

# **The Liability of Professional Athletes and Team Owners to Spectators**

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## **■ INTRODUCTION**

Professional athletes, as modern day gladiators, are often placed on a pedestal because of their athletic prowess. Yet, they share the common reality that if an individual has suffered injuries due to their actions then that person might sue them. Even though the owners of professional teams did not physically partake in the activities that allegedly caused the harm, they too are faced with the very real possibility of being sued. There is not an over abundance of case law regarding player violence which is directed at spectators (e.g. player-spectator violence). However, an examination of that case law, in combination with cases dealing with player-player violence, has the potential to be quite instructive regarding the liability of the defendant athlete and the team owner to the plaintiff spectator.

## **■ PLAYER LIABILITY**

Professional athletes have typically escaped legal liability for negligence by effectively establishing a defense based on assumption of risk on the part of the defendant spectator. Frequently the courts have established that by attending a professional sporting event (e.g., football, basketball, baseball, golf, wrestling, or a rodeo), spectators assume the risks inherent in that particular activity if they know of the risk (or should have known of) and voluntarily assume it (Carroll, 1988; Champion, 1991; Logan, 1990). Examples of such risks might be a foul ball, a player running out of bounds, or a bronco rider being thrown from the back of a steed (*Creel v. Washington*, 1987; *Ratcliff v. San Diego Baseball Club*, 1938). However, when the action taken by the player is beyond that behavior which is acceptable as an "inherent part of the game", the courts have demonstrated a tendency to decide in favor of the plaintiff spectator (*McFatriage v. Harlem Globetrotters*, 1961; *Manning v. Grimsley*, 1981; *Ramsey v. Kallio*, 1952; *Wiersma v. Long Beach*, 1940). Even though it is difficult to establish the level/degree of intent on the part of the athlete and the degree of consent by the spectator, those two factors are both vital considerations in these types of cases.

Existing case law involving player-spectator violence does not do a very effective job of clarifying the legal parameters regarding player intent. Thus, the legal standards found in the cases involving player-to-player violence have the potential to be instructive because of the similarities in the venue and the nature of the activity. In general, cases involving player-player violence tend to find for the defendant player unless the plaintiff is able to establish 'reckless disregard' on the part of the accused. Reckless disregard exists when a player knows that an act is harmful and intends to commit the act but does not intend, by acting, to harm the opposing player. Several cases involving player-player violence in a recreational setting have been decided on the basis of whether or not the action in question was: 1) 'part of the game'; and, 2) whether or not they intended to harm the plaintiff (i.e., acted in reckless disregard for the safety of that individual) (*Bourque v. Duplechin*, 1976; *Dotzler v. Tuttle*, 1990; *Ginsberg v. Hontas*, 1989); *Gauvin v. Clark*, 1989; *Kabella v. Bouschelle*, 1983; *Nabozny v. Barnhill*, 1975; *Oswald v. Township High School*, 1980; *Ross v. Closer*, 1982). *Nabozny v. Barnhill* (1975) was particularly informative regarding the clarification of the importance of intent in player-to-player violence cases. In ruling, the court established a "middle approach" regarding reckless disregard. In other words, the court established that in order for the plaintiff's claim to be valid they must show that the defendant player acted in reckless disregard for the plaintiff's safety.

In the aforementioned cases, the intent of the defendant was the focus of plaintiff's efforts while assumption of risk was the defense most frequently offered by the player. However, when a player enters the stands or a spectator moves out on to the court/field, the possible defenses for the defendant player go beyond the standard assumption of risk since the cause of action is most frequently an intentional tort (i.e., assault and battery). In several of those cases where the player and spectator were no longer restricted to the playing surface and the stand respectively, the players have attempted to establish that the spectators consented to their action because they were heckling the player (*Guttenplan v. Boston Hockey Assoc.*, 1981; *Manning v. Grimsley*, 1981; *Ramsey v. Kallio*, 1952; *Wiersma v. Long Beach*, 1940). Though spectators might heckle professional athletes and consent to being heckled in return it is indeed doubtful that they consent to having a ball or a fist thrown at them. This type of reasoning borrows from the criminal law concept of excessive force which holds that by acting against another person, an individual consents to having an equal or lesser amount of "force" used in return against his or her person. However, spectators do not consent to an amount of force which is in excess of that which they utilized.

Aside from the consent inferred from a defense of assumption of risk, the player can also claim self-defense if a spectator storms onto the field and attacks him or her. Conversely, the spectators can claim that their action was the result of attempting to defend themselves from a player that charges into the stands. Any effort to establish intent and/or consent regarding actionable behavior is obviously more easily defined if there is a physical separation of the players on the playing surface and the spectators in the stands. In those situations where the physical separation between the spectators and the players breaks down, and it results in an altercation, a third possible defense is available to both parties. The defendant, which is most

often the player, could claim that the harm was the result of mutual combat. If such a defense was accepted by the court, the plaintiff would be barred from recovery since both sides consented by being involved in a battery. No recovery would be allowed because a wrongdoer cannot be rewarded for his/her actions.

## ■ OWNER LIABILITY

Any discussion of owner liability must acknowledge the fact that two particular cases, which actually dealt with player-player violence, have permanently altered the concept of the legal responsibility of team owners (Bluver, 1981). *Hackbart v. Cincinnati Bengals* (1979) and *Tomjanovich v. California Sport, Inc.* (1979) have established that team owners are no longer immune from suits involving the actions of one of their players against a spectator (Stephenson, 1990). Of those two, the *Hackbart* case is probably cited more frequently; however, both of those cases utilized respondeat superior as the cause of action. The other main cause of action relative to owner liability is negligent hiring and supervision. The establishment of these two primary causes of action appear to be highly relevant/applicable in player-spectator cases (*Atlanta Baseball v. Lawrence*, 1928; *McFatridge v. Harlem Globetrotters*, 1961; *Ramsey v. Kallio*, 1952; *Wiersma v. Long Beach*, 1940).

According to the doctrine of respondeat superior, the owner can be held vicariously liable if the tort was committed within the scope of the player's employment and/or there was a master-servant relationship between the owner and the defendant athlete. Regarding the scope of the players employment, the courts (Restatement 2d of Agency §216 {1958} ) adhere to one of following four basic standards:

- 1) Was the conduct in question what the athlete was hired for?
- 2) Did the conduct occur within the authorized space and time limits?
- 3) Was the athlete motivated by a desire to further the owner's business?
- 4) Was the force used by the player expected/foreseeable by the owner?

The key consideration regarding player-spectator cases appears to be the question of whether or not the owner should have been able to reasonably expect/foresee the force that the player used against the spectator.

The key test for the other primary component of respondeat superior, the existence of a master-servant relationship, focuses on the degree of control that the owner has over the athlete in the course of employment. It is critical to note that at this point in time the courts have not yet clearly defined the parameters regarding the degree of control. However, three factors are commonly utilized in deciding whether a master-servant relationship exists. The factors that are considered are: the owner's control over the details of the athletes work; the manner in which the player is paid; and, the issue of whether or not the owner can terminate the employee at will. A compelling argument can be made for the point that the contractual relationship between a team owner and a professional athlete illustrates a significant amount of control by the owner. In addition a contract addresses the issues of how the athlete is paid and whether or not they can be released at the owner's discretion.

The other primary cause of action regarding owner liability is negligent hiring

and supervision. The courts have established that an employer (i.e., owner) has two primary duties to a third party (i.e., spectator). First, the owner has the responsibility to make a minimal investigation of a prospective employee's background. In terms of a professional athlete, that might mean investigating whether or not the athlete has a history of being vicious and/or violent (*Tomjanovich v. California Sports Inc.*, 1979). Second, once an individual is hired the employer needs to instruct the employee to refrain from activities which might result in harm to a third party. For owners of professional teams, this means that they need to be able to show that by utilizing team fines, suspensions, and written warnings/reprimands they have made real efforts to effectively instruct their players that certain kinds of behavior will not be accepted and/or tolerated. Relative to the effectiveness of negligent hiring and supervision as a cause of action, the plaintiff spectator must be able to show that the player had previously attacked a spectator in order to establish that the owner did, in fact, have notice. In a variety of cases dealing with owner liability in a sport setting (*Atlanta Baseball v. Lawrence*, 1928; *Creel v. Washington Parish Fair Ass'n.*, 1987; *Ramsey v. Kallio*, 1952; *Wiersma v. Long Beach*, 1940), the courts have relied on the case law involving owners and operators of places of amusement. In those cases the courts have established that owners and operators are only responsible for guarding against hazards that are reasonably expected. Thus, if a player had never before attacked a spectator and/or such confrontations were not a common occurrence in that sport, the owner could make a powerful argument that such an attack was not reasonably expected.

The two primary causes of action available to the plaintiff spectator, respondeat superior and negligent hiring and supervision, have not been consistently applied by the courts in cases involving professional team owners or owners/operators of places of amusement. Sanders (1986) made a compelling argument that until the courts establish more consistent standards then there will continue to be at least two alternatives for addressing the issue of owner liability. A court could decide in favor of the defendant owner since an assault on a spectator was in all probability not authorized by the owner, especially since it goes against the public relations concerns of the organization. In addition, the assault was not in any way connected to the purpose for which the athlete was hired. In other words it was totally outside of the scope of employment as illustrated by the fact that sport specific athletic abilities were the foundation for the athlete's contractual agreement.

On the other hand, the owner could be found to be liable if the court's decision was predicated on affirmative answers to two key questions. One, could the owner have reasonably expected such conduct on the part of the athlete? Secondly, was there an intention on the part of the athlete to serve the owner? "Yes" is a very plausible answer to both of these questions. For example, retaliation by a player who has been unnerved by a heckler is or should be expected. Furthermore, the prevalence in professional sports of the "win at all costs" philosophy, the emphasis on physical intimidation, and the importance placed on being aggressive are all examples of how a professional athlete works to "serve the master" (Sanders, 1986).

## ■ CONCLUSION

The case law regarding actionable behavior between professional athletes and spectators is limited in volume and scope. However, in conjunction with the case law regarding player-player violence it provides valuable insight into the legal responsibility of professional athletes and team owners to the plaintiff spectator. Generally, spectators assume only the ordinary and inherent risks of attending a sporting event and do not assume the risks of unreasonable conduct on the part of the player. In turn, the tendency of the courts is to find professional athletes to be liable for their actions that fall outside of the "inherent part of the game" and for actions which demonstrate a "reckless disregard" for the safety of the spectator. The findings of the court in several cases (*Bourque v. Duplechin*, 1976; *Gauvin v. Clark*, 1989; *Ross v. Closer*, 1982) suggest that the courts are willing to hold the athlete responsible for behavior which is not an accepted part of the game and/or directly disregards the safety of the spectator. Owners are rightfully not liable for every action of their athlete/employee, but they do need to protect the spectator against the foreseeable/expected actions of their players. This can be accomplished by checking the backgrounds and personal histories of individual athletes prior to hiring them, and by establishing and consistently enforcing policies which deter such behavior.

By utilizing their collective wisdom and creativity to develop effective deterrents, owners possess the unique ability to establish potent sanctions. As a result, owners could effectively limit their liability for harm caused to a spectator by one of their players. At the same time, professional athletes will be forced to increase their sensitivity and awareness regarding what types of behavior are not acceptable when they are directed toward spectators.

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