SPORTS PARTICIPATION WITH LIMITED LITIGATION: THE EMERGING RECKLESS DISREGARD STANDARD

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During the 1990's, courts and legislatures will have to deal with the appropriate standard of care for sports tort cases. This important issue places in opposition two sports law principles: an injured person's right to seek redress versus the encouragement of vigorous athletic competition, without the threat that an athletic participant might be sued.

Sports officials are called upon to decide during high school, college and professional contests whether a violation of the rules of a game has occurred. These decisions are not so clearly defined as the black and white striped shirts generally worn by these game arbiters. Rather, they are premised upon reasoned judgment applied to the facts and circumstances of each play.

Sports today, be it played at the local municipal field, college stadium or the professional indoor dome, have become increasingly more complex. Shades of gray, replete with many interpretative rule nuances and supported by the spirit as well as the literal meaning of the sport rules, face these sports officials as they view each play. These on-the-field judges must continually determine whether a particular player's action is "part of the game," cause for tossing of a yellow flag, or for blowing a whistle.

During the last decade, trial and appellate judges throughout the country, like their fellow sports judges, have begun to grapple with sports law standard of care issues. This analysis has focused upon the concepts of what is "part of the game" and upon the definition and scope of the duty imposed upon "participants" in sports. A trend has emerged. Courts and legislatures have espoused the view that torts which might be actionable in other arenas

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if negligence is shown, should only be actionable in the sports arena if the aggrieved person demonstrates gross negligence or reckless disregard by the defendant.

With the increasing growth, visibility and economic stake of amateur and professional sports, there will be a concomitant increase in sports litigation. There is a slowly developing body of judicial decisions and legislative enactments. A review of these can provide guidance for future sports injury cases.

A player can injure another player during a game by an intentional or negligent act or by reckless disregard. An intentional act is one where a player intends to commit an act and by that act to injure an opponent. A negligent act consists of mere inadvertence, failure to act reasonably under the circumstances or failure to take reasonable precautions to avoid injuring another person. Reckless disregard falls somewhere between an intentional act and a negligent act. Reckless disregard exists when a player knows an act is harmful and intends to commit the act, but does not intend by the act to harm his opponent; it further involves a player's knowledge of the danger and risk which are substantially greater in magnitude than is necessary in the case of negligence.

Player v. Player Cases

The first court to adopt the reckless disregard, or gross negligence "standard of care" was the Illinois Court of Appeals. In 1975, in *Nabozny v. Barnhill*,[1] the court held that an amateur youth soccer player injured by an opponent could only recover damages if he could demonstrate that the opponent acted with reckless disregard for others' safety.[2] Proof of ordinary negligence was insufficient.[3]

During a high school game in Winnetka, Illinois, David Barnhill kicked plaintiff Julian Nabozny, the goaltender for the opposing team, in the head while Nabozny was in possession of the ball.[4] Contact with a goaltender who is in possession of the ball is in violation of the soccer rules.[5] Witnesses agreed that the contact could have been, but was not, avoided.[6]

Wrestling with providing Nabozny a right to redress his injury and the competing principle of unhindered athletic participation by our youth, the

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1. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975)

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

3. *Id.* at 212, 334 N.E.2d at 258. A player is also liable if he deliberately or willfully caused injury to another player. *See Id.* at 215, 334 N.E.2d at 261.

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

5. *Id.* The rules referred to by the court in its analysis of the facts were those promulgated by the Federation Internacional Football Association (F.I.F.A.), the world governing body of the sport. *Id.* at 214, 334 N.E.2d at 260.

6. *Id.* at 214, 334 N.E.2d at 260.

court established a middle ground approach.[7] It found that for Nabozny to sustain his claim, he must prove that Barnhill acted in reckless disregard for his safety.[8] The court emphasized that this duty imposed upon an amateur player to not act recklessly was particularly tied to the facts before it.[9] These facts included a game between organized teams trained and coached by knowledgeable personnel, a recognized set of rules governing the game, a violation by the defendant of a safety rule of the sport, and the fact that the incident did not occur during a heated play.[10] The court's holding was carefully drawn "in order to control a new field of personal injury litigation."[11] The court emphasized that it was a decision for the jury whether Barnhill's action was "part of the game."[12] The legal system should not, according to the court, impose unreasonable restrictions on the fervor and spirit with which our youth participate in athletics, however, "some of the restraints of civilization should accompany every athlete onto the playing field."[13]

One of the key underpinnings of the court's analysis in *Nabozny* was that the plaintiff was injured during a contact sport. The Illinois Court of Appeals emphasized this in its 1980 decision in *Oswald v. Township High School District No. 214*,[14] a case involving a basketball game during a physical education class rather than an interscholastic or recreational game.[15] The court, in contrasting players in contact versus non-contact sports, stated: "Because rule infractions, deliberate or unintentional, are virtually inevitable in contact games, we believe the imposition of a different standard of conduct is justified where injury results from such contact."[16] Thus in Illinois, where one player sues another player for an injury sustained during a

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7. *Id.* at 215, 334 N.E.2d at 261. At the time this case was presented to the court no other suits involving a negligence action against a participant in an organized sporting event had been brought in Illinois, however, some jurisdictions which had addressed the issue generally prohibited recovery pursuant to public policy rationale. *See, e.g.*, Gaspard v. Grain Dealers Mutual Insurance Co., 131 So. 2d 831 (La. App. 1961).

8. *Id.* The court reasoned that engaging in such conduct would create an unreasonable risk of serious injury to fellow participants. *Id.*

9. *Id.*

10. *Id.* at 214, 334 N.E.2d at 260.

11. *Id.* at 215, 334 N.E.2d at 261. The court also stated that when there is a safety rule "which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule." *Id.*

12. *Id.* If it was, no liability would attach to the defendant for his condut. *Id.*

13. *Id.*

14. 84 Ill. App. 3d 723, 406 N.E.2d 157 (1980).

15. *Id.* at 723, 406 N.E.2d at 157. In contact sports, a defendant is not liable for ordinary negligence, there must be reckless conduct on the part of the defendant for plaintiff to recover. *Id.*

16. *Id.* at 726-727, 406 N.E.2d at 160. *Cf.* Page v. Unterreiner, 106 S.W.2d 528 (Mo. Ct. App. 1937) and Everett v. Goodwin, 201 N.C. 734, 161 S.E. 316 (1931) (holding that golfers, who participate in a noncontact sport owe only a duty of ordinary care to other golfers).

contact sport, the plaintiff must prove that the opponent acted with reckless disregard.[17]

Louisiana courts have reached the same determination and for the same policy reasons as the Illinois courts. In 1976, the Louisiana Court of Appeals was faced with a similar question concerning an adult. In *Bourque v. Duplechin*,[18] second baseman, Jerome Bourque, was injured during a recreational softball game when Adrian Duplechin was running from first to second base following a ground ball hit by a teammate to the shortstop.[19] The shortstop fielded the ball and threw it to Bourque, who stepped on second base and then away from the base to throw to first base to complete a double play.[20] After Bourque had released the ball to the first baseman and had moved away from the base, Duplechin ran full speed into Bourque and brought his left arm up under Bourque's chin fracturing his jaw and breaking teeth.[21]

Although this case dealt with an adult rather than a youth level athlete, the court agreed with the *Nabozny* rationale and applied the reckless disregard standard.[22] The critical issues were whether Duplechin's actions were "part of the game," and what amount of risk did Bourque have to assume.[23] The Court found that an adult recreational softball player, like an organized youth soccer player, cannot recover for those risks which are "part of the

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17. *Id. See also* Keller v. Mols, 156 Ill. App. 3d 235, 509 N.E. 2d 584 (1987) (plaintiff claimed that defendant was negligent for shooting a hockey puck at a person who was not wearing any safety equipment, court held that the defendant and his parents were not liable for ordinary negligence because this was a contact sport); Ramos v. City of Countryside, 137 Ill. App. 3d 1028, 485 N.E. 2d 418 (1985) (plaintiff alleged that defendant was negligent for hitting plaintiff with a softball in a game of "bombardment," court held that the defendant was not liable under simple negligence because "bombardment" is considered a contact sport that requires the plaintiff to prove that defendant acted with reckless disregard).

18. 331 So. 2d 40 (La. App. 3d Cir. 1976).

19. *Id.* at 41.

20. *Id.*

21. *Id.* at 42. The evidence supported the factual conclusion that the collision occurred four or five feet away from the second base position. *Id.* As a result, the umpire determined the collision a flagrant violation of the rules of the game and proceeded to eject Duplechin from the game. *Id.* at 41-42.

22. *Id.* The court held "that Duplechin was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players." *Id. See also* Hawayek v. Simmons, 91 So. 2d 49 (La. App. Orl. 1956); Carroll v. Aetna Casualty and Surety Company, 301 So. 2d 406 (La. App. 2nd Cir. 1974); Rosenberger v. Central La. Dist. Livestock Show, Inc., 312 So. 2d 300 (La. 1975).

23. *Id.* In a non-contact sport such as softball, a player assumes the risk of being hit by a bat or a ball. *See* Benedetto v. Travelers Insruance Company, 172 So. 2d 354 (La. App. 4th Cir. 1965) *writ denied*, 247 La. 872, 175 So. 2d 108; Richmond v. Employers' Fire Insurance Company, 298 So. 2d 118 (La. App. 1st Cir. 1974) *writ denied*, 302 So. 2d 18. However, Bourque did not have to assume the risk of a player running full speed into him when he was four or five feet away from the base. *Bourque*, 331 So. 2d at 42.

game."[24] Duplechin was found to have violated his duty to not act recklessly by running into Bourque and putting his arm under Bourque's chin in violation of softball rules.[25] The appellate court upheld the trial court's award for monetary damages.[26]

In 1989, in *Ginsberg v. Hontas*,[27] the Louisiana Court of Appeals reaffirmed this rule.[28] In an adult recreational softball game among faculty, staff and residents of Tulane Medical School, defendant Mark Hontas slid into second base and injured the plaintiff shortstop, Harley Ginsburg, who suffered a serious fracture of his right leg.[29] Louisiana jurisprudence mandates that courts in a tort action must analyze the facts according to a "duty risk" analysis in order to determine if a defendant's conduct legally caused the plaintiff's injury.[30] The appellate court noted that the defendant owed the plaintiff "the duty to act reasonably, that is, to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another."[31] Pursuant to the evidence presented before the *Ginsberg* court and the required burden of proof to be borne by the plaintiff, the defendant was found not to have acted negligently in his play during the softball game nor had he breached any duty owed to the plaintiff.[32]

The Missouri Supreme Court applied this principle in 1982 to a men's slow-pitch softball league game.[33] The plaintiff third baseman sustained a knee injury when the defendant runner, despite the fact that the plaintiff was not blocking the base or base path, ran toward and dove head first through the air, at him.[34] Balancing the proper fervor with which sports should be played versus implementation of appropriate behavioral controls, the court concluded that "a player's reckless disregard for the safety of his

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24. *Id.* The court held that participants assume foreseeable risks incidental to the sport. *Id.* Duplechin's action was neither part of the game, nor could Bourque have believed it to be foreseeable. *Id.*

25. *Id.*

26. *Id.* at 43.

27. 545 So. 2d 1154 (La. App. 4th Cir. 1989).

28. *Id.* at 1157.

29. *Id.* at 1155.

30. Hill v. Lundin Assoc., Inc., 260 La. 542, 256 So. 2d 620 (1972). The inquiries required to be made under such an analysis include: 1) whether the defendant owed the plaintiff any duty at all? 2) If so, was this duty breached? 3) Whether the breach was a proximate cause of the plaintiff's injury? 4) Whether the risk of harm within the scope of protection provided by the duty was breached? Annis v. Shapiro, 517 So. 2d 1237 (La. 4th Cir. 1987).

31. *Ginsberg*, 545 So. 2d at 1155. The plaintiff in this type of analysis has the burden of proving by a preponderance of the evidence that the defendant's actions constituted a violation of that duty. Blanchard v. Riley Stoker Corp., 492 So. 2d 1236 (La. App. 4th Cir. 1986).

32. *Ginsberg*, 545 So. 2d at 1157. The appellate court thus affirmed the trial court's dismissal of the case. *Id.*

33. Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982).

34. *Id.* at 13.

fellow participants cannot be tolerated. If a plaintiff pleads and proves such recklessness, he may seek relief for injuries incurred in an athletic competition."[35]

In 1983, in *Kabella v. Bouschelle*,[36] the New Mexico Supreme Court followed the trend and found that for a player to recover for injuries by an opponent during a neighborhood tackle football game, he must prove that the opponent acted with reckless disregard for the safety of other players.[37] Adopting the rationale of the Restatement (Second) of Torts § 50, Comment b (1965), the court followed the long-established rule that one who voluntarily participates in athletics impliedly consents to the normal risks accompanying bodily contact permitted by the rules of the sport because such risks are foreseeable and inherent to the playing of the game.[38] The court emphasized, however, that such consent does not include contact of a nature which is prohibited by the rules or customs of the sport which are designed for the protection of the participants and not merely for game control and administration.[39] The court thus held that such a plaintiff may only recover if he can clearly demonstrate that the defendant opponent acted in reckless disregard of his safety.[40] It apparently limited its holding though to neighborhood games and games which are not formally organized: "[V]igorous and active participation in sporting events should not be chilled by the threat of litigation. The players in informal sandlot or neighborhood games do not, in most instances, have the benefit of written rules, coaches, referees or instant replay to supervise or re-evaluate a player's actions."[41] Yet, it is likely that New Mexico would follow the trend of sister states and apply this decision to all levels of amateur athletics.

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35. *Id.* at 14.

36. 100 N.M. 461, 672 P.2d 290 (1983).

37. *Id.* The minor injured in a neighborhood football game with other minors alleged that defendant was negligent because he continued to tackle and wrestle him even after he said he was "down". *Id.* The court held that defendant was not liable because his conduct was not wanton or reckless. *Id.* The court addressed three divergent legal theories to predicate recovery in tort for sports injuries similar to those presented here: 1) assault and battery; 2) negligence; and 3) wilful or reckless misconduct. *Id.* at 460, 672 P.2d at 291. *See generally* J. WEISTART & C. LOWELL, THE LAW OF SPORTS 933 § 8 (1979); 84 DICK. L. REV. 753 (1980); 42 MO. L. REV. 347 (1977). *Id.*

38. *Id.* at 463, 672 P.2d at 292.

39. *Id.*

40. *Id.* at 464, 672 P.2d at 293. RESTATEMENT (SECOND) OF TORTS § 500 provides:

> [T]he 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.

Id.

41. *Id.* at 465, 672 P.2d at 294.

In 1989, Massachusetts continued the trend. In *Gauvin v. Clarke*,[42] a case involving a college ice hockey game, the Massachusetts Supreme Judicial Court held that the appropriate duty imposed upon a college athlete is to not act in reckless disregard for the rights of fellow players.[43] Mere negligent conduct would be insufficient to permit an injured athlete to recover for injuries sustained by an opponent's actions.[44]

In *Gauvin*, the plaintiff, a Worcester State College ice hockey player, was injured by Richard Clark, a Nichols College player, who pushed the butt-end of the stick into Gauvin's stomach.[45] There was no dispute that Clarke violated the hockey safety rule which makes this act a major misconduct penalty, resulting in disqualification of the penalized player. The court opined, however, that the violation of a safety rule does not always constitute a required element for a tortious element committed in an athletic event for which liability is required.[46] The court carefully analyzed the problems attendant with establishing the appropriate duty of care of participants in sports and ruled that the better standard is reckless disregard of a player's safety.[47] The court emphasized their weariness of imposing wide tort liability on sports participants.[48]

In January 1990, Nebraska became the sixth state to adopt this new standard of care in player versus player injury lawsuits when its Supreme court decided *Dotzler v. Tuttle*.[49] Plaintiff, Joseph Dotzler, and defendant, Bruce Tuttle, were playing on opposing teams in a pick-up basketball game at the Omaha Southwest YMCA.[50] Dotzler claimed he had just made a shot

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42. 404 Mass. 450, 537 N.E.2d 94 (1989).

43. *Id.* at 455, 537 N.E.2d at 97. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

44. *Gauvin*, 404 Mass. at 455, 537 N.E.2d at 97. The essence of conduct illustrating a reckless disregard constitutes a deliberate act in which there is a "high degree of likelihood that substantial harm will result to another." RESTATEMENT (SECOND) OF TORTS § 500 (1965).

45. *Gauvin*, 404 Mass. at 452-53, 537 N.E.2d at 95. The blow occurred after the face-off had been completed and the puck was sliding down toward the Nichols' goal. *Id.*

46. *Id.*

47. *Id.* at 453, 537 N.E.2d at 97. The Massachusetts court refused to apply the assumption of risk doctrine used by other jurisdictions to justify the limitation on liability in cases such as the one at bar due to the abolishment by the state legislature of the defense. *See* MASS. GEN. L. ch. 231, § 85 (1986 ed.). The focus of the analysis is thus shifted entirely onto the defendant. *Gauvin*, 404 Mass. at 454, 537 N.E.2d at 97 n. 5. *See* Blair v. Mt. Hood Dev. Corp., 291 Or. 293, 301, 630 P.2d 827 (1981).

48. *Gauvin*, 404 Mass. at 454, 537 N.E.2d at 97. *Id.*

> The courts are wary of imposing wide tort liability on sports participants, lest the law chill the vigor of athletic competition. Allowing the imposition of liability in cases of reckless disregard of safety, diminishes the need for players to seek retaliation during the game or future games. Precluding the imposition of liability in cases of negligence without reckless misconduct, furthers the policy that '[V]igorous and active participation in sporting events should not be chilled by the threats of litigation.

See also Kabella v. Bouschelle, 100 N.M. 461, 465, 672 P.2d 290 (1983).

49. 234 Neb. 176, 449 N.W.2d 774 (1990).

50. *Id.* at 177, 449 N.W.2d at 776.

and was moving back to play defense when at the top of the key near his opponent's basket, he was pushed by Tuttle.[51] The collision sent him flying about twenty feet, causing him to land near the baseline resulting in his fracturing both wrists when he fell.[52] Tuttle's version was that he was moving down court on a fastbreak, trying to get open for a pass when he inadvertently banged into Dotzler.[53] He denied pushing Dotzler.[54] The trial court dismissed Dotzler's negligence cause of action ruling more than mere negligence must be shown of plaintiff to succeed.[55] The Nebraska Supreme Court agreed in a well-reasoned opinion.[56] The court held that "[a] participant in a game involving a contact sport such as basketball is liable for injuries in a tort action only if his or her conduct is such that it is either willful or with a reckless disregard for the safety of the other player, but is not liable for ordinary negligence."[57]

In August 1990, Ohio became the seventh state to adopt the reckless disregard standard. Like in *Kabella*, the Supreme Court of Ohio in *Marchetti v. Kalish*[58] was faced with an injury inflicted on a player during an unorganized, neighborhood game.[59] The thirteen year old plaintiff, Angela Marchetti, was injured during a "kick the can" game, using a ball instead of the traditional tin can.[60] Pursuant to the game rules, plaintiff ran to home base, placed her foot on the ball and shouted defendant's name.[61] The defendant was supposed to stop, according to the game rules, when he heard his name called, however, he continued to run toward the plaintiff and kicked the ball out from under her foot, causing the plaintiff to fall and break her leg.[62]

The court rejected the plaintiff's contention that the standard to be applied in this context should be one of ordinary negligence.[63] The Ohio tribunal reasoned that regardless of whether the plaintiff player is injured in an unorganized or organized athletic activity, or whether it involves children or

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51. *Id.*
52. *Id.*
53. *Id.* at 178, 449 N.W.2d at 776.
54. *Id.*
55. *Id.* at 177, 449 N.W.2d at 776.
56. *Id.* at 179, 449 N.W.2d at 777.
57. *Id.* at 183, 449 N.W.2d at 779. In adopting this standard, the court held that "allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games." *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 521 (10th Cir. 1979).
58. 53 Ohio St. 3d 95, 559 N.E.2d 699 (1990).
59. *Id.*
60. *Id.*, 559 N.E.2d at 699-700.
61. *Id.*
62. *Id.*, 559 N.E.2d at 700.
63. *Id.* at 96, 559 N.E.2d at 700. The plaintiff's argument for the lower standard of care was based on the fact that the case at bar involved children at play rather than an organized sporting event. *Id.* at 98, 559 N.E.2d at 702.

adults, vigorous competition should be encouraged.[64] Thus, in adopting the reckless disregard standard, the court sought to "strike a balance between encouraging . . . free participation in recreational or sports activities, while ensuring the safety" of the participants.[65]

Following an examination of the existing facts according to the standard adopted, the court found that the defendant did not act recklessly and affirmed the trial court's grant of summary judgment to the defendant, while reversing the appeals court finding that the standard of care to be applied is ordinary negligence requiring a trial to be held.[66]

On the same day, the Supreme Court of Ohio decided *Marchetti*, it held that the reckless disregard standard applies in both contact and non-contact athletic activities.[67] It thus became the first court to so extend this principle. In *Thompson v. McNeill*, the court pronounced that this standard of care will also be applied to an injury caused by one golfer to another golfer during a golf match, a non-contact sport.[68] Plaintiff, JoAnn Thompson, suffered an eye injury when hit by a ball shanked by defendant, Lucille McNeill, a member of her foursome, during a recreational golf match at Prestwick Country Club.[69] The shanking of a ball when hit is a common occurrence in recreational golf and happens when the ball is hit with the heel of the club.

This decision shows the strong growing trend of courts to reduce cognizable claims by players injured in recreational or organized sports. Certain injuries are merely "part of the game" and correctly should not give rise to a cause of action against a fellow participant unless caused by reckless disregard.

This standard has also been applied to professional sports. In 1979, in *Hackbart v. Cincinnati Bengals, Inc.*,[70] the United States Court of Appeals for the Tenth Circuit, held that despite the violence of professional football, a football player may be held responsible for an injury caused to an opponent if he acted with reckless disregard for that opponent's safety.[71]

In this case, Charles "Booby" Clark of the Cincinnati Bengals struck Dale Hackbart of the Denver Broncos in the back of the head with his fore-

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64. *Id.* at 98, 559 N.E.2d at 702. The court could find no reason to require a higher standard of care on youths simply because the activity takes place on their neighborhood block rather than in their school gymnasium. *Id. See also* Keller v. Mols, 156 Ill. App. 3d 235, 509 N.E.2d 584 (1987) (plaintiff injured in floor hockey game on neighbor's porch was prevented from recovering for injuries on negligence theory).

65. *Marchetti*, 53 Ohio St. 3d at 99, 559 N.E.2d at 703.

66. *Id.* at 100-101, 559 N.E.2d at 704.

67. Thompson v. McNeill, 53 Ohio St. 3d 102, 559 N.E.2d 705 (1990).

68. *Id.* at 104, 559 N.E.2d at 708.

69. *Id.* at 102, 559 N.E.2d at 706.

70. 601 F.2d 516 (10th Cir. 1979).

71. 435 F. Supp. 352 (D. Col. 1977), *rev'd.* 601 F.2d (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979) (trial court incorrectly held that defendant's contact with plaintiff even though it was in violation of the rules did not make him liable because he had no intent to injure plaintiff).

arm while Hackbart was kneeling in the end zone.[72] The federal district court judge who heard this case concluded that there could be no liability for such an occurrence despite the claimed recklessness of the act.[73] In dismissing the claim the court stated that the conclusion that the civil courts cannot be expected to police the violence in professional football is limited by the fact that professional football is a commercial enterprise quite distinct from athletics as an extension of the academic experience.[74]

On appeal to the United States Court of Appeals for the Tenth Circuit, this decision was reversed and remanded.[75] The appeals court, relying upon the *Nabozny* decision, ruled that professional football games are indeed governed by law and mores of society.[76] A professional player like an amateur youth level or adult player who acts in a reckless manner during a game may be held liable for injuries sustained by an opponent.[77]

Legislative Action

Concomitant with the decisions reached in the various state courts, state legislatures have enacted laws which make the burden of proof stricter for players injured by opponents. Some of these laws have adopted the reckless disregard or gross negligence standard to be met by injured players when they claim to have been injured by acts or omissions of volunteers in athletics such as coaches, managers, non-profit organizations, referees and umpires. For example, since 1986 several states have passed laws providing that this standard is necessary to encourage volunteer participation in sports while permitting lawsuits for activities which involve more than ordinary negligence. More recently, during the past three years, through the efforts of the National Association of Sports Officials, state legislatures have passed other statutes which require that a player prove gross negligence to maintain an action against any sports official, referee or umpire, whether a volunteer or compensated for services.[78]

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72. 601 F.2d at 518-19.

73. *Id.* at 519.

74. 435 F. Supp. at 358.

75. 601 F.2d at 526.

76. *Id.*

77. *Id.* at 524.

78. These states are Arkansas, New Jersey, Hawaii, Maryland, Mississippi, Nevada, Rhode Island and Tennessee. For example, the Tennessee statute, signed into law on March 5, 1989, provides:

> A sports official who administers or supervises a sports event at any level of competition shall not be liable to any person or entity in any civil action for damages to a player, participant, or spectator as a result of the sports official's duties or activities. Nothing in this act shall be deemed to grant civil immunity to a sports official who intentionally or by gross negligence inflicts injury or damage to a person or entity.

Tenn. Code Ann. § 49-7-2101 (1989). Similar legislation is pending in many other states.

CLAIMS AGAINST SPORTS ORGANIZATIONS

The defendants in these sports tort cases have been players. However, athletic institutions and organizations, non-profit organizations, coaches, athletic administrators, schools and sports officials are subject to liability on the same theories. These are "participants" in the athletic arena as much as the players themselves and should also be accorded limited immunity from liability lawsuits.

For example, in 1989 the Appellate Division of the New York Supreme court in *Wertheim v. United States Tennis Association*[79] impliedly found that although the United States Tennis Association was not a player, it was still a "participant" in a sponsored tennis match and could only be held responsible for injuries sustained by other participants if it acted recklessly.[80] New York thus became the eighth state to adopt the emerging "reckless disregard" standard of care.[81] In that case, tennis linesman, Richard Wertheim, was officiating a match in the U.S. Tennis Open in Flushing, New York, in 1983.[82] During the match, Stefan Edberg served an ace which landed within the court boundary lines, but cut with a spin and struck Wertheim in the groin area.[83] Wertheim was in the "ready position," bent forward with his hands placed on or above the knees.[84] He was immediately hospitalized and four days later died as a result of a stroke.[85] Wertheim's estate sued the USTA claiming that requiring tennis linesmen to assume the "ready position" rather than the previously accepted method of sitting in a chair, was negligent and resulted in his death.[86] The appeals court reversed and vacated the jury verdict which found the USTA 25% responsible for the award of $173,000 and held that there was no proof that the USTA had acted with gross negligence.[87]

It is clear as we enter the 1990's that a steady trend is emerging in courts across the country: a player claimed to have been injured by an opposing player, sports official or other "participant" during the course of a game may recover only if the player can show that the defendant acted in reckless disregard for his safety. Once this standard is adopted, then the inquiry must focus upon whether the defendant participant's conduct was "part of the game." If it was, then the defendant not having acted with reck-

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79. 150 A.D.2d 157, 540 N.Y.S.2d 443 (1989); *See also* Benitez v. New York City Bd. of Ed., 73 N.Y. 2d 650, 541 N.E. 2d 29 (1989) (Board of Education not liable for ordinary negligence for plaintiff's allegation that he was mismatched in size and ability when he competed against opposing high school football team).

80. *Wertheim*, 150 A.D.2d at 160, 540 N.Y.S.2d at 445.

81. *Id.*

82. *Id.* at 159, 540 N.Y.S.2d at 444.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

less disregard will win, if it is not, then the plaintiff will win. Analysis of whether the act was "part of the game" must deal with such factors as competition level, skill level, sport involved, when during the game the incident occurred, the type of play involved, manner in which the play evolved, rules of the sport and interpretations of the rules of the sport.

The "reckless disregard" standard is the correct approach for courts to take in deciding when and in what manner to become involved in sports injury litigation. It strikes the appropriate balance between permitting an injured player to seek compensation for a wrongfully inflicted injury and encouraging vigorous athletic competition without the threat of a "participant" being hauled into court for conduct which is "part of the game."