gestured a threatening motion, suggesting his intent to "stick the next pitch in [plaintiff's] ear."⁷⁴ After plaintiff successfully avoided being hit by three close pitches, the fourth brushed his arm.⁷⁵ As plaintiff proceeded to take his base, he aggressively tossed his bat in the direction of the pitcher.⁷⁶ Without any warning, the defendant catcher, stood up and struck plaintiff in the back of his head with his fist.⁷⁷ Consequently, plaintiff was knocked unconscious and fractured his jaw upon falling face-first to the ground.⁷⁸ The plaintiff sued the defendant for assault and battery and was awarded \$5,000.⁷⁹ Although the court in *Averill* focused heavily on the issue of *respondeat superior*, the court characterized the defendant's actions as an impermissible, "willful [and] independent assault" on an unsuspecting player that fell entirely outside the scope of the game.⁸⁰

However, when considering the violent nature of contact sports such as ice hockey, which permits fighting and hyper-aggressive conduct, many claims advanced under this theory are not as successful as one might initially think. For example, in *McKichan v. St. Louis Hockey Club*,⁸¹ the Missouri Court of Appeals for the Eastern District of Missouri held that a severe body check was

⁷¹ Restatement (Second) of Torts § 21 (1965) (defining "Assault").

⁷² 311 S.W.2d 812 (Tenn. Ct. App. 1957).

⁷³ *Averill*, 311 S.W.2d 812, 813-814.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Averill*, 311 S.W.2d 812, 815.

⁸⁰ *Id.*

⁸¹ 967 S.W.2d 209 (Mo. Ct. app. 1998).

not actionable as a matter of law because the hit at issue was an inescapable “a part of the game” of ice hockey.⁸² In *McKichan*, the plaintiff was a goaltender for a minor league hockey team that was affiliated with the NHL.⁸³ Prior to the incident at issue, plaintiff skated out of his crease towards the near-side boards after the puck was sent over the glass and out of play.⁸⁴ Even though the referee blew his whistle, signaling a stoppage in play, the defendant proceeded to skate in the direction of plaintiff at full speed.⁸⁵ The referee took notice of the defendant’s actions and blew his whistle a second time.⁸⁶ To no avail, the defendant ignored the whistle and ultimately delivered a gruesome body check on the unsuspecting plaintiff.⁸⁷ The blow knocked the plaintiff into the boards and rendered him unconscious for nearly 30 minutes.⁸⁸

Accordingly, plaintiff sued both the defendant and the St. Louis Blues organization, and was awarded \$175,000 in compensatory damages.⁸⁹ However, the Missouri Court of Appeals reversed, and ruled in favor of the defendants.⁹⁰ Although the court did not explicitly prescribe an applicable standard of care, the court listed numerous factors that assisted their decision. Such factors included:

the ages and physical attributes of the participants, their respective skills and knowledge of the rules and customs, their status as amateurs or professionals, the type of risks which inhere to the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective equipment, [and] the degree of zest with which the game is being played.⁹¹

⁸² *McKichan*, 967 S.W.2d 209, 213 (1998).

⁸³ *McKichan*, 967 S.W.2d 209.

⁸⁴ *Id.* at 210-211.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *McKichan*, 967 S.W.2d at 212-213.

⁹¹ *Id.*

The court concluded that although the defendant's conduct was extremely aggressive and constituted an intentional violation of the rules of the game, his actions were not outside the realm of reasonable anticipation considering the extremely violent nature of professional ice hockey.⁹² Moreover, the court added, "for better or for worse, [violence and rough play] are part of the game of professional ice hockey."⁹³

As exemplified by the *Averill* and, to a lesser extent, *McKichan*, decisions, intentional tort theories are considered a viable cause of action in the sports participant liability context. However, most claims brought under this theory are generally successful only "when players step outside their roles as fellow competitors," and go beyond what is ordinarily permissible by willfully or maliciously attacking one another.⁹⁴ In the context of non-contact sports such as baseball, determining whether a participant acted with the requisite intent and malice seems rather straightforward considering violent conduct like that of the defendant in *Averill*, is generally deemed outside the scope of the game. But in the context of contact sports such as ice hockey, the *McKichan* decision illustrates the courts' *laissez faire* approach, which recognizes a cause of action only when "no player could reasonably anticipate the act."⁹⁵ Not only does this approach allow the courts to balance the basic tort law principle of *volenti non fit injuria* with the underlying

⁹² *McKichan*, 967 S.W.2d at 213.

⁹³ *Id.*

⁹⁴ See e.g., *Overall v. Kadella*, 361, N.W.2d 352, 352-356 (Mich. Ct. App. 1984) (plaintiff brought an action against defendant for injuries he sustained during a fight after an amateur hockey game. Plaintiff was knocked unconscious and suffered severe eye injury. The Michigan Court of Appeals affirmed the \$46,000 judgement in favor of plaintiff, and held "there is a general agreement that an intention act, causing injury, which goes beyond what is ordinarily permissible, is an assault and battery for which recovery may be had"); *Pfister v. Shusta*, 657 N.E.2d 1013, 1014 (1995) (in amateur contact sports, courts are generally more willing to entertain claims in which liability is predicated on "willful, wanton or intentional misconduct").

⁹⁵ See Heidi C. Doerhoff, *Penalty Box or Jury Box – Deciding Where Professional Sports Tough Guys Should Go*, 64 Mo. L. Rev., 755-58 (1999).

circumstances, but, as a practical matter, this heightened threshold is indicative of the courts' preference to avoid unnecessary judicial oversight of professional competitive sports.⁹⁶

B. Recklessness Theory

The majority of state courts in the United States generally only require sports participants to show that the defendant's conduct was reckless. As defined within the Restatement (Second) of Torts,

[an] actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.⁹⁷

In short, recklessness falls somewhere in between the negligence theory and intentional tort theory. Accordingly, the recklessness threshold is higher than mere negligence because it requires a showing that the defendant knew or should have reasonably known that his actions, or lack thereof, created a substantially unreasonable risk of harm.⁹⁸ Moreover, the recklessness threshold requires less than intentional torts because the claimant need only prove that the defendant acted intentionally or with conscious disregard.⁹⁹ Comparatively, under the intentional tort theory, the claimant must show the defendant acted with the specific intent to cause a harmful result, beyond mere conscious disregard for the safety of another.¹⁰⁰ Despite this lesser threshold, the doctrine of

⁹⁶ See Doerhoff, *supra* note 95 at 756.

⁹⁷ Restatement (Second) of Torts § 500, Reckless Disregard of Safety Defined (1965).

⁹⁸ Restatement (Second) of Torts § 500 cmt. g (1965).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

assumption of risk remains an elusive concept in some jurisdictions as it would for claims brought under the intentional tort theory.¹⁰¹

In *Nabozny v. Barnhill*,¹⁰² the plaintiff, a high school soccer-goalskeeper, was severely injured during a match when the defendant, an opposing forward, kicked the plaintiff in the head.¹⁰³ During the course of regular play, the plaintiff positioned himself at the top of the penalty box and went down on his knee in an effort to retrieve and secure a rolling pass directed towards him.¹⁰⁴ As the plaintiff cradled the ball to his chest, the pursuing defendant continued onward in the direction of the plaintiff and proceeded to kick the plaintiff in the left side of his head.¹⁰⁵ The plaintiff sued the defendant for damages caused by the alleged negligence of the defendant and the trial court ruled in favor of the defendant.¹⁰⁶

On appeal, however, the Illinois Appellate Court reversed the trial court ruling and ordered a new trial.¹⁰⁷ The *Nabozny* court acknowledged that “the law should not place unreasonable burdens on the free and vigorous participation in sports,” but further expressed, “some of the restraints of civilization must accompany every athlete on to the playing field.”¹⁰⁸ The court held that in competitive sports in which the players are trained and thus, deemed knowledgeable of a set of rules primarily designed to protect players’ safety, owe a “duty to fellow competitors to refrain from conduct proscribed by such rules.”¹⁰⁹ Accordingly, a player is potentially “liable for

¹⁰¹ Restatement (Second) of Torts cmt. b (1965).

¹⁰² 334 N.E.2d 258 (Ill. App. Ct. 1975).

¹⁰³ *Nabozny*, 334 N.E.2d at 260.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 261.

¹⁰⁸ *Id.* at 260-61.

¹⁰⁹ *Id.*

injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player.”¹¹⁰

Although the *Nabozny* court did not explicitly specify what constitutes reckless disregard, many jurisdictions subsequently adopted the *Nabozny* logic, requiring claimants to prove that the defendant acted either 1) willfully with the intent to injure; or 2) where intent cannot be proven, with an utter indifference or conscious disregard for the safety of others.¹¹¹ In *Hackbart v. Cincinnati Bengals*,¹¹² the plaintiff, a safety for the Denver Broncos, suffered a broken neck as a result of an altercation with the defendant, a running back for the Cincinnati Bengals.¹¹³ The incident at issue occurred when the plaintiff fell to the ground after attempting to block the defendant.¹¹⁴ As the play progressed up-field the defendant, “acting out of anger and frustration, but without specific intent to injure,” lunged forward and struck the kneeling plaintiff in the back of the head.¹¹⁵ The sheer force of defendant’s blow was so powerful that both players fell to the ground.¹¹⁶ However, because the referees did not observe the incident no subsequent penalty was assessed.¹¹⁷ Moreover, the plaintiff did not come to realize the severity of his injuries until the

¹¹⁰ *Id.*

¹¹¹ See e.g., *Pfister v. Shusta*, N.E.2d 1013 (Ill. 1995) (recreational participants have a duty to refrain from willful and wanton conduct); *Ziarko v. Soo Line R.R. Co.*, 641 N.E.2d 402 (Ill. 1994); *Crawn v. Campo*, 643 A.2d 600 (N.J. 1994); *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992); *Connell v. Payne*, 814 S.W.2d 486 (Tex. Ct. App. 1991); *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989); but see *Lestina v. West Band Mutual Ins. Co.*, 501 N.W.2d 28 (Wis. 1993) (Wisconsin Supreme Court held that the negligence standard applied to injuries incurred during a recreational soccer game and that the participants were required to exercise ordinary care under the circumstances).

¹¹² See *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977), *rev'd*, *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

¹¹³ See *Hackbart*, 435 F. Supp. At 353.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

next day, when he began experiencing neck pain.¹¹⁸ Nonetheless, plaintiff's career was abruptly ended as he was released from the team.

Consequently, the plaintiff sued the defendant individually for reckless misconduct, as well as the defendant's employing team for negligently failing to control their player.¹¹⁹ The U.S. District Court for the District of Colorado held that the plaintiff was not entitled to recovery, placing a great deal of emphasis on the inherently violent nature of professional football in relation with the doctrine of assumption of risk.¹²⁰ The court compared the morality of the playing to that of a battlefield, and explained because the game is played "with a reckless-abandonment of self-protective instincts," the plaintiff "must have recognized and accepted the risk that he would be injured by such an act."¹²¹

On appeal, however, the Tenth Circuit reversed the district court ruling and stated, it is a fundamental policy of tort law that "for every injury wrongfully inflicted, some redress under the state law must be afforded since it is essential that citizens be able to look to their government for redress."¹²² Unsatisfied with the district court's reliance on the doctrine of assumption of risk, the Tenth Circuit further explained, "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."¹²³ Similar to the appellate court in *Nabozny*, the Tenth Circuit highlighted the distinction between negligent misconduct and intentional and reckless conduct.¹²⁴ The court concluded that even though the defendant lacked specific intent to injure required for an intentional tort claim, his

¹¹⁸ *Id.*

¹¹⁹ *See Hackbart*, 435 F. Supp. At 355-356.

¹²⁰ *Id.*

¹²¹ *See Hackbart*, 435 F. Supp. At 356-358.

¹²² *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 523 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

¹²³ *See Hackbart*, 601 F.2d at 520.

¹²⁴ *Id.* at 524

actions were more than a mere inadvertence.¹²⁵ As in *Nabozny*, the Tenth Circuit went on to find that the defendant's actions constituted reckless misconduct because he consciously disregarded specific rules of the game that were primarily designed to protect player-safety.¹²⁶

The Tenth Circuit's holding in *Hackbart* "transmitted a sobering message to the sports establishment—if they cannot keep their own house clean, the courts will not hesitate to do it for them."¹²⁷ Accordingly, the *Hackbart* holding strengthened the principles established under *Nabozny* and reiterated the notion that sports participants, regardless of their amateur or professional status, will not be shielded from liability simply because they did not intend to cause harm. Moreover, the *Hackbart* decision essentially rendered limitations imposed under the doctrine of assumption inapplicable to claims based on reckless misconduct. The Tenth Circuit concluded *that* mere participation in such violent sports does not manifest consent to such reckless or proscribed conduct of other participants. Following *Nabozny* and *Hackbart*, a sports participant may be liable for an injury caused to a fellow competitor if 1) he acted with specific intent to bring about a specific harm; or 2) he intended the act committed, but lacked sufficient knowledge or consciously disregarded the reasonable likelihood significant harm would result.

C. Negligence Theory and the Application of Assumption of Risk.

Generally, most courts that have been willing to entertain sports participant liability claims have demonstrated a reluctance to recognize actions for simple negligence, and instead require claimants to bring such claims under either an intentional tort theory or recklessness theory.¹²⁸ As

¹²⁵ *Id.* ("the Defendant admittedly acted impulsively and in the heat of anger, and even though it could be said from the facts that he intended the act, it could also be said that he did not intend to inflict the serious injury which resulted").

¹²⁶ *Id.* at 521.

¹²⁷ See *Cameron J. Raines*, *supra* note 64 at 803.

¹²⁸ See *Nabozny*, 334 N.E.2d at 261.

defined within the Restatement (Third) of Torts, a person may be liable for negligently causing physical harm to another if the actor 1) has a duty to exercise reasonable care under the circumstances; 2) it is reasonably foreseeable that his conduct will cause, or is likely to cause physical harm; and 3) the actor's unreasonable conduct is the factual cause of the claimants harm.¹²⁹ Consequently, the majorities' reluctance is in recognition of the fact that subjecting another participant to an unreasonable risk of harm—the essence of a negligence claim—is a fundamental element of contact sports such as football and hockey.¹³⁰ Thus, the majorities' rationale is essentially predicated on the doctrine of assumption of risk.

In *McKichan*, the court dismissed the plaintiff's negligence claim against the defendant's employing organization, and ruled the doctrine of assumption of risk precluded liability for injuries that arise from risks inherent to the sport of ice hockey.¹³¹ Even though the defendant's illegal check arguably constituted recklessness under the *Nabozny* and *Hackbart* frameworks, the court opined that doctrine precluded plaintiff's negligence claims because physical conduct and aggressive body-checks are a fundamental part of the game of ice hockey.¹³² Notwithstanding the majorities' unwillingness to recognize sports torts negligence claims, there are a minority of jurisdictions that have permitted such claims to proceed. However, it is important to note that

¹²⁹ Restatement (Third) of Torts § 6, cmt. B (1965) (listing the elements of a prima facie negligence claim).

¹³⁰ See *Hackbart*, 601 F.2d at 520.

¹³¹ See e.g., *McKichan*, 967 S.W.2d at 213

¹³² See e.g., *McKichan*, 967 S.W.2d at 213; *Karas v. Strevell*, 884 N.E.2d 122, 134 (Ill. 2008) (participants are deemed to have breached a duty of care to co-participants on if he acts intentionally or so recklessly as to be totally outside the range of ordinary activity involved in the sport. Plaintiff's negligence claims were dismissed because he assumed the ordinary risk of being checked from behind during an amateur hockey game); *Borque v. Duplechin*, 331 So.2d 40, 42 (La. Ct. App. 1976), *cert. denied*, 3354 So.2d 210 (La. 1976) (although the court termed the defendant's conduct "negligent," the thrust of the majority opinion supports the notion that sports participants invariably assume risks incidental to the particular sport that are created by a co-participant's negligence but not necessarily recklessness); Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable*, 5 Seton Hall J. Sport L. 253, 256 (1995).

most of these cases involve participation in nonprofessional sports and thus, are not relevant to the analysis of this note.¹³³

Although courts have not generally spelled it out, there is an apparent, logical relationship between the foreseeability of violence, particularly violence that is not part of the game, itself, and the doctrine of assumption of risk. In non-contact sports, such as baseball and soccer, the correlation between foreseeability of harmful conduct and assumption of the risk is somewhat clearer than in comparison to contact sports. For example, in the *Averill* and *Nabozny* decisions, the court's decision can be explained by the nature of the sport: violent or hyper-aggressive conduct is substantially less likely to occur because violent conduct is not a natural or expected aspect of the game of baseball and soccer, respectively. Both the batter in *Averill* and the goaltender in *Nabozny* could not have reasonably assumed the risks associated with the defendants' conduct because the expectation for such violent and injurious conduct was highly unforeseeable, given the non-violent nature of the sports at hand. Consequently, a participant's presumed assumption of the risks associated with the sport generally decreases as the likelihood or foreseeability of violent conduct decreases. To the contrary, in contact sports such as hockey and football, a participant is presumed to have assumed a greater amount of risks because violent conduct is more foreseeable when considering the violent nature of the game.

Through that lens, the *McKichan* decision makes some sense. There, the court adopted a circumstantial approach and emphasized certain conduct, such as a severe and illegal body check on an unsuspecting player, was considered an inescapable aspect of the game of ice hockey.

¹³³ See e.g., *Lestina v. West Blend Mutual Ins. Co.*, 501 N.W. 2d 28 (Wis. 1993); *Niemczyk v. Burlison*, 538 S.W.2d 737 (Mo. Ct. App. 1976); *Lutterman v. Studer*, 217 N.W.2d 756 (Minn. 1974); but see *Babych v. McRae*, 567 A.2d 1269 (Conn. Super. Ct. 1989) (professional hockey player's negligence cause of action permitted because Connecticut law did not bar negligence actions in the context of co-participant sports injury claims).

Although the defendant's conduct might have been proscribed under the rules of the game, the *McKichan* court ruled that such illegal body checks were not outside the reasonable realm of anticipation.

However, it becomes evident that the correlation between dangerousness and assumption of the risk is problematic when it comes to violent conduct that is not generally expected or accepted as a part of the game. In both the *McKichan* and *Hackbart* decisions, the court grappled with the issue of whether or not the injured claimants had assumed the risks associated with such violent and aggressive sports. In *Hackbart*, the court emphasized the fundamental policy rationale of tort law and stressed the need for appropriate redress regardless of the violent nature of the sport. On the one hand, it is not obviously unreasonable to conclude that since a player has assumed the risk to get hit in a dangerous manner by another player in the course of the game within the rules has also, thereby, assumed the risk of being hit by another player in a dangerous manner in the course of the game in *violation* of the rules. On the other hand, there can be no doubt that a player is also much more likely to guard themselves against injuries that come from rule-compliant conduct than against injuries that come from rule-violating conduct.

The reasoning in *McKichan* and other like-minded cases leaves claimants in hockey with only one option: those torts that do not allow for assumption of risk—namely, intentional torts and, to a lesser extent, recklessness.¹³⁴ Courts generally do not accept that intentional, injurious conduct is something that is part of the general risks of an activity that can be assumed by a participant. In sports, participants might consent to such conduct, but a participant might assume

¹³⁴ Compare Restatement (second) of Torts § 496A (limiting assumption of the risk to negligent and reckless conduct and *City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 751 (2007) “an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy.”).

the risk of being carelessly body checked but not the risk of being mugged or sucker-punched from behind. To be sure, a participant might consent to conduct within the bounds of the sport's rules (or just beyond them), but it is not a question of assumption of the risk. This means that when a player complains of an intentional tort, the primary hurdle that they must clear is consent. When viewed through that lens, it is unreasonable to conclude that a player has consented to violent actions against them that go well beyond the rules of the game.

III. The Dennis Wideman Incident & NHL Concussion Litigation

A. The Wideman Incident

On January 27, 2016, former NHL Linesman, Don Henderson, was forcefully struck in the back of his neck/head by Calgary Flames defenseman, Dennis Wideman.¹³⁵ The incident occurred as Wideman, who had appeared to have been disoriented from a previous hit, skated towards to bench area in attempt to exit the ice.¹³⁶ Within feet of the bench and “without provocation, Wideman grasped his stick with both hands and forcefully struck Henderson from behind with the shaft of his stick.”¹³⁷ As a result of the hit, Henderson suffered significant injuries and was forced to retire from his position as an NHL linesman.¹³⁸ Wideman was subsequently suspended and fined by the NHL.¹³⁹ Accordingly, the ongoing suit between the NHL and the Players' Association pertains primarily to the legality of Wideman's suspension. However, for purposes of this article, these facts provide a hypothetical landscape perfect for illustrating the potential application of law if Henderson were to file a civil suit against Wideman.

¹³⁵ See Cooper, *supra* note 2.

¹³⁶ See Complaint, *National Hockey League v. National Hockey League Players' Assoc.*, 16-cv-04287 at 2 (S.D.N.Y. 2016) available at <http://thewhitebronco.com/nhl-sues-nhlpa-over-wideman-suspension/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Based on the legal frameworks set forth above, Henderson would have to bring a claim against Wideman and allege Wideman acted either intentionally or with recklessness. Under the intentional tort theory, Henderson would need to prove that Wideman had intent to make an objectively harmful or offensive contact.¹⁴⁰ Under the *Averill* holding, Henderson would need to show that Wideman's conduct constituted an impermissible, "willful [and] independent assault" on an unsuspecting player that fell entirely outside the scope of the game.¹⁴¹ Moreover, under the *McKichan* holding, Henderson would need to show that Wideman's actions constituted an intentional violation of the rules of the game and were outside the realm of reasonable anticipation¹⁴²

For arguments sake, if Henderson could not prove Wideman had the requisite intent to injure, he could potentially assert a cause of action under the recklessness theory as iterated in *Nabozny*¹⁴³ and *Hackbart*.¹⁴⁴ Henderson would need to prove 1) Wideman intended to commit his actions; and 2) his conduct constituted a conscious disregard of the reasonable likelihood significant harm would result.¹⁴⁵ Accordingly, under both *Nabozny* and *Hackbart*, such reckless misconduct can be established by a showing that a participant acted with a conscious disregard of specific rules primarily designed to protect player-safety.¹⁴⁶

Accordingly, Henderson may have difficulty proving Wideman acted with specific intent to injure because Wideman claims to have been concussed just prior to the incident.¹⁴⁷

¹⁴⁰ Restatement (Second) of Torts § 18 (1965) (defining "Battery: Offensive Contact").

¹⁴¹ *Averill*, 311 S.W.2d 812 at 815.

¹⁴² *McKichan*, 967 S.W.2d at 213.

¹⁴³ See *Nabozny v. Barnhill*, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975)

¹⁴⁴ *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 52-23 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

¹⁴⁵ *Id.*

¹⁴⁶ *Nabozny*, 334 N.E.2d at 261.

¹⁴⁷ See Appeal of Dennis Wideman Suspension, *National Hockey League v. National Hockey League Players' Assoc.*, James Oldham, Neutral Discipline Arbitrator for the National Hockey League (2016) available at <https://www.sportslaw.org/members/secureDocument.cfm?docID=1227>.

Notwithstanding any difficulties relating to this intent threshold, Henderson may have a stronger claim under the recklessness theory because Wideman's conduct could be considered a conscious disregard for Henderson's safety. Unlike the aforementioned cases, this situation is particularly unique because it involves a referee and not a co-participant. Thus, one might contend that any implications relating to the assumption of risk are explicitly irrelevant because unlike players, referees are not similarly situated to the extent they do not have a reasonable expectation of being deliberately body-checked or mugged from behind by a player.

For example, a referee may be deemed to have assumed the risk of injury if while attempting to break up a fight, he was punch accidentally by a player. But under these facts, it is highly unlikely that a fact finder could conclude that a referee assumed the risk of injury because the rules of the game explicitly prohibit players from recklessly and intentionally applying physical force directed towards a referee.¹⁴⁸ Moreover, Wideman's conduct was completely unexpected and unforeseeable because his actions were not considered a part of the game. These facts provide a great illustration of how the foreseeability of violence and the assumption of risk relate to one another.

Although Henderson may have consented and even assumed some of the risks associated with being on the ice, as a referee, Henderson is comparable to an innocent bystander, and thus, could not have reasonably assumed the risk of being mugged from behind by Wideman. If Henderson were an opposing player, perhaps the court, like in *McKichan*, would conclude that Henderson assumed such risks given the uniquely violent nature of ice hockey. However, because Wideman's actions were in direct violation of the NHL rules, and arguably an intentional form of

¹⁴⁸ National Hockey League Official Rules 2015-2016, Rule 40.2, *Automatic Suspension*, available at: <http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf> (2015).

retaliation against Henderson for a previously missed call, one might argue that Henderson is in a favorable position to assert a meritorious claim against Wideman.

B. The NHL Concussion Litigation

As previously mentioned, the National Hockey League Players' Association and the National Hockey League are in the midst of a class action lawsuit, in which the Players allege the League acted recklessly and negligently by failing to warn and adequately protect players from the adverse effects of repeated concussions and head trauma; and instead promoted a culture of unreasonable and unnecessary violence.¹⁴⁹ Specifically, the Players allege that the League fostered a culture of excessive violence as a means of generating revenue and developing a greater fan base.¹⁵⁰ Moreover, the Players contend that the League acted recklessly because the NHL knew or reasonably should have known, as a result of the 2011 Concussion Program data, "that repeated concussive impacts that the Players endured while playing in the NHL likely put them at substantially-increased risks of developing one or more neurodegenerative diseases or conditions, including, but not limited to, dementia, ALS, CTE, Alzheimer's disease, Parkinson's disease, and any cognitive, or behavioral conditions associated with such."¹⁵¹

Even though many commentators have suggested the Players have presented weak claims against the League,¹⁵² it will be interesting to witness how the suit plays out in the coming months. Some commentators have even gone so far as to suggest that the recent \$1 billion settlement in the National Football League will incentivize the NHL to settle the suit and extinguish such negative

¹⁴⁹ Plaintiffs' Second Amended Consolidated Class Action Complaint, *In Re: National Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551 at 102-111, (SRN/JSM) (D. Minn. 2016).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 102.

¹⁵² See McGowan, *supra* note 16 at 26 (suggesting the NHLPA has a weak claim considering players consent to the inherently violent nature of hockey and thus, will have trouble refuting a lack of consent or assumption or risk).

attention.¹⁵³ However, considering the lack of scientific evidence connecting repetitive blows to the head and long term health risks, it is very possible that the NHL refuses to settle and instead fights the Players in court.

i. Significant Challenges Affecting the Players' Claims

Admittedly, the Players are at a distinct disadvantage because the majority of courts in the United States refuse to permit such sport torts claims on the basis of negligence. Notwithstanding this general reluctance, the Players' claims are only the second of its kind, behind the National Football League's. Considering that case settled out of court prior to trial, it remains unclear whether a federal judge will permit an organizational negligence cause of action. On the other hand, because the Players also alleged that the League acted recklessly, under the *Nabozny* and *Hackbart* frameworks, one might argue their claims are not as weak as they may seem.

As a threshold matter, the Players must establish that the League has a duty to care for its players. The League controls the rules of the game, the equipment the players wear, and even the medical protocol and monitoring players must complete before returning to play. Accordingly, this is substantive proof that the League has taken it upon themselves to protect the players from foreseeable harms associated with playing professional ice hockey and assumed the duty to take reasonable efforts to that end. When determining whether the League breached this duty, the Players have an arguably sturdy claim considering the League, as evidenced by current and former commissioners' statements,¹⁵⁴ used violence as a means of generating profits. Yet despite the barbaric and extremely unsafe nature of fighting and violence in hockey, this contention only

¹⁵³ See Ken Belson and Jeff Klein, *N.F.L. Concussion Case Offers Clues For Hockey Lawsuit*, New York Times (2013) available at <http://www.nytimes.com/2013/11/27/sports/hockey/nfl-concussion-case-offers-clues-for-hockey-lawsuit.html>.

¹⁵⁴ See Mary Clarke and Pat Iverson, *supra* note 48.

supports the notion that the League breached its duty towards the Players and does not establish the requisite element of causation.

a. Causation and the Assumption of Risk

Assuming this suit does in fact go all the way to trial and does not settle out of court, the Players could face a significant hurdle with respect to proving causation because most, if not all of the players included in the class, may have great difficulty proving the Leagues' actions, or lack thereof, were the proximate cause of their injuries. Most notably, the Players will likely face great difficulty establishing causation given the lack of scientific data connecting repetitive blows to the head and long-term health risks. Moreover, the relationship between the foreseeability of violence and whether the Players assumed the risks associated with such a uniquely violent sport will play a critical role in determining whether the Players have a viable theory of causation.

As previously mentioned, the *McKichan* court determined that the plaintiff in that case assumed the risk of being illegally and forcefully body checked because such violence was a part of the inescapable aspects of the game. Like in *McKichan*, the Players will likely have great difficulty contending they did not assume the risks associated with the violent nature of hockey because aggressive stick slashes and fighting are also considered inescapable elements of the game. But the players are not required to fight or play with a reckless abandonment in order to win. Instead, the winner is determined by the team who scores the most goals. Although fighting may have an indirect impact on the outcome of a game, *i.e.*, a favorable shift in momentum, it by no means dictates which team will win.

As in *McKichan*, the court may give a great amount of deference to the circumstances surrounding the Players claims. Specifically, these players are highly-skilled, trained, professional

athletes and are deemed to have a reasonable understanding and expectation of the foreseeable risks associated with the violent nature of ice hockey.¹⁵⁵

Given the unique nature of professional ice hockey and the propensity for violence, the court may reasonably conclude that the Players assumed the risks of potential injury and therefore lack the requisite causation to establish a meritorious claim. For example, Derek Boogaard fought over sixty times throughout his career in the NHL. However, considering he fought hundreds, if not thousands of times throughout his entire hockey career, the requisite connection for causation seems blurred. Like Derek Boogaard, the Players would have to establish a nexus between the Leagues' duty to protect their health and safety, and their asserted injuries. This will likely cause a significant challenge for the Players especially when considering some of the players included in the class have been playing hockey since they were young boys. Moreover, a vast majority of the players also played long careers in the minors and at the collegiate level. Consequently, the League might contend that because these players spent a majority of time playing in a league other than the NHL, there is no reasonable basis to conclude that their injuries were not foreseeable and that the League was responsible for their alleged injuries.

Yet, the Players may have a strong counter argument if confronted with allegations that contend they assumed the risk of injury by participating in such a uniquely violent sport. As in *Nabozny* and *Hackbart*, where participants assumed the risk of injury inherent to the nature of the game, here, the players could argue that, while they might have consented to the inherent risks associated with the sport, they did not consent or assume the risks of the long-term health complications as set forth in the complaint. For example, such inherent risks may include injuries

¹⁵⁵ See *McKichan*, *supra* note 91.

such as lacerations, dislodged teeth and broken bones from fighting and ordinary rough or violent play.

b. Class Certification

Like sport tort cases brought by individual claimants, the Players' class action has many parallels, but also unique challenges that individual plaintiffs otherwise do not face. For example, unlike individual claimants, the Players must establish that the class of representative is appropriate and that the class of claimants share a common injury. Additionally, individual claimants generally have a greater control over litigation strategies, specifically, whether to accept a proposed settlement offer. Conversely, the class of Players must come to a mutual agreement, among other requirements, prior to accepting a proposed settlement offer.

The class of Players in this suit could contend—like in the Henderson—that they never assumed the specific risks relating to concussions because they did not know, nor were they reasonably capable of knowing, the alarmingly negative health risks associated with such a violent sport, although the League was in the position to know those things and prevent them through the threat of greater sanctions or taking other defensive measures. To further support this contention the Players have asserted that their lack of knowledge and subsequent injury, regardless of their assumption of the risk, was in part caused by the League, considering the League withheld unfavorable medical data from their 2011 Concussion Program for nearly seven years.¹⁵⁶ This contention could play a critical role when establishing causation, especially considering that the players are likely disadvantaged under the doctrine of assumption of risk.

¹⁵⁶ See *supra* note 54.

Additionally, this issue of causation also implicates challenges relating to whether or not the Players will be granted certification as a proper class of plaintiffs. As of January 2017, the League and Players are currently awaiting a ruling relating to the appropriateness of the class of plaintiffs.¹⁵⁷ However, the court may likely conclude that the class of plaintiffs is improper for this litigation because they lack commonality. In order to gain certification as a proper class of plaintiffs, the class must generally establish, among other minor elements, that the individual plaintiffs seeking redress share a common injury that can be practically adjudicated by the courts.¹⁵⁸ Accordingly, the League may have a strong argument in support of denying class certification to the Players because not all of the plaintiffs in the proposed class necessarily share the same type or timing of injury.

For example, some of the listed plaintiffs played in the League nearly thirty years ago. During that period, neither the League nor the players knew or should have had reason to know of the potentially adverse health risks associated with playing professional hockey. Moreover, the fact that these plaintiffs played at different times creates further challenges relating to the application and limitations imposed by various collective bargaining agreements. For instance, some of the younger claimants may not have a proper claim in court if the collective bargaining agreement governing the Players at the times of their alleged injuries required arbitration relating such claims. Whereas older players, who were presumably governed by a different collective bargaining agreement might not have been limited in such a way. Although the court has previously ruled that the current collective bargaining agreement does not impose any hurdles for

¹⁵⁷ See *In re National Hockey League Players' Concussion Injury Litigation*, Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, 14-MD-02551 (SRN/JSM), 2016 available at http://www.nhlconcussionlitigation.com/assets/htmldocuments/Memo_of_Law.pdf

¹⁵⁸ *Id.* at 31.

the class of plaintiffs, it will be interesting to see if the League contends that previous agreements should be applied to these claims.

IV. Conclusion

As previously mentioned, professional ice hockey is perhaps the most dangerous and violent sport, considering the natural and inescapable elements of the game. In addition to the weapon-like equipment and violent body checks that occur at remarkably high speeds, hockey is the only modern day sport that openly tolerates its players to fight. Yet unlike sports in which fighting has a direct impact on the winner of the game, hockey is unique because its inclusion of fighting is like pouring gasoline on an already violent fire of a sport. Although some players and fans alike contend that fighting and hyper-aggressive conduct is a necessary mechanism to keep the game safe, this paradoxical rationale is obviously flawed given the recent class action concussion lawsuit and alleged injuries.

Based on the general tort law principles relating to sport torts claims, it remains unclear whether the League or the Players will come out on top of the ongoing litigation. Because hockey is so uniquely violent, the court, unlike those that previously entertained sport tort cases, will very likely face significant challenges relating to whether the Players assumed the foreseeable risks associated with playing such a violent sport. Moreover, it will be interesting to see if the Players will succeed on the merits as a class, or if certain claimants opt out to pursue individual claims against the League or individual wrongdoers. As a class action, the plaintiffs are more likely to experience more challenges as a result of the class certification requirements, the potential application of previous collective bargaining agreements, and the difficulties associated with causation and assumption of the risk.

Notwithstanding the potential challenges associated with the ongoing suit, it is important to emphasize that the court hearing the NHL Concussion lawsuit has the opportunity to step up and hold professional sports organizations accountable for their failure to protect their players' safety and wellbeing. It is somewhat bizarre to think that no modern-day court has explicitly ruled such violent and grossly negligent conduct as inexcusable on the field of play because such violence should be expected by participants. As a result of the courts unwillingness to provide a clear set of directives relating to the potential application of law to sport tort cases, the courts have created a great deal of tension between the fundamental policies of law and its potential application to sports tort cases.

Specifically, the courts have focused far too much on the violent nature of the sport at hand and the foreseeability of harm, rather than the wrongful conduct at issue. Consequently, this has created an odd relationship: as the foreseeability of violence in sports increases, a participant's potential claim becomes less actionable. This creates a perverse incentive where leagues that exploit the violent nature of a sport for profit receive greater tort protection through assumption of the risk than those leagues that are generally less violent and exploitative. Regardless of the violent nature of sports, the courts should not be given deference to determine whether an injured participant has a viable claim based on the courts subjective perception of the foreseeability of potentially violent conduct. The underlying policy rationale of tort law is to provide protection, safety and appropriate redress for injured claimants. Allowing the courts to determine whether a claimant assumed the risk of injury based on the courts understanding of the violent nature of a specific sport completely undermines and frustrates this policy rationale.

Instead, the courts should direct return to the frameworks as iterated in *Hackbart* and *Nabozny*, and direct their attention to the alleged wrongful conduct rather than the violent nature

and circumstances of the sport involved. If the courts continue to turn a blind eye towards sport tort cases, specifically organizational claims, players' unions may be forced to strike until their governing league succumbs to the players' demands for greater protection.