

THE EMERGING LAW OF REFEREE MALPRACTICE

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I. INTRODUCTION.....	73
A. <i>The Tragic Games & Tragic Losses</i>	73
1. Buc'd.....	73
2. Roughing the Integrity.....	76
3. Royal Luck.....	77
4. Buffaloed.....	78
5. Buffaloed II.....	80
6. The Umpire Sneak.....	81
7. Curse of the Big Bad Umpires.....	83
II. THE INJURY.....	84
A. <i>A Casue of Action</i>	87
1. The Legal Precedent.....	88
B. <i>A Sample Case</i>	92
1. The Boston Red Sox, et. al. v. Rick Reed and Tim Tschida.....	93
a. <i>Duty</i>	93
b. <i>Breach</i>	94
c. <i>Cause</i>	94
d. <i>Injury</i>	96
III. CONCLUSION: THE INSTANT REPLAY AND INSURANCE ALTERNATIVE.....	97

I. INTRODUCTION

A. *The Tragic Games & Tragic Losses*

1. Buc'd

The game was reminiscent of the great Boston College/University of Miami game in 1984, with Boston College and the Miami Hurricanes trading touchdowns to what culminated in Doug Flutie's famous 'Hail Mary'¹ pass to Gerard Phelan with no time on the clock.² But this game

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1. A "Hail Mary" pass (named after the prayer of the same name) is a last second, long

between the St. Louis Rams and the Tampa Bay Buccaneers was different—it was a National Football League (NFL) conference championship game and the winner was to proceed to the Super Bowl.³

The underdog Buccaneers were beating the Rams 6-5 in the 1999 National Football Conference (NFC) championship game when Rams' quarterback Kurt Warner⁴ struck Ricky Proehl⁵ in the end zone to score a touchdown.⁶ With only four minutes and 48 seconds remaining, the Rams led 11-6 and, given the game's sparse offensive achievements, they seemed destined for the Super Bowl.⁷

Tampa Bay, however, was not finished.⁸ In determined fashion, the Buccaneers used their remaining energy to plod down the field to the only destination that would yield success and a trip to the Super Bowl—the end zone.⁹ The players, inspired not only by thoughts of destiny, miracles and Cinderella stories, but probably of their friends, families and fans rooting for them back in Tampa Bay as well, marched down the field to glory.¹⁰

The Buccaneers reached the St. Louis 35-yard line facing second down

distance pass thrown downfield by a quarterback to receivers in an attempt to score a touchdown in football. "Although the odds are stacked impossibly against it, on rare occasions the pass is completed." Greg Garber, *On a Wing and a Prayer*, at http://espn.go.com/nfl/columns/garber_greg/811229.html (last visited Nov. 21, 2000) (describing 'Hail Mary' passes in football history).

2. On November 22, 1984, at a National Collegiate Athletic Association football game held at the Orange Bowl in Miami, Florida, Boston College quarterback Doug Flutie completed a 48-yard "Hail Mary" pass to wide receiver Gerard Phelan with no time left in regulation for a touchdown to lead the Boston College Eagles to a 47-45 victory over the University of Miami (Florida) Hurricanes. Flutie is currently a quarterback for the Buffalo Bills of the NFL. See <http://www.dougflutie.org/career.html> (last visited Nov. 21, 2000) (describing Mr. Flutie's career statistics).

3. The Super Bowl is the National Football League championship game, pitting the winners of the American Football Conference against the winners of the National Football Conference. Martin Fennelly, *Bitter End; One Play, and Maybe One Call, Derail Bucs*, TAMPA TRIBUNE, Jan. 25, 2000, at 1.

4. Kurt Warner, according to the Rams' official Website, "rewrote Rams' single-season passing records and etched his name along side some of the greatest players to ever play the position" with an improbable 1999 season, capped by a Super Bowl victory and League MVP award. See <http://www.stlouisrams.com/Team/Players?playerid=51> (last visited Nov. 27, 2000) (describing Mr. Warner's career statistics).

5. Ricky Proehl, described by the Rams' official Website, as a "veteran, hard-nosed receiver with good hands" will "forever be remembered in St. Louis" sports history for making "The Catch", as chronicled above. <http://www.stlouisrams.com/Team/Players?playerid=42> (last visited Nov. 27, 2000) (describing Mr. Proehl's career statistics).

6. *Id.*; see also Nancy Gay, *Tampa Bay Burned by Instant-Replay Call*, THE SAN FRANCISCO CHRONICLE, Jan. 24, 2000, at E7.

7. Gay, *supra* note 6.

8. *Id.*

9. *Id.*

10. *Id.*

and twenty-three yards.¹¹ With one minute and 25 seconds left to play, Buccaneers quarterback Shaun King¹² dropped back and fired a 13- yard pass to wide receiver Bert Emanuel.¹³ The scoreboard changed to third down and ten, leaving Tampa Bay two attempts at a 10 yard gain with plenty of time on the clock.¹⁴ Tampa Bay's hopes were rekindled, albeit temporarily.¹⁵

Replay official Jerry Markbreit¹⁶ called down to referee Bill Carollo¹⁷ to review the play.¹⁸ Upon review, they reversed the ruling: incomplete pass—the ball was trapped.¹⁹

Television replays later showed that Emanuel caught and controlled the ball as his knee hit the turf.²⁰ At worst, it was a ground-induced fumble that he recovered.²¹ And at the very least, it was inconclusive and did not meet the NFL's version of the clearly erroneous standard, which provides that officials will only be overruled when their on-the-field rulings are conclusively incorrect.²²

The botched call put Tampa Bay in a position they could not overcome, third and twenty-three, and the ball never left the 35-yard line.²³ Tampa Bay left St. Louis unable to ease the decades of pain their loyal Tampa Bay fans had been forced to endure.²⁴

11. Gay, *supra* note 6, at E7. A down is "one of 4 chances a team on offense has to gain 10 yards." First Base Sports Football Glossary, at <http://www.firstbasesports.com/glossaries/ftbglos.htm> (last visited Feb. 5, 2001) (providing definitions for football terms).

12. Shaun King is described by the Buccaneers' official Website as an "extremely gifted athlete who... combines [a] strong and accurate arm with top-shelf speed...". See <http://www.buccaneers.com/Team/PlayerPage.asp> (last visited Nov. 27, 2000) (listing Mr. King's career statistics).

13. Bert Emanuel currently plays for the Miami Dolphins. See <http://espn.go.com/nfl/profiles/notes/2906.html> (last visited Nov. 27, 2000) (listing Mr. Emanuel's career statistics). See also Gay, *supra* note 6, at E7.

14. Gay, *supra* note 6, at E7.

15. *Id.*

16. Jerry Markbreit was an NFL on-field official for 23 years, before moving to the role of off-field replay official. See <http://nfl.com/news/981227notes.html> (last visited Nov. 27, 2000) (describing Markbreit's last regular season game as referee between the New England Patriots and the New York Jets in 1998).

17. Bill Carollo is currently in his 12th season as an NFL referee. See <http://nfl.com/randf/offglance.html> (last visited Nov. 27, 2000) (listing the 2000 NFL referee roster).

18. Gay, *supra* note 6, at E7.

19. Fennelly, *supra* note 3, at 1.; Gay, *supra* note 6, at E7.

20. Fennelly, *supra* note 3, at 1.

21. *Id.*

22. Thomas George, *N.F.L. Backs Limited Replay After Complaints of Bad Calls*, THE NEW YORK TIMES, Mar. 18, 1999, at A1.

23. Fennelly, *supra* note 3, at 1.

24. *Id.* Tampa Bay has never appeared in a Super Bowl. See

2. Roughing the Integrity

Bad officiating did not begin in January, 2000—just ask members of the New England Patriots about the game they played on December 18, 1976 in Oakland, California.²⁵ It was the first round of the American Football Conference (AFC) playoffs, and the winner was to proceed to the AFC championship game and possibly to the Super Bowl.²⁶ The underdog Patriots, 3000 miles away from home,²⁷ led for most of the game.²⁸ The score was 21-17 with only four minutes and 12 seconds remaining.²⁹ Oakland had possession of the ball at their own 32-yard line.³⁰

Oakland quarterback Kenny Stabler³¹ had moved the ball to New England's twenty-eight yard line; however, they faced third down and 17 with only a minute to play.³² Throughout the game, New England's defense had been effective in shutting down Oakland.³³ Stabler dropped back to pass, but came up with an incompletion.³⁴ It was now fourth down.³⁵ A blitz³⁶ could likely seal the win for the Patriots. However, referee Ben Dreith³⁷ threw a flag indicating a penalty on the Patriots.³⁸

<http://www.superbowl.com/u/xxxv/history/recaps/> (last visited Feb. 5, 2001) (listing all Super Bowl match-ups since 1967).

25. Will McDonough, *Officials Ignore Oakland Infractions*, THE BOSTON GLOBE, Dec. 19, 1976, at 83; Will McDonough, *Stabler Scrambles Across in Last 10 Seconds for 24-21 Win*, THE BOSTON GLOBE, Dec. 19, 1976, at 73, 82.

26. *Id.*

27. It is approximately 3100 miles from Boston, MA to Oakland, CA. See <http://www.mapquest.com> (last visited Nov. 27, 2000).

28. Will McDonough, *Officials Ignore Oakland Infractions*, THE BOSTON GLOBE, Dec. 19, 1976, at 83; Will McDonough, *Stabler Scrambles Across in Last 10 Seconds for 24-21 Win*, THE BOSTON GLOBE, Dec. 19, 1976, at 73, 82.

29. *Id.*

30. *Id.*

31. Ken Stabler played for the Raiders from 1970 to 1979. See <http://nfl.com/Raiders/news/991028nominees.html> (last visited Nov. 27, 2000) (detailing former Oakland Raiders in or nominated to the Hall of Fame). He ended his career with the New Orleans Saints in 1984. *Id.* Mr. Stabler is currently nominated to be enshrined at the NFL Hall of Fame. *Id.*

32. Will McDonough, *Officials Ignore Oakland Infractions*, THE BOSTON GLOBE, Dec. 19, 1976, at 83; Will McDonough, *Stabler Scrambles Across in Last 10 Seconds for 24-21 Win*, THE BOSTON GLOBE, Dec. 19, 1976, at 73, 82.

33. *Id.*

34. *Id.*

35. *Id.*

36. A blitz is "a play where the defensive team sends players rushing towards the line of scrimmage as soon as the ball is snapped" in an effort to sack the quarterback. First Base Sports Football Glossary, at <http://www.firstbasesports.com/glossaries/ftbglos.htm> (last visited Feb. 5, 2001) (providing definitions for football terms).

37. Even though Mr. Dreith is retired from the NFL, his name is still in the headlines whenever officials make questionable calls. See Ray Ratto, *Once Again, Luckett in the Middle*, at http://espn.go.com/columns/ratto_ray/281525.html (last visited Nov. 27, 2000) (equating the

The replay clearly showed, however, that the penalty was incorrectly called.³⁹ Nonetheless, the call stood and the Oakland Raiders scored a touchdown from the more advantageous position of the Patriots' 13 yard line and subsequently won the game.⁴⁰ In making the incorrect call against New England, the referees effectively robbed the Patriots of a trip to the AFC Championship and a possible trip to the Super Bowl.⁴¹ As for the instant replay, the game certainly sparked a debate, but not a reversal.⁴²

3. Royal Luck

Lest one is concerned that bad officiating is only a part of the football tradition, consider the 1985 World Series⁴³.

The St. Louis Cardinals, the 2-1 favorite of oddsmakers and the team with the best regular season record in baseball in 1985, held a three to two game lead over the Kansas City Royals and a 1-0 lead going into the ninth inning of Game Six.⁴⁴ St. Louis was three outs away from a World Series title.⁴⁵ Kansas City's first batter in the ninth inning hit a routine infield ground ball to first base.⁴⁶ American League umpire Don Denkinger⁴⁷ called Orta safe at first, even though television replays indicated that St. Louis' pitcher Todd Worrell⁴⁸, who had already caught the ball, had

controversy over referee Phil Luckett's calls during the 1999-2000 NFL season to that of Mr. Dreith's in 1976).

38. Will McDonough, *Officials Ignore Oakland Infractions*, THE BOSTON GLOBE, Dec. 19, 1976, at 83; Will McDonough, *Stabler Scrambles Across in Last 10 Seconds for 24-21 Win*, THE BOSTON GLOBE, Dec. 19, 1976, at 73, 82.

39. *Id.*

40. *Id.*

41. *Id.*

42. Dave Brady, *Refereeing by Camera Could Pose More Problems*, THE WASHINGTON POST, Jan. 8, 1978, at N4; Will McDonough, *Officials Ignore Oakland Infractions*, THE BOSTON GLOBE, Dec. 19, 1976, at 83; Will McDonough, *Stabler Scrambles Across in Last 10 Seconds for 24-21 Win*, THE BOSTON GLOBE, Dec. 19, 1976, at 73, 82.

43. The World Series is the championship series for Major League Baseball.

44. Joseph Durso, *Royal Rout a Bitter Ending for Cards*, THE NEW YORK TIMES, Oct. 28, 1985, at C1; *With Bats to Wall, Cardinals Need to Hit Herzog Blasts Series Umpiring*, THE WASHINGTON POST, Oct. 27, 1985, at L4.

45. Richard L. Shook, *Game Six Turning Point*, UPI SPORTS NEWS, Oct. 27, 1985.

46. *With Bats to Wall, Cardinals Need to Hit Herzog Blasts Series Umpiring*, THE WASHINGTON POST, Oct. 27, 1985, at L4.

47. Don Denkinger, although retired from professional umpiring, is still in the headlines. See *Certain Call: Denkinger's Call Worse than Garcia's* at <http://www.usatoday.com/sports/baseball/hedwin08.htm> (last visited Nov. 29, 2000) (listing results of fan poll). His "blown call" at first base in the 1985 World Series was judged to be the worst umpire gaffe in postseason history in a recent USA Today.com's survey. *Id.*

48. Todd Worrell played from 1985-1997 for the Cardinals and Los Angeles Dodgers. See <http://www.baseball-reference.com/w/worreto01.shtml> (last visited Nov. 29, 2000) (detailing Mr. Worrell's career statistics).

clearly beaten Orta to the bag.⁴⁹ Orta was subsequently taken out of the game for pinch runner Onix Concepcion⁵⁰ and the landslide began.⁵¹ Kansas City went on a hit streak that culminated in Dane Iorg's⁵² two-run RBI which won the game for Kansas City.⁵³ The Royals went on to win the series in their 11-0 rout over the Cardinals in Game Seven⁵⁴ but one is left to ask: if Orta was called out at first as he should have been, would there have been a Game Seven?

4. Buffaloed

The date was November 29, 1998 when the Buffalo Bills played the New England Patriots, and the NFL playoff race was hot.⁵⁵ Buffalo Bills quarterback Doug Flutie⁵⁶ waited on the sidelines with his team holding a 21-17 lead with only 6:14 to play in the game. Patriot's quarterback Drew Bledsoe⁵⁷ began marching his team down the field towards the end zone, similar to the way he had marched his team down the field to victory over the Miami Dolphins the previous Monday night, and similar to the way Tampa Bay's Shaun King⁵⁸ attempted to march his team down the field in the NFC Championship game later that season.⁵⁹ Drew Bledsoe was about

49. John Feinstein, *Tudor, Herzog, and Andujar Sore but Not All Sorry; Manager Blames Game 6 'Blown Call'*, THE WASHINGTON POST, Oct. 28, 1985, at C10; Bob Ryan, *No Excuse for Bad Judgment: Reed Should Have Had Help from Crew*, THE BOSTON GLOBE, Oct. 15, 1999, at E3; Mark Starr, *Hey! We Wuz Robbed!* NEWSWEEK, Dec. 21, 1998, at 52; *With Bats to Wall, Cardinals Need to Hit Herzog Blasts Series Umpiring*, THE WASHINGTON POST, Oct. 27, 1985, at L4.

50. Onix Concepcion played from 1980-1987 for the Royals and the Pittsburgh Pirates. See http://sportsillustrated.cnn.com/baseball/mlb/all_time_stats/players/c/1680/ (last visited Nov. 29, 2000) (detailing Mr. Concepcion's career statistics).

51. *With Bats to Wall, Cardinals Need to Hit Herzog Blasts Series Umpiring*, THE WASHINGTON POST, Oct. 27, 1985, at L4.

52. Dane Iorg played from 1977-1986 for the Philadelphia Phillies, Cardinals, Royals, and San Diego Padres. See http://cbs.sportsline.com/u/baseball/bol/ballplayers/I/Iorg_Dane.html (last visited Nov. 29, 2000) (Detailing Mr. Iorg's career statistics).

53. John Feinstein, *Tudor, Herzog, and Andujar Sore but Not All Sorry; Manager Blames Game 6 'Blown Call'*, THE WASHINGTON POST, Oct. 28, 1985, at C10; Richard L. Shook, *Game Six Turning Point*, UPI SPORTS NEWS, Oct. 27, 1985.

54. Starr, *supra* note 49, at 52.

55. Bill Porter, *Bills Blast Officials in Pats Loss*, THE ASSOCIATE PRESS SPORTS NEWS, Nov. 30, 1998; Howard Ulman, *Penalty Derails Buffalo; QB Points Pats to a Win*, THE COMMERCIAL APPEAL, Nov. 30, 1998, at D4.

56. See *supra* note 2 and accompanying text.

57. Drew Bledsoe has been the Patriots' starting quarterback since 1993. See <http://www.patriots.com/team/Personal.sps?biotextid=4644&playerid=119&playertype=1&go.x=18&go.y=14> (last visited Nov. 30, 2000) (detailing Mr. Bledsoe's career statistics). He owns several team and league passing records. *Id.*

58. See *supra* note 12 and accompanying text.

59. Porter, *supra* note 55. See *supra* note 2 and accompanying text.

to show Doug Flutie his version of a "Hail Mary" pass.⁶⁰

Buffalo had a record of seven wins and four losses while New England was struggling with a six and five record.⁶¹ A win for Buffalo would put them in a strong position for a playoff berth, placing them in a tie for first place with a record of eight and four.⁶²

Buffalo was still leading New England 21-17 with only 11 seconds left to play in the game.⁶³ The Patriots needed a touchdown to win, and were faced with a near impossibility, fourth and nine at Buffalo's 36-yard line.⁶⁴ Quarterback Bledsoe dropped back and fired to receiver Shawn Jefferson,⁶⁵ who caught the ball, but appeared to be both out of bounds and short of the first down.⁶⁶ An incompletion would have ended the game, but the officials ruled it a catch.⁶⁷ Doug Flutie, present on the sidelines, recounts the call: "The guy [referee] closest said no catch. Then a second guy came in and he said he didn't know. Then another guy comes in and says, 'Just give it to them'."⁶⁸

With the ball at the 26-yard line and only six seconds left, it appeared as though Buffalo could pull off two wins.⁶⁹ Bledsoe took the snap from the center and lofted the ball into the back corner of the Buffalo end zone.⁷⁰ A cluster of players developed and jockeyed for position.⁷¹ Terry Glenn,⁷² of the Patriots, leapt the highest and grabbed the ball – only to drop it.⁷³ The referees called pass interference—a call never made on a

60. See *supra* note 1 and accompanying text. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1; Ulman, *supra* note 55, at D4.

61. Porter, *supra* note 55.

62. *Id.*

63. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1.

64. *Id.*

65. Shawn Jefferson currently plays for the Atlanta Falcons. See <http://espn.go.com/nfl/profiles/profile/1118.html> (last visited Nov. 30, 2000) (detailing Mr. Jefferson's career statistics).

66. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1; Porter, *supra* note 55; Ulman, *supra* note 55, at D4.

67. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1.

68. *Id.*

69. Ulman, *supra* note 55, at D4.

70. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1.

71. *Id.*

72. Terry Glenn had been a wide receiver for the Patriots since 1996. He owns several team and league receiving records. See <http://www.patriots.com/team/Personal.sps?biotextid=5018&playerid=228&playertype=1&go.x=9&go.y=9> (last visited Nov. 30, 2000) (detailing Mr. Glenn's career statistics).

73. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1.

"Hail Mary" pass as long as players are simply jockeying for the ball, as the replay showed.⁷⁴ Nonetheless, the call stood.⁷⁵ With the ball at the one-yard line and one play left, Bledsoe completed the pass to Ben Coates⁷⁶ and Buffalo lost the game.⁷⁷ Had Buffalo won, they would have been much stronger contenders for a playoff berth.⁷⁸

5. Buffaloed II

Only five months before their chances for the Vince Lombardi trophy⁷⁹ were significantly lessened, Buffalo sports fans may have been erroneously deprived of the Stanley Cup as well.⁸⁰ As Buffalo hockey fans were soon to discover, bad officiating is not limited to football and baseball.⁸¹ Hockey officials are capable of substantial mistakes that cost teams significant losses as well.⁸² The Sabres, Buffalo's hockey franchise, were subjected to such officiating errors.⁸³

In 1999, the National Hockey League (NHL) had a rule prohibiting a player from being in the crease⁸⁴ in front of the goal while a shot was being taken.⁸⁵ The penalty for such an infraction is to reverse the goal.⁸⁶ The NHL uses replay to enforce this rule.⁸⁷

Dallas led 1999's Stanley Cup finals three games to two going into

74. *Id.*

75. *Id.*

76. Ben Coates is currently a tight end for the Baltimore Ravens. See <http://espn.go.com/nfl/profiles/profile/1067.html> (last visited Nov. 30, 2000) (detailing Mr. Coates' career statistics).

77. Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1.

78. Porter, *supra* note 55. See also Steve Lopez, *Let's Go to the Tape*, TIME, Dec. 21, 1998, at 58.

79. The Vince Lombardi trophy is awarded to the winner of the Super Bowl. See <http://www.nfl.com> (last visited Nov. 30, 2000).

80. The Stanley Cup is awarded annually to the National Hockey League champion. See <http://www.nhl.com> (last visited Nov. 30, 2000). Jaime Aron, *Stars Celebrate Stanley Cup with Fans, Texas Style*, ASSOCIATED PRESS, June 21, 1999; Bill Porter, *Buffalo Still Steaming over Cup-Winning Goal*, ASSOCIATED PRESS, June 21, 1999; Jeff Shultz, *Cup Comes with Controversy: Replays Reveal Hull was in Crease*, THE AUSTIN AMERICAN-STATESMAN, June 21, 1999, at C1.

81. Porter, *supra* note 80; Shultz, *supra* note 80, at C1.

82. *Id.* See also Phil Mushnick, *Official Replay? Put it on Ice*, TV Guide, June 20, 1997, at 48.

83. Porter, *supra* note 80; Shultz, *supra* note 80, at C1.

84. Red lines are painted on the ice to indicate the borders of the goal crease. See <http://www.nhl.com/hockey/rulebook/rule78.html> (last visited Nov. 30, 2000) (explaining the protection of goalkeepers within the crease).

85. Mushnick, *supra* note 82, at 48; Shultz, *supra* note 80, at C1.

86. *Id.*

87. *Id.*

Game Six.⁸⁸ The Sabres had home ice advantage in Game Six,⁸⁹ and thus far, the teams had been evenly matched.⁹⁰ Game Six remained tied until 14:51 into the third overtime, making the game the second longest Stanley Cup finals game in professional hockey history.⁹¹ The time was 1:31 a.m. Eastern Standard Time.⁹² The referees were exhausted but the hometown faithful were still eager and ready to support their team in a Game Seven, if necessary.⁹³ At 14:51 of the third overtime, Brett Hull⁹⁴ skated his way into the crease, snagged a rebounding puck, and shot it past Dominik Hasek⁹⁵ to win game six and the Stanley Cup.⁹⁶ Many presumed that the referees and league rules would not allow this goal to stand.⁹⁷ A review of the play would have shown that Hull's foot was in the crease.⁹⁸ But the review was never conducted and the Dallas Stars took home the Stanley Cup.⁹⁹

6. The Umpire Sneak

The Seattle Seahawks had not made the NFL playoffs since 1988, but ten years later, they were a contender.¹⁰⁰ Their position behind Denver in the AFC's Western Division, 12 weeks into the season, gave them a viable opportunity to earn a wild card spot.¹⁰¹ Their next game, against the New

88. *Id.*

89. Mushnick, *supra* note 82, at 48; Shultz, *supra* note 80, at C1.

90. Shultz, *supra* note 80, at C1.

91. *Id.*

92. *Id.*

93. *Id.*

94. A 16-year veteran of the Calgary Flames, St. Louis Blues, and Dallas Stars, Brett Hull ranks among the NHL's all-time leaders in goals scored. See <http://espn.go.com/nhl/profiles/stats/career/0003.html> (last visited Nov. 30, 2000) (detailing Mr. Hull's career statistics).

95. Dominik Hasek, perennial all-star and league MVP candidate, has been in the NHL since 1990, playing for the Chicago Blackhawks and Buffalo Sabres. See <http://espn.go.com/nhl/profiles/stats/career/0260.html> (last visited Nov. 30, 2000) (detailing Mr. Hasek's career statistics).

96. Shultz, *supra* note 80, at C1.

97. Porter, *supra* note 80; Shultz, *supra* note 80, at C1.

98. Shultz, *supra* note 80, at C1.

99. *Id.*; Aron, *supra* note 80.

100. Rich Cimini, *Seattle Out to Settle up Seahawks Remember Vinny's Phantom TD*, THE NEW YORK DAILY NEWS, Dec. 31, 1999, at 80; Tom Pedulla, *Ref. Crew Hear Heat Over Jets' 32-31 Win*, USA TODAY, Dec. 7, 1998, at 1C.

101. Jarrett Bell, *Refs Hope Bad Calls are History*, USA TODAY, Dec. 24, 1998, at 9C; Les Carpenter, *Hawks Fall Short Against Jets, Ref—Phantom Touchdown Leaves Seattle Fuming*, THE SEATTLE TIMES, Dec. 7, 1998, at D1; Steve Kelley, *Where's the Flag for Incompetence?* THE SEATTLE TIMES, Dec. 7, 1998, at D1. The wild card is "a team that makes the NFL playoffs by having one of the three best records among non-division winners in its conference." First Base Sports Football Glossary, at <http://www.firstbasesports.com/glossaries/fbglos.htm> (last visited Feb.

York Jets, was crucial.

The Seattle Seahawks came to the Meadowlands Sports Complex as underdogs to face the home team, the New York Jets. Instead, Seattle played like the favorite, beating the Jets 31-26 with twenty seconds left.¹⁰² The Jets were on the five-yard line and needed a touchdown to win the game.¹⁰³

On fourth down, Jets' quarterback Vinny Testaverde¹⁰⁴ lurched forward on a quarterback sneak.¹⁰⁵ Instant replay showed in no uncertain terms that the tip of Testaverde's helmet reached the tip of the end zone, but only after he was down and with the ball resting at least two feet from the goal line.¹⁰⁶ Nonetheless, referee Earnie Frantz¹⁰⁷ signaled touchdown and the Jets emerged victorious, 32-31.¹⁰⁸ The 70,000 Jets fans were elated by the "home cooking" call¹⁰⁹, which placed Seattle out of play-off contention.¹¹⁰ Seattle's coach Dennis Erickson¹¹¹ was subsequently fired. Seahawks Vice President Randy Mueller¹¹² speculated that the NFL office

5, 2001) (providing definitions for football terms).

102. *Testaverde Wins it on Disputed Play; Jets 32, Seahawks 31*, THE WASHINGTON POST, Dec. 7, 1998, at D7; Cimini, *supra* note 100, at 80; Les Carpenter, *Hawks Fall Short Against Jets, Ref—Phantom Touchdown Leaves Seattle Fuming*, THE SEATTLE TIMES, Dec. 7, 1998, at D1.

103. *Testaverde Wins it on Disputed Play; Jets 32, Seahawks 31*, THE WASHINGTON POST, Dec. 7, 1998, at D7; Kelley, *supra* note 101, at D1; Les Carpenter, *Mueller: Dispute Makes Case for Instant Replay*, THE SEATTLE TIMES, Dec. 7, 1998, at D7.

104. Vinny Testaverde has been in the NFL for 14 seasons, with the Tampa Bay Buccaneers, Cleveland Browns, Baltimore Ravens, and New York Jets. See <http://www.newyorkjets.com/> (last visited Nov. 30, 2000) (detailing Mr. Testaverde's career statistics).

105. Les Carpenter, *Mueller: Dispute Makes Case for Instant Replay*, THE SEATTLE TIMES, Dec. 7, 1998, at D7; Pedulla, *supra* note 100, at 1C.

106. Pedulla, *supra* note 100, at 1C; Kelley, *supra* note 101, at D1.

107. Earnie Frantz has been an NFL official for 20 years. See <http://nfl.com/randf/offglance.html> (last visited Nov. 30, 2000) (listing 2000 NFL officials).

108. Pedulla, *supra* note 100, at 1C; Kelley, *supra* note 101, at D1.

109. "Home cooking is an expression used in the NFL, and all pro sports, to describe game officials who appear not to have the courage to make a call against the home team when the game is on the line." Will McDonough, *Bills' Official Stance: They Were Robbed*, THE BOSTON GLOBE, Nov. 30, 1998, at D1;

110. Bell, *supra* note 101, at 9C; Les Carpenter, *Hawks Fall Short Against Jets, Ref—Phantom Touchdown Leaves Seattle Fuming*, THE SEATTLE TIMES, Dec. 7, 1998, at D1; Les Carpenter, *Mueller: Dispute Makes Case for Instant Replay*, THE SEATTLE TIMES, Dec. 7, 1998, at D7; Cimini, *supra* note 100, at 80. Kelley, *supra* note 101, at D1; Pedulla, *supra* note 100, at 1C; *Testaverde Wins it on Disputed Play; Jets 32, Seahawks 31*, THE WASHINGTON POST, Dec. 7, 1998, at D7.

111. Dennis Erickson is currently the head coach at Oregon State University. See Todd Harris, *There's Nothing Civil About It*, at http://espn.go.com/abcports/bcs/columns/harris_todd/index.html (last visited Nov. 30, 2000) (detailing University of Oregon- Oregon State University football game).

112. Randy Mueller is currently the General Manager of the New Orleans Saints. See *Muller has reshaped the New Orleans Saints* at <http://espn.go.com/nfl/s/000517ap/mueller.html> (last visited Nov. 30, 2000) (describing Mueller's personnel moves since taking over as Saints' General Manager).

would call to apologize because “that’s what always happens”.¹¹³

7. Curse of the Big Bad Umpires

If ten years is long to wait for a play-off berth, imagine waiting 80 years to win a World Series. The curse of the Bambino¹¹⁴ may have prevented the Red Sox from winning the World Series since 1918, but it is poor umpiring that may have held the Red Sox back in their 81st year.¹¹⁵

The match-up was termed baseball’s “Holy War” and pitted two famous foes, the Boston Red Sox and New York Yankees, against each other for the 1999 American League Championship Series with the winner continuing on to the World Series.¹¹⁶ During game one at Yankee Stadium, the game was tied 3-3 entering the tenth inning when Jose Offerman¹¹⁷ gained first base with no outs.¹¹⁸ John Valentin¹¹⁹ then hit a slow grounder to Scott Brosius¹²⁰ who flipped the ball to Chuck Knoblauch¹²¹ to begin the double play procession.¹²² But Knoblauch

113. Les Carpenter, *Mueller: Dispute Makes Case for Instant Replay*, THE SEATTLE TIMES, Dec. 7, 1998, at D7.

114. The curse of the Big Bambino refers to a mythical theory on why the Red Sox have not won a World Series since 1918: “For three-quarters of a century, the Red Sox have been haunted by the Babe factor.” <http://www.cnn.com/US/9910/13/curse.bambino/> (last visited November 18, 2000). Back in 1915, when Boston’s Fenway Park was young, the Red Sox won the World Series. *Id.* But a few years later, the team’s owner sold the game’s first stars for cold, hard cash and the team’s luck changed. *Id.* The hated Harry Frazee sold Babe Ruth to the Yankees in 1920 for \$100,000—and a \$300,000 loan to pay off Fenway Park. *Id.* Both teams have fielded big stars. Besides Ruth, the Yankees have had Lou Gehrig and Joe DiMaggio. *Id.* The Red Sox have had Ted Williams and Carl Yastrzemski. *Id.* But New York has won 26 World Series and Boston hasn’t had a win since the sale of Ruth. Could that be because of a curse?” *Id.*

115. Bob Hille, *Getting*, THE SPORTING NEWS, Oct. 25, 1999, at 57; Ron Kroichick, *Replay Could Help Postseason Baseball*, THE SAN FRANCISCO CHRONICLE, Oct. 23, 1999, at E2; Ryan, *supra* note 49, at E3; Ben Walker, *Umps Clear Field After Close Calls Brings Shower of Debris*, ASSOCIATED PRESS, Oct. 18, 1999.

116. Hille, *supra* note 115, at 57; Kroichick, *supra* note 115, at E2.

117. Jose Offerman is an 11-year Major League Baseball (MLB) veteran infielder, having played for the Los Angeles Dodgers, Kansas City Royals, and Red Sox. See <http://espn.go.com/mlb/profiles/stats/batting/4542.html> (last visited Nov. 30, 2000) (detailing Mr. Offerman’s career statistics).

118. Ryan, *supra* note 49, at E3.

119. John Valentin is a 9-year MLB veteran infielder, who has spent his entire career with the Red Sox. See <http://espn.go.com/mlb/profiles/stats/batting/4902.html> (last visited Nov. 30, 2000) (detailing Mr. Valentin’s career statistics).

120. Scott Brosius is a 10-year MLB veteran infielder, who has played for the Oakland Athletics and the Yankees. See <http://espn.go.com/mlb/profiles/stats/batting/4720.html> (last visited Nov. 30, 2000) (detailing Mr. Brosius’ career statistics).

121. Chuck Knoblauch is a 10-year MLB veteran infielder, who has played for the Minnesota Twins and the Yankees. See <http://espn.go.com/mlb/profiles/stats/batting/4617.html> (last visited Nov. 30, 2000) (detailing Mr. Knoblauch’s career statistics).

122. Ryan, *supra* note 49, at E3.

bobbled the ball, as the replay clearly showed, never taking possession.¹²³ Nevertheless, umpire Rick Reed¹²⁴ called Offerman out and left the Red Sox with one out and a runner on first base, instead of two runners on the bases with no outs.¹²⁵ Reed later admitted that he botched the call.¹²⁶

In Game Four of the same series, the Red Sox were trailing 3-2 in the bottom of the eighth inning. With one out, a ground ball was hit to Chuck Knoblauch, who reached out to tag Jose Offerman as he was running from first to second base.¹²⁷ Knoblauch then threw to first base to complete the double play.¹²⁸ The replay clearly showed, however, that Knoblauch missed the tag on Offerman. Umpire Tim Tschida¹²⁹ later admitted missing the call.¹³⁰ This honorable admission, however, did not change the fact that the Red Sox's potential rally was over.

II. THE INJURY

The harm caused as a result of bad officiating can be substantial and can have a profound negative impact on numerous parties.¹³¹ Bad calls can change the outcome of games and create a domino effect of subsequent monetary and emotional harm.¹³² Teams, players and coaches are "deprived of victory and its accompanying benefits."¹³³ Economically, a team's lost revenues can be substantial when it fails to make the playoffs, or to further advance once they have made it to the post

123. Kroichick, *supra* note 115, at E2; John Powers, *Yankees Make Best of Breaks; Champions Know They Got the Calls*, THE BOSTON GLOBE, Oct. 19, 1999, at F7; Walker, *supra* note 115, at E3.

124. Rick Reed has been a professional umpire for 20 years. See <http://www.worldumpires.com/page4.html> (last visited Nov. 30, 2000) (listing the MLB umpiring assignments for the 2000 season).

125. Ryan, *supra* note 49, at E3.

126. Bill Finley, *Ump Blows Call, Knob Gets 2nd Break Umpires Have Bosox Feeling Blue*, NEW YORK DAILY NEWS, Oct. 18, 1999, at 71; Hille, *supra* note 115, at 57; Walker, *supra* note 115, at E3.

127. Finley, *supra* note 126, at 71; Kroichick, *supra* note 115, at E2; Sean McAdam, *Dubious Calls Lead to a Call for Action*, THE PROVIDENCE JOURNAL-BULLETIN, Oct. 19, 1999, at 4D; Powers, *supra* note 123, at F7.

128. *Id.*

129. Rick Reed is still active as an American League umpire. See <http://www.eumpire.com/index.cgi?category=baseball&page=2000openingday> (last visited Nov. 30, 2000) (listing 2000 MLB umpiring assignments).

130. Finley, *supra* note 126, at 71; Kroichick, *supra* note 115, at E2; Walker, *supra* note 115, at E3.

131. Darryll M. Halcomb & Frank S. Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673 (1990); Scott Parven, *Judgment Calls-Sports Officials in Court*, 9 ENT. & SPORTS LAW. 9 (1991).

132. *Id.*

133. *Id.*

season.¹³⁴ The value of a team may be reduced as a result of a loss and, according to some, losing can be the equivalent of bankruptcy for a team.¹³⁵ Teams that win more games, especially championship teams, earn far more revenues than teams that do not.¹³⁶

There are also less tangible harms, such as the discharge of members of the coaching staff and bitter fans.¹³⁷ Consider, for example, Seattle Seahawk's coach Dennis Erickson, who lost his livelihood after the Seahawks failed to make the play-offs in 1998.¹³⁸ Many opine that Seattle's loss to the Jets as a result of Vinny Testaverde's "phantom touchdown" was the direct cause of Erickson's termination.¹³⁹ As a result of such losses, fan disappointment and dejection occurs, and may have a negative impact on future attendance levels.¹⁴⁰

Despite the courts' general and overarching reluctance to consider legal claims based on negligent officiating,¹⁴¹ the courts have recognized the profound impact of such.¹⁴² In one instance, the court recognized the impact of bad officiating and held that a boxer who achieved an initial victory in a bout did have standing to sue. In so holding the court stated:

As in most money-making callings, a boxer's earning capacity is related to his reputation and his reputation is dependent upon his success. In the sports world the interested public follows the detailed records of individual athletes and teams with avidity. It flocks to watch the athletes with winning records; and the earnings of those athletes are related directly to the number of paying spectators they can attract. Spiritually, a professional boxer may emerge greater in defeat than in victory. Materially, however, his prestige and the purses he can command are lowered. Any action which affects his record so prejudicially of necessity impairs economic rights and interests sufficiently to give the petitioner legal standing to sue.¹⁴³

134. *Id.* See also Stephen Harris, *Hockey: It's Bummer Time For B's Miserable Season Ends with a Win*, THE BOSTON HERALD, Apr. 10, 2000, at 104; GERALD SCULLY, THE MARKET STRUCTURE OF SPORTS, 3, 25, 69, 117, 128 (1995).

135. SCULLY, *supra* note 134, at 101, 110.

136. SCULLY, *supra* note 134, at 3, 25, 69, 117, 128.

137. Halcomb & Forbes, *supra* note 131.

138. David Kamp, *The Thin Striped Line*, GENTLEMEN'S QUARTERLY, Sept. 1999, at 269.

139. *Id.*; see also Brendan I. Koerner, *Next Week in the NFL: Back to the Videotape?* U.S. NEWS AND WORLD REPORT, March 15, 1999, at 56; Lopez, *supra* note 78, at 58; Les Carpenter, *Hawks Fall Short Against Jets, Ref—Phantom Touchdown Leaves Seattle Fuming*, THE SEATTLE TIMES, Dec. 7, 1998, at D1; Cimini, *supra* note 100, at 80; Kelley, *supra* note 101, at D1.

140. Halcomb & Forbes, *supra* note 131.

141. Parven, *supra* note 131, at 9 (noting that the scenario changes if sports-related injuries occur).

142. *Tilelli v. Christenberry*, 120 N.Y.S.2d 697, 699 (1953); *California State Univ., Hayward v. N.C.A.A.*, 47 Cal. App. 3d 533 (1975).

143. *Tilelli*, 120 N.Y.S.2d at 699. However, the court also held that the New York State Athletic Commission could not overturn a boxing referee's decision despite evidence of corruption. *Id.*

In another instance, the court recognized the impact of bad officiating and ruled that the court may intervene in the internal affairs of voluntary associations when the association is acting in violation of its own by-laws or constitution.¹⁴⁴ The court in *California State University, Hayward v. N.C.A.A.* held that the NCAA's declaration of California State's ineligibility to compete in post season play may have violated its own rules.¹⁴⁵ In so ruling, the court took judicial notice of the economic realities and possibilities substantiating the need for judicial review of such a claim:

In these days when juniors in college are able to suspend their formal educational training in exchange for multi-million dollar contracts to turn professional, this Court takes judicial notice of the fact that, to many, the chance to display their athletic prowess in college stadiums and arenas throughout the country is worth more in economic terms than the chance to get a college education. . . . It has also been held that high school students' interests in participation in athletics are so substantial that they cannot be impaired without proceedings which comply with minimum standards of due process. Surely, the interests of college athletes in participating in activities which have the potential to bring the great economic rewards are no less substantial.¹⁴⁶

The injuries, especially on the professional sports level, are capable of objective calculation.¹⁴⁷ While some injuries are intangible, such as team pride, emotional distress, and fan support, other injuries can be supported by more empirical data.¹⁴⁸

Professional sports teams in football, basketball, baseball and hockey earn income through gate receipts, local and national broadcasting rights, luxury box sales, concessions, memorabilia, parking, and licensing fees.¹⁴⁹ Although leagues have different revenue-sharing rules for gate receipts and broadcasting rights, the distribution rules in sports such as baseball, basketball and hockey are uneven, enough that the lost opportunity to host a play-off game could cost a team substantial revenues.¹⁵⁰

Less tangible losses are also discernible, despite their lack of empirical steadfastness. Economic studies reveal that wins, losses and championship rings significantly impact future earnings of teams and their

144. *California State Univ., Hayward*, 47 Cal. App. 3d at 533.

145. *Id.* at 543.

146. *Id.* at 541-542.

147. See SCULLY, *supra* note 134 and accompanying text.

148. SCULLY, *supra* note 134 and accompanying text.

149. SCULLY, *supra* note 134 at 116.

150. *Id.* at 25, 69.

overall value.¹⁵¹ One study reports that a baseball franchise earns \$1,000,000 more in revenue for every home game won; and in hockey, every home game won increases revenue by \$268,000 or \$215,000 per population of 1,000,000 people.¹⁵²

The direct financial damages and consequential damages vary depending on the sport, the point during the season at which the game was played, and the prospects for the losing team to participate in future play-off games. In every case, however, these teams that are prejudiced in such critical games lose in some manner.¹⁵³

Aside from the emotional harm that players, fans, and owners must endure from losing a game critical to prosperity and prestige, the direct financial damage is significant as well.¹⁵⁴ This is so despite certain revenue-sharing rules which attempt to make team income less dependent upon success.¹⁵⁵ But whether the applicable league has such a revenue sharing system like the NFL, or one such as Major League Baseball which distributes income in accordance with a team's success, all of the aforementioned teams are still subjected to lost income by way of gate receipts, broadcasting revenue, and fan support which manifests itself in future ticket sales as well as luxury box, parking, concession and memorabilia income.¹⁵⁶ In all of these cases, the team's value would most likely decrease as a result of not advancing in post-season play as well.¹⁵⁷

A. A Cause of Action

The damages that flow as a result of negligent officiating can be in the form of millions of dollars as well as severe emotional disturbance for players, staffers, management and owners, as well as the fans who support the team. Such issues propose the question of whether a professional

151. *Id.* at 3, 25, 69, 101, 110, 117, 128.

152. *Id.* at 117, 128. These damages resulting from a loss are subject to fluctuation depending on the particular event, game, and forum.

153. See SCULLY, *supra* note 134, at 101, 110.

154. See *id.*

155. For example, the NFL's revenue sharing plan allocates broadcasting revenues evenly among the teams and distributes 40% of the gate receipts from each game to the visiting team, and only 60% to the home team. Tim Tyers, *Realignment Changes Loom in Cards' Future; Could End Up In NFC West*, THE ARIZONA REPUBLIC, Nov. 2, 2000, at C1; Jimmy Smith, *Ticket Rollback Would Spice Saints' Vibe*, THE TIMES-PICAYUNE, Feb. 6, 2000, at CO2; Gordon McKibben, *In Quest of a Real Super Sunday*, THE BOSTON GLOBE, Jan. 28, 1990, at 77; Kenneth Lehn, *Antitrust and Franchise Relocation in Professional Sports: An Economic Analysis of the Raiders Case*, 42 ANTITRUST BULL. 42 (1997); IMUSA Corporate Governance of Professional Football Conference at <http://www.imusa.org.uk/library/revenue.htm>.

156. See SCULLY *supra* note 134 at 3, 25, 69, 101, 110, 117, 128.

157. See *id.*

sports team that has been harmed by bad officiating should be entitled to sue the official or seek an injunction to reverse the call?

1. The Legal Precedent

Available causes of action against referees and umpires are commonly based in tort, particularly negligence.¹⁵⁸ Suits may also be based on breach of contract.¹⁵⁹ In order to satisfy the common law requirements of negligence, the complainant must show the referee's conduct deviated from a required standard of care and that such a deviation resulted in a different outcome for the game.¹⁶⁰ Finally, it must be proven that the different outcome resulted in a demonstrable monetary loss.¹⁶¹

In order to show that a referee's conduct deviated from a required standard of care, the plaintiff must prove that the official had an affirmative duty.¹⁶² The duty can be established by statute, contract, implied contract, or the common law.¹⁶³ Claims that arise under statutes usually deal with laws aimed at punishing referees for their intentional conduct.¹⁶⁴ If the claim arose by an official's contract or implied contract to officiate competently or in good faith, the plaintiff could raise a breach of contract claim.¹⁶⁵ These types of claims, however, would be limited by the doctrines of privity and expectation.¹⁶⁶ The injury would also have to be covered by a contract or be reasonably foreseeable in order to recover damages, thereby limiting chances of recovery.¹⁶⁷

Most claims, however, are raised under a negligence theory.¹⁶⁸ In so doing, the plaintiff would need to show that the referee owed him a duty and subsequently breached that duty.¹⁶⁹

Several factors contribute to the analysis of duty and breach including the foreseeability of the harm, the magnitude of the potential harm, the policy around preventing the particular harm, the position the defendant is in to prevent the harm, and the burden that the duty would impose upon a

158. Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game into Your Own Hands, Take Them to Court!* 4 SPORTS LAW. J. 213, 214-215.

159. *Id.* at 215.

160. *Id.*

161. Feiner, *supra* note 158, at 216.

162. *Id.* at 217.

163. *Id.*

164. *Id.* at 215-217.

165. Feiner, *supra* note 158, at 217.

166. *Id.*

167. *Id.*

168. *Id.*

169. Feiner, *supra* note 158, at 217.

referee.¹⁷⁰ Expectations and trust would be factors in determining whether certain conduct is a breach of what the teams, players and fans consider to be the referee's duty.¹⁷¹

Even after a plaintiff shows that a duty existed and proves a breach of that duty, the party must prove the breach was the cause-in-fact and the proximate cause of the injury the plaintiff suffered.¹⁷² In other words, the plaintiff must prove that but for the mistaken call by the official, the team would have won the game or the outcome would have been different.¹⁷³ Any other intervening possibilities, such as the possibility of the team losing despite the erroneous call, could and probably would bar recovery.¹⁷⁴ Common law negligence requires the nexus between the initial conduct and ultimate harm to be closely connected.¹⁷⁵

If a plaintiff could show duty, breach and cause, then proving injury could perhaps be the easiest hurdle to overcome. As previously mentioned, the stakes and potential losses that could result from a botched call are, in many cases, self-evident.¹⁷⁶

Courts in the past have held that "decisions of sports officials are 'outside the realm of judicial controversy' and will not be addressed by courts absent a showing of corruption, fraud or bad faith."¹⁷⁷ Inherent in the judicial decisions of these types of cases is a presumption of correctness on the part of the referee.¹⁷⁸ Even in cases where the mistake is obvious or the referee admitted error, courts have refused to adjudicate.¹⁷⁹ The court may refuse to adjudicate because of presumptions of good faith and correctness, lack of causation, lack of proof that the

170. *Id.* at 228-229.

171. *Id.*

172. *Id.*

173. *Feiner*, *supra* note 158, at 228-229.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Feiner*, *supra* note 158, at 224.

178. *Id.*; see also *Durando v. State Athletic Comm'n of Wis.*, 272 Wis. 191 (1956) (upholding Commission's determination that referee's decision should not be overturned based on presumption of correctness and deference to Commission's administrative jurisdiction, power and discretion); *Gardner v. N.Y. Racing Ass'n, Inc.*, 525 N.Y.S.2d 116 (1988) (dismissing bettor's claim that horse racing referees erred in judging race based on deference to referees and the rules of the governing administrative body as well as the consent of the bettors to be governed by those rules); *White v. Turfway Park Racing Ass'n*, 718 F.Supp. 615 (E.D. Ky. 1989) (granting summary judgment to defendant racetrack even though the referees admittedly erred in officiating a race based on a presumption of good faith and correctness, lack of causation, lack of proof that the change would have affected the outcome, deference to the regulations of the administrative agency which did not allow recovery, and a general policy against reversing umpires' decisions because of the difficult nature of their jobs).

179. *Id.*

change would have affected the outcome, deference to the regulations of the administrative agencies governing the sports contests at issue, and a general policy against reversing umpires' decisions.¹⁸⁰ Three seminal cases illustrate the courts' reluctance to intervene in officials' decisions in sporting events.

In *Shapiro v. Queens County Jockey Club*, the petitioner sought to overrule a false start initiated at a horse race.¹⁸¹ The court denied the petition and set forth the general rule governing courts' intervention in umpires' decisions:

[I]t has been found of great practical importance to have umpires, referees, timekeepers, and other officials . . . who are experienced, mentally alert, fair, and otherwise well qualified to make immediate decisions, and whose decisions must be final and binding. In more than one sense, such officials are truly judges of the facts, since they are closer to the actual situation and characters involved, at the time, and as and when, and under the circumstances in which the events occurred. Surely their immediate reactions and decisions of the questions which arose during the conduct of the sport should receive greater credence and consideration than possibly the remote, subsequent, matter-of-fact observation by a court in litigation . . .¹⁸²

In *Georgia High School Ass'n v. Waddell*,¹⁸³ players' parents alleged that one of the referees incorrectly applied a penalty that subsequently cost the team a trip to the Georgia state play-offs.¹⁸⁴ The trial court granted the injunction and ordered the game to be replayed.¹⁸⁵ The Supreme Court of Georgia reversed, holding that because a high school football player has no right to participate in interscholastic sports, they have no property interest in the game.¹⁸⁶ In so holding, the court held that if its decisions were to hold otherwise, "every error in the trial courts would constitute a denial of equal protection. We now go further and hold that courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies."¹⁸⁷

Finally, in *Bain v. Gillispie*,¹⁸⁸ a store owner who sold Iowa University apparel and novelty items counter-claimed against an NCAA basketball referee for a call made at the end of an Iowa-Purdue basketball game that

180. *Id.*

181. *Shapiro v. Queens County Jockey Club*, 53 N.Y.S.2d 135, 136-37 (1945).

182. *Id.* at 138-139.

183. 285 S.E.2d 7 (Ga. 1991)

184. 285 S.E.2d at 8 (relying on *Smith v. Grim*, 240 S.E.2d 884 (1977)).

185. *Id.* at 8.

186. *Id.*

187. *Id.* at 9.

188. 357 N.W.2d 47 (Iowa Ct. App. 1984).

resulted in a loss for Iowa.¹⁸⁹ This loss eliminated Iowa's chance to compete in the NCAA Championship.¹⁹⁰ The storeowner alleged that the bad call caused lost business because of his subsequent inability to produce and sell Iowa products for the NCAA Championship.¹⁹¹ The trial court and the Iowa Court of Appeals struck down the counter-claim based on strong policy objections.¹⁹² The trial court held:

Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is liability to a merchandiser like the Gillispies, why not to thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks."¹⁹³

The Iowa Court of Appeals affirmed the trial court's decision, stating:

It is beyond credulity that Bain, while refereeing a game, must make his calls at all times perceiving that a wrong call will injure Gillispies' business or one similarly situated and subject him to liability. The range of apprehension, while imaginable, does not extend to Gillispies' business interests. Referees are in the business of applying rules for the carrying out of athletic contests, not in the work of creating a marketplace for others. In this instance, the trial court properly ruled that Bain owed no duty. Gillispies have cited no authority, nor have we found any, which recognizes an independent tort for "referee malpractice." Absent corruption or bad faith, which is not alleged, we hold no such tort exists.¹⁹⁴

It might seem as though a claim for "referee malpractice" by owners of an injured team seeking money damages is legally dead, but all is not lost. First, recall the cases of *Tilleli* and *California State University*, discussing the high stakes and potential harm in making teams or participants ineligible or less successful.¹⁹⁵ These cases indicate the courts' willingness to recognize the harm that may result from umpire errors.¹⁹⁶ Second, the *Shapiro*, *Waddell* and *Bain* cases, which denied causes of action for referee malpractice, are all distinguishable from a claim seeking money damages involving a party directly injured.¹⁹⁷ *Shapiro* and *Waddell* involved injunctions seeking to overturn decisions as opposed to monetary

189. *Id.*

190. *Id.* at 48.

191. *Id.*

192. *Bain*, 357 N.W.2d at 48.

193. *Id.* at 49-50.

194. *Id.* at 49.

195. *Tilleli*, 120 N.Y.S.2d at 697; *California State Univ, Hayward*, 47 Cal. App. 3d at 533.

196. *Id.*

197. *Shapiro*, 53 N.Y.S.2d at 135; *Waddell*, 285 S.E.2d at 7; *Bain*, 357 N.W.2d at 47.

damages, and *Bain* involved a third party complainant, whose claims, if recognized as legitimate, would open the floodgates of litigation.¹⁹⁸ Finally, the different leagues have the ability to reduce this harm—namely, by instant replay. Instant replay is capable of showing the egregious errors made by officials. With instant replay a viable option, courts may be less likely to allow referees to use the 1945 *Shapiro* escape hatch to avoid liability, subsequently imposing a duty upon officials and thereby recognizing a claim for malpractice.¹⁹⁹ With modern technology, the imposition of a legally recognizable duty available to aid in a quick and accurate resolution of a challenged officiating call is simply less burdensome than it was in 1945.

B. A Sample Case

Both case law and the disposition of courts show a general reluctance to interfere with decisions made by umpires and referees.²⁰⁰ However, judicial notice of the substantial stakes in high school and collegiate athletics, combined with leagues' abstinence and hesitation to fully employ instant replay, could lend support to a cause of action for teams and players harmed by an umpire's negligent call.²⁰¹

Even if cause can be established, injury may have its limitations as well. For instance, assessing lost gate receipts or broadcasting revenues may be dependent upon how the applicable league distributes its revenues. For instance, the Buffalo Bills may have made the play-offs if the referees had not blown calls against them,²⁰² but one could not claim damages for lost broadcasting revenues since the league distributes those revenues evenly among the teams.²⁰³

Baseball, on the other hand, distributes post season revenues in line with a team's success.²⁰⁴ One must also consider the next venue if the erroneous calls had not been made.²⁰⁵ In any event, unlike the cause element, which could pose obstacles to success on a negligence claim, the questions concerning the injury prong do not ask 'if', only 'how much'.

198. *Id.*

199. *Shapiro*, 53 N.Y.S.2d at 135.

200. See *supra* notes 182-199 and accompanying text.

201. See *supra* notes 134-161 and accompanying text.

202. See *supra* notes 55-79 and accompanying text.

203. See SCULLY, *supra* note 134, at 3, 25, 69, 101, 110, 117, 128.

204. Press Release: World Series Shares at [http://www.mlb.com/u/...press release/playoffshares1202.htm](http://www.mlb.com/u/...press_release/playoffshares1202.htm) (last visited Oct. 12, 2000).

205. For instance, even if the Buffalo Sabres could establish that a Game Seven would have occurred but for Hull's illegal goal, Game Seven would have been played in Dallas and Dallas would have been the recipient of those gate receipts. See SCULLY, *supra* note 134, at 25, 69, 116.

Any of the above teams, despite any reductions in direct damages from gate receipts or broadcasting revenues would still have viable complaints for less tangible losses such as losses in opportunity to participate in post-season play, future ticket sales, team value, luxury boxes, memorabilia, parking, licensing fees and even damages for emotional distress.²⁰⁶

Case law certainly suggests that courts faced with this issue are reluctant to intervene.²⁰⁷ Referee errors usually are not the sole source of the team's loss. Direct monetary damages may be limited to less tangible losses based on revenue-sharing rules. On the other hand, these errors, at the very least, cast serious doubt as to the validity of the outcome of certain games—games potentially determinative of teams' advancement in post-season play. Courts have taken judicial notice of the economic effect of these potential losses.²⁰⁸ In addition, the availability of instant replay, which could serve the sports community well in preventing these harms, could actually make courts more likely to intervene in the future since the availability of such a protection could heighten an umpire's duty to officiate accurately.²⁰⁹ The following is an analysis of one of the above-mentioned games in the context of a referee malpractice suit.

1. The Boston Red Sox, et. al. v. Rick Reed and Tim Tschida

The Red Sox could institute an action in tort against umpires Rick Reed and Tim Tschida for negligent calls in Games One and Four citing loss of the series and concomitant lost earnings and team value and emotional distress as the injuries.²¹⁰

a. Duty

The Red Sox could support the existence of a duty in several ways. First, it is the umpire's job to "possess and implement adequate knowledge of the rules and their application."²¹¹ This is merely an ordinary standard of care applied to officials which imposes no extraordinary duty upon them. Second, the policy against preventing the harm is significant, both in terms of upholding the integrity of the game and preventing the potential harm. Third, the harm is, in general, foreseeable, because the obvious ramifications of making an erroneous call are that the team that

206. See *supra* notes 134-140 and accompanying text.

207. See *supra* notes 182-199 and accompanying text

208. See *supra* notes 143-150 and accompanying text

209. Feiner, *supra* note 158, at 228-230.

210. See *supra* notes 118-133 and accompanying text.

211. Feiner, *supra* note 158, at 213, 217.

was supposed to win the game, loses the game, and that game could determine post season eligibility or even a championship victory. Courts have even recognized the harm in losing opportunities based on bad officiating.²¹² Fourth, referees are in a unique position of trust and power that "imposes an obligation to reduce the risk of mistakes that may deprive a team of victory and associated monetary benefits."²¹³ Finally, with the advent of instant replay, the duty is no longer a significant burden on the umpires and leagues. In any event, a duty is established that referees should administer the rules of the game as the league has set forth.

b. Breach

Breach is generally defined as a failure to perform a duty or "failure to exercise that care which a reasonable [person] would exercise under similar circumstances."²¹⁴ Scholars argue that in order for a breach of the above-mentioned standard to have occurred, the referee's conduct must be so far outside of the acceptable range of error that it constitutes gross negligence.²¹⁵ "[L]iability should be limited to situations in which sports officials grossly depart from the necessary standard of officiating, and not to situations which can be deemed minor aberrations."²¹⁶

If a trier of fact were to look at the replays of Chuck Knoblauch's questionable catch at second base in game one and equally disputable tag on Offerman in game four, the conclusion undoubtedly would be that Knoblauch accomplished neither.²¹⁷ In fact, both calls were so incorrect that both Umpires Reed (game one) and Tschida (game four) later admitted that they made the wrong calls.²¹⁸ Boston Red Sox counsel could actually seek a stipulation of undisputed facts on the breach element.

c. Cause

Cause is often a very difficult element to prove – especially cause-in-fact.²¹⁹ Proximate causation may exist because both umpires should have reasonably foreseen that a grossly negligent call in such a high stake series could have led to devastating monetary and emotional losses. Cause-in-

212. See *supra* note 143-150 and accompanying text

213. Feiner, *supra* note 158, at 229.

214. Steven H. Gifis, BARRON'S LAW DICTIONARY, Barron's Educational Services, Inc. (1996).

215. Feiner, *supra* note 158, at 215, 229.

216. *Id.* at 215.

217. See *supra* notes 119-133 and accompanying text.

218. Finley, *supra* note 126, at 71.

219. Feiner, *supra* note 158, at 228-229.

fact, however, would be far more difficult to establish.²²⁰ Even if a cause-in-fact were shown, it “may still be tempered by a judicial determination of ‘proximate cause,’” if the court employs the requirement that the plaintiff show “the relationship between ‘initial conduct and the ultimate harm’ [is not] so far off ‘as to discredit the imposition of liability.’”²²¹ Perhaps the best standard is that “[t]he plaintiff must show that ‘but for’ the error, the loss would not have occurred. Intervening events, and remaining opportunities in the game to score or prevent the opponent from scoring, may preclude such a finding of liability.”²²²

The questionable call in game one of the 1999 American League Championship Series may have effectively denied the Red Sox a chance to take the series lead. The admittedly wrong call by Umpire Reed eliminated a late-inning runner in scoring position for Boston. Had Offerman not been called out,²²³ the Red Sox may have rallied as their strongest hitters were due to bat. The Red Sox could argue that, due to the line-up and posture of the inning, had the correct call been made, their chance of scoring the go ahead run would have increased enormously.

In game four of the same series, the Yankees lead by only a run in the bottom of the eighth inning when Knoblauch failed to apply a tag to a Boston base runner en route to second base.²²⁴ Umpire Tim Tschida wrongly called the runner out – enabling Knoblauch to turn an inning-ending double play instead of leaving a Boston runner on second base with Nomar Garciaparra due to bat.²²⁵ The Red Sox could argue that due to Garciaparra’s batting average and slugging percentage, there was a reasonable probability that the Red Sox could have, at a minimum, tied the game.

These two clearly erroneous calls, falling below the standard required,²²⁶ might have changed the outcome of two games. If the Red Sox had won such games they would have led the series 3-1 after game four, with Cy Young winner Pedro Martinez set to pitch game five. This might have meant a trip to the World Series and possibly a World Series title.

220. *Id.*

221. *Id.* at 229-230.

222. *Id.* at 229.

223. *See supra* note 128 and accompanying text.

224. *See supra* notes 130-133 and accompanying text.

225. *See id.*

226. *See supra* note 164 and accompanying text.

d. Injury

As previously mentioned, there are no cases on point that discuss claims seeking monetary damage. In *Shapiro* and *Waddell*, the plaintiffs only sought injunctive relief, namely overturning the referee's decision, and both were denied.²²⁷ Due to the courts' unwillingness to grant injunctive relief in these cases, contrasted with other courts' rulings indicating an acknowledgment of the financial stakes and harm

involved when an erroneous call is made, this hypothetical claim will seek monetary damages.²²⁸

The primary monetary damages are potential gate receipts from future games. According to the Office of the Commissioner of Major League Baseball, the World Series winners, the New York Yankees, earned \$14,687,589.02 from the players' pool, while the World Series' runners-up, the Atlanta Braves, earned \$9,791,726.01.²²⁹ The Red Sox earned \$4,895,863.01.²³⁰ Therefore, the Red Sox potentially lost \$4,895,863.00 from their failure to advance to the World Series and upwards of \$9,791,726.01 for their failure to win the series.²³¹

The Red Sox suffered other losses as well. First, they lost their percentage of concession revenue for any World Series games played at home.²³² In addition, it has been estimated that every major league baseball game won at home translates into \$1,000,000 in future income from increased ticket sales, etc.²³³ Therefore, at the very least, the loss of game four alone, which was at Boston's Fenway Park, potentially cost the Red Sox \$1,000,000 in future earnings. Finally, if the Red Sox had proceeded further in the play-offs and won the championship, it might have resulted in a higher market value for the franchise itself.²³⁴ The total

227. See *supra* notes 185-91 and accompanying text

228. See *supra* notes 199-202 and accompanying text

229. *Balls and Strikes—Baseball News* (Oct. 31, 1999) at <http://www.sportsbusinessnews.com/oct31.htm>.

230. *Id.* The players' pool was comprised of 60% of gate receipts from the first three games of the division series and 60% of the first four games of the Championship and World Series. *Id.*

231. *Id.* The amount of \$4,895,863.00 represents the difference between what the World Series runner-up earned and the amount the Red Sox earned, and the \$9,791,726.01 represents the difference between what the World Series winner earned and the amount the Red Sox earned.

232. ARAMARK, the company the Red Sox contracts to sell concessions, would not discuss their specific contract with the Red Sox but said the arrangement involved a fixed rate plus a percentage of receipts. One could conclude, therefore however, that even if the Red Sox averaged only \$20 per ticket holder in concessions and the team only received 5% of that, the loss would be in the neighborhood of \$34,000 per home game. Interview by Laura Maslow with Charles Doggett, Aramark, on April 20, 2000.

233. SCULLY, *supra* note 134, at 128.

234. *Id.* at 101.

estimated damages is roughly somewhere between \$5,000,000 and \$11,000,000. This assessment does not include lost income from increased revenue on luxury box sales, memorabilia, licensing fees, or emotional distress.

Indeed, the causation element for referee malpractice, or negligence, discussed both in the specific instance of the Red Sox and in general is both disfavored and extremely difficult to prove. But when will the leagues be more willing to take a proactive and precautionary approach to diminish referee error before it *does* become the direct and sole cause of a team not winning a major championship or other significant sporting event? After all, if the blunders continue unchecked, an erroneous call will inevitably be the sole cause of a team losing the opportunity to advance to the post-season, advance in the post-season, or even to win a championship.

III. CONCLUSION: THE INSTANT REPLAY AND INSURANCE ALTERNATIVE

Clearly, prior case law indicates the courts' hesitance, if not refusal, to intervene in referee's decisions.²³⁵ On the other hand, courts have recognized the substantial losses that can arise from bad officiating.²³⁶ Further, the advent of instant replay offers an alternative to prevent this harm. As previously discussed, instant replay actually gives a strong policy reason in favor of imposing a duty upon referees. Instant replay could also serve as a very powerful evidentiary tool in courts, thereby alleviating the court's policy concern over being the "Monday morning quarterback."²³⁷ Furthermore, courts have not yet ruled on a non third-party action for money damages. There no doubt exist cases in which bad officiating has potentially caused serious monetary damage. Although the seven incidents cited above have some weaknesses, primarily in the area of causation, a future professional league game will inevitably arise where the causation element is as strong as the duty, breach and injury elements. Therefore, a cause of action against an umpire for money damages is very possible in the near future.

Although it may seem as though this article has argued in favor such causes of action, this solution would be quite disheartening. The proper solution is to give instant replay full force and effect. The benefits include

235. See *supra* notes 182-199 and accompanying text.

236. See *supra* notes 144-156 and accompanying text.

237. "Monday morning quarterback" refers to fans who question the actions of their favorite football teams the day after the game is decided. See *MMQB with Favre*, at <http://nfl.com/qbclub/mmqb/index.html> (last visited Nov. 30, 2000) (detailing a radio show featuring Green Bay Packers' quarterback Brett Favre).

a significant reduction of bad officiating, thereby allowing sports contests to be judged on the merits of play rather than officiating foibles.²³⁸ Teams', players' and fans' trust²³⁹ of outcomes would improve, and the amusing, yet embarrassing, thought of Jose Offerman and Chuck Knoblach squaring off in the courtroom instead of the field would be even less likely than it is now. Limiting the use of instant replay to certain situations, while not precluding its use altogether, as was done by NFL this past season,²⁴⁰ is the correct answer.

Commentators have not offered a sound reason not to use instant replay.²⁴¹ They claim that instant replay used for insignificant calls would lead to unnecessary delay and its use would actually impose more burdens on umpires.²⁴² However, are any calls really insignificant? Any seemingly insignificant bad calls, especially in the aggregate, could change the outcome of a game. Second, it would be better for games to be delayed if it eliminated the possibility that Championship titles would be erroneously awarded as a result of a bad call.

Opponents advance even less persuasive arguments. They argue, for instance, that instant replay undercuts referee authority and extracts the human element out of sporting contests, namely the capability of referees to commit errors like the players do, and that implementation of replay tends to judge the referees by "perfection rather than excellence".²⁴³ The professional sports leagues should be far more concerned with crediting their appropriate teams and individual competitors with victory and career success when so deserved than protecting the referee's feelings of power and autonomy. A referee's ability to commit error is well established, but this is not something that should be protected.

Some objectors to the instant replay in the NFL realm protest that

238. See George, *supra* note 22.

239. Brendan I. Koerner, *Next Week in the NFL: Back to the Videotape?* U.S. NEWS AND WORLD REPORT, March 15, 1999, at 56 (indicating some polls reveal that 90% of fans favor the return of instant replay to the N.F.L.) available at <http://www.usnews.com/usnews/issue/990315/15nfl.html> (last visited Oct. 12, 2000).

240. See George, *supra* note 22.

241. Feiner, *supra* note 158, at 230.

242. *Id.*; George, *supra* note 22; Kamp, *supra* note 138, at 269; Lopez, *supra* note 78, at 58. This delay argument comes primarily from the NFL days of replay between 1986 and 1991 when replay officials in the booth would fast forward and rewind tapes in standard video cassette recorders. Kamp, *supra* note 138, at 269. (Kamp refers to an average of one in every four pre-season games wherein replay officials in the booth would fast forward and rewind tapes in standard VCR's). See *id.* Today, the NFL, is actually using much faster equipment, which puts to rest the delay argument. *Id.* Jerry Markbreight, an NFL official for 23 years, explains that replay only increased the length of games by 7-10 minutes during 1986-1991. See Brendan I. Koerner, *Next Week in the NFL: Back to the Videotape?* U.S. NEWS AND WORLD REPORT, March 15, 1999, at 56.

243. George, *supra* note 22; Lopez, *supra* note 78, at 58; Mushnick, *supra* note 82, at 48.

there is too much focus on the referees rather than the players.²⁴⁴ This argument fails because referees are already the focus when the correctness of the call is at issue. Instant replay does very little to change that.

Finally, opponents argue that sport has lasted long enough without replay and that even with replay, disputes will always remain.²⁴⁵ This is hardly a justification for continuing to employ a system with such grave shortfalls. This is the system of unchecked referees prone to make errors at critical times in deciding games in which the stakes are high. It is time to reupholster.

Instant replay should be utilized to prevent the obvious harms that could result from erroneous calls made by officials. In addition, the fact that the technology exists to implement an effective and efficient replay system should heighten the duty on the umpires to make the correct calls. Moreover, the concerns of opponents discussed above simply do not outweigh the importance of making the correct calls and deciding the game on its merits. Recently, Bob Costas²⁴⁶, "regarded as one of sports' most fervent traditionalists," said, "I used to be pretty strongly anti-replay. . . But we need a way to avoid these obvious injustices."²⁴⁷

244. Kamp, *supra* note 138, at 269; *see also* Mushnick, *supra* note 82, at 48.

245. Lopez, *supra* note 78 at 58. Mushnick, *supra* note 82, at 48; Starr, *supra* note 49, at 52.

246. Bob Costas is a sports commentator for the National Broadcasting Company ("NBC"). *See* <http://home.nbc.com/> (last visited Nov. 30, 2000).

247. Starr, *supra* note 49, at 52.