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Professional Player-on-Player Violence: Another Plaintiff Failure in Redress by the McKichan Court

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The judge has dispensed substantial forethought to this case. His face registers a grim look on his face as he begins to divulge his decision. "Reasonable men might argue that the physical punishment you incurred represents an inherent part and/or risk of the game. Whereas, others might claim that the pain and injury inflicted upon you surface outside the boundaries of an already violent game. However, your employers equipped you with the foremost quality of protective equipment, designed to absorb a great amount of force. In addition, your coaches conditioned you so that your body was able to cushion additional energy. You, sir, a professional athlete, represent a highly compensated member of society. Your contract per year calls for more money than many people earn in a lifetime. Sir, here you appear before this court, seeking damages against another player for striking you. I am confident that you have probably struck someone before. After all, your game appears so violent. I must say that an athlete grossing $5 million a year does not need to seek damages for a smack in the face. The scar on your face will no doubt blend in with the scars you have already received playing the game. The teeth that you have lost will fit in with the three other teeth you have lost playing the game. Your salary compensates for the fear that you feel when taking the ice. You must have expected to be hit before you even took the ice. You assumed the risk of injury from an opponent who broke the safety rules. Verdict for the defendant. Good luck".

One of the most disturbing trends in American sport rests with the increasing frequency and severity of violence attributed to player-on-player violence. Walker and McCaw (1998) reported that many authorities in the field of violence prevention believe that the increasing acceptance of violence in sports creates a cultural climate that "spills over" and translates into greater violence in society. Daugherty, Auxter, Goldberger, & Heinzman, (1994) claimed that athletes appear naturally reluctant to sue other athletes and that they are willing to accept many violently induced injuries as the "breaks of the game." This internalization tends to suppress the number of player-on-player claims, making a consistent body of case law slow in developing. However, noted above, sport injuries find their way into the legal system. A recent court finding (McKichan v. St. Louis Hockey Club) has raised the liability standard so high in professional sports making future recovery seem remote.

Competitive sports pose an interesting problem for the legal system. Society, on the one hand, expects players to exude a high level of energy and effort into their performances to overcome their opponent within the rules. Then again, society expects players to participate under control. The rise in sport violence does not suggest however, that participants and spectators no longer appear as moral pillars of our sport communities.

Writers have chronicled considerable player-on-player violence in sport settings

(Carroll, Winter, 1983; Holfeld, 1975; Spevacek, 1979; Turro, 1980; van der Smissen, 1990; and Zupanec, 1988). Recently, Grazis (1998) annotated an exhaustive number of cases that discussed the circumstances under which a civil court held a participant in team competition liable to another participant for injuries or death incurred during the course of the action. Earlier, Weiler and Roberts (1993) reported that those seeking redress in state appellate courts on the theories of negligence, intentional torts, willful and wanton misconduct, recklessness, and gross negligence has increased in the last quarter century. Mulrooney (1997) verified that violent scenarios appear equally distributed in recreational, amateur, or professional sport categories. In fact, Conn (1999) identified 47 cases since 1927 that addressed the standard of unintentional and intentional torts. Twenty-two, nearly 50% of the cases were reported in the 1990's. Keep in mind that petitioners settle countless cases out of court through unchallenged dismissals and some incidences go unreported. Perhaps player-on-player violence ranks far more prevalent than reported. The general purpose of this paper is two-fold. The initial intent attempts to review the liability standards and findings of selected appellate cases of player-on-player violence in traditional United States sport settings. The final objective is confined to comparing, contrasting, and commenting on the recent judgment in McKichan v. St. Louis Hockey Club.

Appellate Findings

A careful analysis of legal holdings in traditional professional, amateur, and informal team sport settings establishes appropriate background for predicting future findings. Averill and Hackbart, represent findings in professional contact sports of baseball and football. Whereas, Gauvin, Nabozny, Savino, Niemezyk, Rourque, Ross, Martin, Jaworski, Greer, and Oswald typifies adjudication in contact amateur sports.

Averill v. Luttrell

Lyle Luttrell, a minor league baseball player with the Chattanooga Lookouts, took three pitches inside and was hit by pitcher Gerry Lane with the next pitch. Luttrell then threw the bat toward the pitching mound in disgust. Earl Averill Jr., the catcher with the Nashville Vols, without warning stepped up behind Luttrell and punched him in the head. The blow fractured his jaw and rendered him unconscious. The plaintiff obtained a $5,000 jury verdict against Averill and the Nashville Vols. The Vols organization appealed the decision of the lower court.

The appellate court held that Averill's assault represented a willful act, independent of the baseball club, entirely outside the scope of his professional duties as a player nor in advancement of employer's business. Also, the court failed to find the Nashville Vols liable to Luttrell under the doctrine of respondeat superior. Consequently, the court reversed the judgment against the Nashville Vols, and dismissed the suit at plaintiffs costs. All three judges concurred.

Hackbart v. Cincinnati Bengals

Dale Hackbart, a free safety for the Denver Broncos attempted to block Charles Clark (defendant), the Bengals fullback following a pass interception. Hackbart fell to the ground and knelt on one knee. Acting out of frustration, Clark delivered a forearm blow to the back of the Hackbart's head. However, Hackbart continued to play. Two weeks later, the Broncos released him from the team. Later, Hackbart sued Clark and the Cincinnati Bengals. The District Court for the State of Colorado found judgments for the defendants. The court viewed the action of Clark, the rookie fullback in striking Hackbard out of anger and frustration, as an instance of excessive violence typical of the style of play anticipated in professional football. The court failed to find Clark liable to Hackbart for injury arising from the incident. In addition, the court held that the Cincinnati Bengals, the employer of Clark, was not liable under doctrine of respondeat superior. The court went on to say that Hackbart assumed the risk of that injury and subsequently could not recover on a theory of reckless misconduct or negligence.

Hackbart then appealed the decision of the lower court to the U.S. Court of Appeals 10th Circuit. The Appellate Court concluded that the trial court did not limit the case to a trial of evidence bearing on defendant's liability. The Court resolved that as a matter of social policy, the game was so violent and unlawful, that lines

could not be drawn. The Court observed that this issue was not a proper determination and that Hackbart was entitled to have the case tried on an assessment of his rights and whether they had been violated. In sum, the Appellate court reversed the judgment for the Cincinnati Bengals applying the "recklessness" standard.

Gauvin v. Clark

Robert Gauvin, a center for Worcester State College hockey team was involved in a face-off with Richard Clark of Nichols College. Both players vied for possession of the puck with Clark controlling the face-off. As the puck floated toward the Nichols College goal, Gauvin felt a stick in the stomach. Clark allegedly "butt-ended" Gauvin with his hockey stick. Physicians hospitalized Gauvin where he underwent surgery to remove his spleen. He missed seven weeks of college and suffered from bladder and abdominal pain. The Superior Court entered judgment for Clark. Gauvin appealed the decision to the Supreme Judicial Court of Massachusetts. The Court held that Clark's actions were not willful, wanton or reckless, even though they violated safety. The Court found that a violation of a safety rule alone, without reckless disregard of safety, remained insufficient to support a cause in negligence.

Nabozny v.Barnhill

David Barnhill kicked Julian Nabozny, a high school soccer goalie, in the head in a non-contact zone. The facts denote that Nabozny kneeled down on his left knee, caught a pass and pulled the ball into his chest. Barnhill, the defendant, continued running toward the ball and kicked Nabozny in the head upon catching the ball. The kick to the head of Nabozny caused serious head injuries. Nabozny sued for compensation. The lower court held for Nabozny that the actions of Barnhill appeared deliberate, willful or with a reckless disregard for the safety of the other player. The 1975 judicial finding, nearly 25 years ago, represented a new finding... "in order to control a new field of personal injury litigation" (p. 261). Thus, the court failed to apply the ordinary standard of care. The Court deemed the conduct of Barnhill deliberate, willful, and with a reckless disregard for the safety of Nabozny.

Savino v. Robertson

Scott Robertson shot a puck that missed the goal and hit John Savino in the eye causing an 80% vision lost in the eye. Savino filed a negligence action suit against Robertson claiming the defendant failed to warn plaintiff that he was going to shoot the puck toward the plaintiff and failed to wait until a goalie was present before shooting the puck. He also argued that the defendant failed to warn others that he was shooting the puck and failed to follow the custom and practice of the Northbrook Men's Summer League that required the presence of a goalie at the net before shooting. Finally, the plaintiff contended that the defendant failed to keep an adequate lookout. The trial court granted summary judgment to the defendant. The plaintiff appealed the following issues for consideration: (a) whether a plaintiff must plead and prove willful and wanton conduct in order to recover for injuries incurred during athletic competition; and (b) whether there was a genuine issue of material fact as to whether defendant's conduct was willful and wanton in injuring plaintiff The plaintiffs argued that this case differed from Nabozny in that this injury occurred during "warm-up" as opposed to actual game commencement. Plaintiffs then claimed that the standard of willful and wanton should not be the standard of measure but simple negligence. The Appellate court affirmed the decision of the lower court stating that "warm-up" was illusory.

Niemczyk v. Burleson

Virginia Niemezyk, a baserunner and plaintiff, was injured while participating in a softball game. While attempting to advance from first base to second base, Sue Burleson, the shortstop and defendant, ran across the infield and collided with the Niemezyk in the base path. The Niemczyk claim was fixed in ordinary negligence. She made no assertion of intentional misconduct on the part of the defendant. The findings of the trial court agreed with the response of Burleson, that the petition failed to state a claim upon which relief can be granted. Niemczyk then petitioned the Missouri Court of Appeals. In a majority decision, with Judge Billings dissenting and filing an opinion, held that the petition sufficiently stated a claim on which

relief could be granted on theory of negligence. In sum, the appeals court reversed the finding of the trial court and remanded to the lower court with directions.

Bourgue v. Duplechin

Jerome Bourque, the plaintiff, was playing softball for Boo Boo's Lounge. Bourque, well out of the baseline, had already thrown the ball toward first when Adrien Duplechin, the defendant, ran into him full speed at second base attempting to break up a double play. Duplechin failed to slide. As Duplechin ran into Bourque, he brought his left arm up under Bourque's chin breaking his jaw. The umpire evicted Duplechin from the game. The trial court rendered judgment in favor of the plaintiff against both Duplechin and the Allstate Insurance Company. Both defendants claimed the trial court erred in not finding that Bourque assumed the risk of the injury and that the plaintiff contributed to the negligence. The Court of Appeals held that the defendant, Duplechin, breached his duty to play softball in an ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. In addition, the court held that Bourque did not assume the risk of Duplechin going out of his way to collide with him at full speed when the plaintiff was five feet away from base. Finally, the court found no evidence of contributory negligence.

Ross v. Clouser

During a slow pitch church league softball game, Stephen Clouser, the defendant, collided with James Ross the third baseman (plaintiff) attempting to go from first to third on a hit to short centerfield. On the play Ross severely injured his left knee. Both sides dispute the account of the events. Ross amended the first petition of ordinary negligence by alleging that Clouser "carelessly, negligently, and recklessly" dove into him. The Circuit Court held for the defendant that the Ross had assumed the risk of the collision. Ross then appealed and the Supreme Court granted a decision on the amended petition. A majority decision from the Court held that: (1) where the plaintiff plead recklessness and it was reasonably arguable that he made the case submissible under that allegation, but the case was mistakenly submitted, and the jury found only on issue of negligence, cause would be remanded for retrial under theory of recklessness, and (2) trial court erred in stating that plaintiff assumed risk (p. 12). Therefore, to recover on personal injury in athletic competition, the legal theory must utilize the higher standard of negligence, most notably recklessness. Under Missouri law, the defendant is liable for a plaintiffs injury sustained during athletic competition only if the defendant acts recklessly (Ross, p. 14).

A plaintiff is barred from recovery when either expressly or impliedly, the plaintiff had voluntarily accepted the danger of a known and appreciated risk and intelligently acquiesced in it.

Martin v. Buzan

Mary Martin, a catcher on her co-ed softball team, broke her left ankle in several places after being run into by Keith Buzan (defendant), a base runner at home plate. Martin alleged that Buzan acted in reckless disregard for her safety during the game. The Martin and Buzan provided conflicting accounts of the collision. A lower court jury verdict found for Buzan, the baserunner. Martin then appealed the decision of the lower court to the Circuit Court of St. Louis. The appellate court unanimously found for the defendant. The Court indicated that the assumption of risk doctrine served as an affirmative defense to the charge of reckless conduct during athletic competition. In addition, Buzan was liable for Martin's (plaintiff) injuries sustained during athletic competition only if he acted recklessly. The court concluded that Buzan was entitled to the instruction that risk of collision at home plate during the softball game was inherent and that the injured catcher assumed risk of collision with baserunner at home plate.

Jaworski v. Kiernan

Cynthia Jawarski brought action against Harry Kiernan to recover for injuries sustained when Kiernan came in contact with her during the course of play in an adult coed soccer game. The recreation department of South Windsor, Connecticut sponsored the game. Kiernan collided with Jawarski while she was shielding the soccer ball from the opposition so that the goalie on her team could retrieve the ball. Jawarski suf-

fered an injury to her left anterior cruciate ligament, that caused a 15 percent permanent partial disability of her left knee. The trial court found Kiernan negligent and awarded Jawarski $20,910, the exact amount of her medical bills. The defendant appealed to the state Supreme Court. The state Supreme Court held that Kiernan owed Jawarski a duty to refrain from reckless or intentional conduct, with proof of mere negligence insufficient to create liability. In addition, Kiernan owed Jawarski a duty to refrain from such conduct even though his actions, which led to injury, violated league rules.

The court admitted that they appreciate the strain between promoting vigorous athletic competition on the one hand and protecting the participates on the other. As have most jurisdictions, we conclude that this balance is best consummated by permitting a participant in an athletic contest to initiate a lawsuit against another player only for reckless or intentional conduct and not for merely negligent conduct. We are persuaded that a recklessness standard will fittingly harbor participants in athletic contests by furnishing them a right of action against those who occasion injuries not inherent in the particular contest in which the participants are matched. In other words, we believe that the reckless or intentional conduct standard of care will sustain civility and relative safety in team sports without moistening the competitive spirit of the participants. Public policy arguments: (1) promoting lively competition and participation; and (2) avoiding a surge of lawsuits.

Greer v. Davis

Kenneth Greer, a softball player, attempted to tag Martin Davis at home plate. Greer alleged that Davis lowered his head and shoulders and recklessly and intentionally collided with him instead of attempting to slide into home plate or step aside to avoid the tag. Greer claimed to have suffered physical and emotional injuries. The lower court granted Davis summary judgment because (1) Greer was a voluntary participant in a contact sport; (2) the defendant did not act intentionally or recklessly; and (3) Greer assumed the risk of the collision. Greer petitioned the Texas Court of Appeals. The court of appeals held that: (1) the material issue of facts remained as to whether the collision between base runner and tagging player was accidental, or the result of the base runner's intentional or reckless conduct, and (2) assumption of risk defense did not bar the assault claim of the tagging player. The judges reversed the judgment of the trial court and remanded the case for a trial on the material facts of the case.

Oswald v. Township High School District No. 214

John Oswald alleged that he was injured when Michael Hannon kicked him while playing basketball in a required high school gym class. In count III, Oswald alleged that at the time of the occurrence, the National Federation of State High School Association rules governing the protection and safety of participants in basketball games were in effect. First, Oswald contended that Hannon knew or should have known of these rules. Next, Oswald argued that Hannon owed a duty to play the game in accordance with those rules and to exercise care to avoid causing injury to other participants. Finally, Oswald claimed that Hannon's failure to comply with those rules and failure to conduct himself in a manner consistent with the rules approximated his cause of injury. The trial court granted a motion in favor of the defendants that the plaintiff failed to state a cause of action, and Oswald appealed. The Appellate Court decided that liability for injuries sustained as a result of the breach of a safety rule in a physical education class basketball game may not be predicated upon ordinary negligence, as the plaintiff argued. To recover, the conduct must be predicated on willful and wanton misconduct. The Appellate Court affirmed the finding of the trial court.

Recent Case

In a recent case, McKichan v. St. Louis Hockey Club, the Missouri Court of Appeals Eastern District reached a similar decision. In McKichan, the plaintiff, a goalie, sustained injuries in the 3rd period of action. During the that period, a player shot a hockey puck in the direction of McKichan, the goalie. The puck traveled over the goal and over the plexiglass, out of play. The linesman blew his whistle stopping play. As McKichan began to move away from the goal,

Tony Twist, the defendant started skating from near the blue line toward the MeKichan. Tony Twist smashed the plaintiff with his body and hockey stick rendering the plaintiff unconscious. The officials assessed Twist with a "match penalty" and a subsequent ejection from the game. The league reviewed the incident and later suspended Twist for additional games. McKichan filed a civil suit against Twist and the St. Louis Hockey Club. Twist counterclaimed McKichan. Both parties dismissed the claims against each other three weeks later leaving the St. Louis Hockey Club as the sole defendant in the lower court. The lower court found the hockey club culpable for the injury on the theory of vicarious liability. The court awarded a jury verdict of $175,000 compensation to MeKichan. The defendant, St. Louis Hockey Club, appealed the verdict.

The court pointed out that they utilized a number of relevant factors in weighing their decision. The court considered the specific game involved, the ages and physical attributes of the participants, their respective skills at the game and their knowledge of its rules and customs. The court also contemplated their status as amateurs or professionals, the type of risks which inhere to the game and those which are outside the realm of reasonable anticipation. Finally, they pondered the presence or absence of protective uniforms or equipment, the degree of zest with which the game is being played, and other factors.

Missouri courts, replete of precedent setting cases involving professional contact sport law, relied upon Missouri and Illinois amateur contact sport law for direction. A majority finding of the court of appeals granted a verdict for the defendant, reversing the action of the lower court. Judge Gaertner dissented and failed to scribe his dissent. Writing for the majority, Judge Grimm concluded that contact between/among players remains an inherent risk in professional hockey. Specifically, body checking during and after the referee's whistle represents an inherent risk assumed by the players. He claims that hockey players reasonably anticipate severe body checking. To prepare for such contact, players wear pads, helmets, and other protective gear.

Judge Grimm begun the reasoning of the court by delimiting the level of play and then described the action of the players in a professional hockey contest. The participants were engaged in a professional hockey game, not an amateur, pickup, school, or college game. The judge pronounced that rough play appears commonplace and that violent behavior pervades throughout a professional hockey game. He pointed out that an observer could quickly recognize that players frequently collide with each other (body checking) attempting to gain possession of the puck or to impede the progress of opponents. On a regular basis the participants fight and/or strike each other with sticks. Judge Grimm also pointed out that many of those activities continue beyond the whistle or multiple whistles of the officials. Finally, the court mentions that the players are equipped with pads, helmets and other protective paraphernalia.

Then the court alludes to the financial condition, physical condition, and skill level of the professional hockey players. Judge Grimm described the professional hockey player as financially compensated, well conditioned, and plays professional hockey at a high level of skill. He then pointed out that the players know the rules and customs of professional hockey to include the violence of the sport. The court further declared that they play the game with great intensity because they can reap substantial financial rewards. The court closed its description of the professional hockey player and its game by recognizing that the professional leagues utilize internal mechanisms for penalizing players and teams that violate league rules and for compensating injured persons.

In light of the foregoing delimitation of the sporting context and the description of the professional hockey player, the court reasoned that the specific conduct at issue in the case, a severe body check, symbolized a part of professional hockey. The court concluded their reasoning by claiming that severe body checking several seconds after repeated whistles by the officials represented a reasonable act for the participants to assume, as "part of the game." As such, the court held as a matter of law that the specific conduct that occurred was not ac-

tionable, reversing the decision of the trial court.

Comparison, Contrasts and Commentary

Comparison and Contrast

Having provided a brief on the current state of affairs of team sport player-on-player litigation, and making a special notation of the recent finding of McKichan, warrants further integration with earlier decisions and a final commentary. The McKichan decision adds to the trend of civil courts denying professional players access to compensation and punitive damages. Champion (1993) would find that decision of no consequence since he claimed that "There is no question that some degree of violence is a part of sports.., especially true in contact sports like football and hockey (p. 193)." The how much violence is a professional athlete expected to incur? The question now before us emanates from van der Smissen (1990):

> When does reckless disregard for the safety of others or the deliberate, willful and reckless violation of rules become civil assault and battery? Does or can the injured player consent to such conduct of another because it is" commonly done" among players? There is the defense of player consent, but to what degree can the injured consent? (p. 61).

How long after an official whistles a play dead does a professional player consent to an intended violent act of another professional without compensation for injury? These questions raise discussion.

Defendants have successfully utilized a number of common defensive strategies. Defendants in recreational, high school, and professional sport have employed the doctrine of assumption of risk (Babych v. McRae), doctrine of consent (People, State of NY v. Freer), and contributory negligence (Kabella v. Bouschelle) as primary means for fortifying a player-on-player defense. Also, the failing of a plaintiff to adequately show that the defendant's conduct represented willful, wanton and a reckless disregard for the safety of another player, as opposed to an ordinary negligence standard, offers one more successful defense strategy (Gauvin v. Clark). The jury verdict in McKichan shadowed Nabozny (Illinois law). The lower court found that the willful and wanton violation of a safety rule that proximately caused an injury to another player in turn violated the standard of care of a professional hockey player owes another player.

However, when the Appellate court in McKichan stated that they used Illinois amateur sport law for guidance, they failed to consider that the 1975 Illinois appellate finding that Barnhill's conduct was deliberate, willful, and recklessly disregarded the safety of the plaintiff. The recent finding in McKichan (a professional sport context) failed to support Illinois amateur sport law. In fact, the holding supported a majority of other appellate court findings requiring a higher standard than ordinary negligence (Averill; Gauvin; Greer; Hackbart; Jaworski; Martin; Oswald; Ross; and Savino). Commentary

The final commentary attempts to wade through the reasoning of the McKichan court. The court alluded to the following attributes during judgment: (a) physical attributes; (b) cognitive attributes ; (c) financial attributes; (d) equipment attributes; (e) social attributes; and (f) control attributes.

Physical attributes. The McKichan court considered many personal attributes of the participants. The court dwelled on the condition (presumed physical condition) of the participants, their level of skill and implied that a professional player knows, understands, and appreciates the risks of a player breaking the rules (inherent parts of the game). The finding also implies that a professional hockey player consents intentional misconduct after an official blows the whistle at least two times to stop the action. Whereas, in Nabozny, the appellate court held that the defendant did not assume that the plaintiff knew, understood, and appreciated those risks.

Unfortunately, unreasonable harm in everyday life fails as the standard on the professional athletic field. The McKichan review pointed out that an established standard of liability in professional sport cases failed to exist in Missouri case law or statutes. By the court's own account, they reviewed Ross (recreational softball), Pfister (informal can kicking), Averill (professional base-

ball) and Hackbart (professional football). If the participant's level of competition raised a level of concern for review by the court, then one must question Ross and Pfister. Perhaps an extended review of Gauvin (collegiate hockey — lower court verdict for defense, district court reversed, and supreme court affirmed — recklessness standard), Griggas (recreational basketball — lower court verdict for plaintiff, appeals court affirmed — intentional misconduct standard), and Babych (professional hockey — lower court verdict for plaintiff, appeals court affirmed — ordinary negligence standard) may have changed the thinking. However, the McKichan holding tends to mirror Vaz (1979) when described that the illegitimate conduct of hooking, clutching, elbowing and grabbing as commonplace in some sports and suggests that these acts somehow reflect an inherent part of the game. If the player's conduct resides within the bounds of what one would reasonably foresee as a hazard of the game, the violent act appears authorized. It is hard to assume that Judge Grimm acted as an impartial facilitator of justice in a value-free ideological setting when the finding clearly protected the sanctity of hockey and added precedent to professional sports. McKichan has moved injured professional athletes further from enjoying the protection of the Constitutional right to redress in the event of having been wronged or injured.

Cognitive attributes. Considering the participants knowledge of rules and customs appears as a reasonable part of the criteria. However, the reasoning of the court baffles me. It would appear that the more knowledgeable that a hockey player is of the rules would yield a greater responsibility to abide by them. Sort of analogous of "ignorance is not excuse for violation of the law". If the professional hockey player knowingly violates a rule that is designed to protect another player, then that exercise suggests a clear intent to injury another. Customs, I am not sure if players who possess an abundance of knowledge about customs would desire to add to the customs of activities that would remain unlawful in a civilized society. Granted players have a responsibility to behave in a civilized manner but the courts also have a responsibility to control uncivilized behavior so as to protect the life, liberty, and pursuit of happiness guaranteed by the Constitution. The Mauer court stated that a participant does not assume risks that are unreasonably increased. Perhaps the court construe that a violation of a hockey rule that leads to severe injury in a professional sport represents a reasonable risk for which the participants voluntarily consent.

Financial attributes. The financial compensation that the owners afford the participant to perform on the ice represented another criteria for deciding the case. If owners of teams financially compensate the employees (players) then that somehow signals that a player consents to unreasonable risks of harm delivered by another participant. In addition, the finding of the court leaves one with the thought that the financial compensation to a player relates to the type of actions that are inherent in sport. The logical question "How much compensation does an owner provide a player to trigger consent"? When does a risk become unreasonable? This court clearly suggests that a well compensated professional player remains a lawful target for intentional injury or abuse by another professional player

Equipment attributes. This court clearly suggested that a well compensated professional player that wears protective equipment, remained a lawful target for injury or abuse by another professional player. The court reasoned that the intended purpose of the protective equipment served to insulate each participant from injury, albeit intentionally or unintentionally caused by the other participants violating a rule rather then protecting participants against foreseeable injuries inherent in the sport. As stated previously, the McKichan court discussed the findings in the Ross court while arriving at their decision. Perhaps the driving force in the McKichan decision remain nested in the dissenting view of Judge Welliver:

> That holding *(trial court erred in stating that plaintiff assumed risk)* will do nothing more than open the door to needless litigation. This case should be reversed and remanded for a new trial with proper instruction of the jury as to the intentional torts, consent

and assumption of risk. The question of recklessness, not present in this case and unnecessary to the decision, should be reversed for another day." (Ross p. 15-16)

Should not participants in sport, who are preyed upon and intentionally injured by another participant, have access to the courts for redress?

Social attributes. In contrast, the lone voice supporting a violation of a Constitutionally protected right, as appeased to a decision based on social policy rest with Nabozny nearly 25 years ago. In 1975 the Nabozny court indicated that:

> the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control (p.260).

The Hackbart (1977) court ignored the educational benefits discussed in Nabozny claiming that professional "football as a commercial enterprise is something quite different from athletics as an extension of the academic experience and what I have said here may have no applicability in other areas of physical competition (p. *358).*" Clearly, the McKichan court brought into the Hackbart argument that professional football remains aligned with the commercial enterprise and the fact that young people watch professional sport and attempt to emulate their character is a society problem.

These often quoted phrases, "Winning isn't everything, it's the only thing" (professional attitude) and "It's not whether you win or lose, but how you play the game" (amateur attitude) shape society's behavior in sport. These descriptions of sport competition mobilize the sports fan, players, and maybe civil courts toward particular social attitudes and behavior of sport activities. In other words, the amateur coach must remind their players who watch professional players (models), that they cannot intently injure another player during their present level of play. However, be patient and wait until they become professionals, where the findings of the court support society's values so insinuates the McKichan holding. A final conclusion might suggest that an unwarranted judicial finding for the defendant may possibly inhibit the vigor of the game. Since the law, in part, sanctions such behavior, the perpetrator need not worry about being exposed to criminal liability, even if serious injury or death to another athlete resulted from the actions (Schubert, Smith & Trentadue, 1986). Therefore, the proximate cause of harm must exist far outside the scope of what can be expected in a game.

The MeKichan court failed to purport that "some of the restraints of civilization must accompany every athlete onto the playing field." The McKichan court has joined many other Americans that cherish the illusion that athletes represent paragons of nobility. When a professional player steps on the field of competition the courts suggest that society fails to expect civilized behavior. The unscrambling of professional sport from all that is serious in American life represents one of the most persistent barriers to meaningful analysis of the relationship of sport to law. The lower court consisting of local community members found for the plaintiff. They reasoned that the plaintiff did not voluntarily consent to the behavior of another professional hockey player, who intentionally charged into him resulting in serious injury to plaintiff, after two whistles from the officials to stop play. The lower court reasoned that the act committed was unreasonable and not an inherent part of the game. This finding represents another unwarranted breach of legal justice and human equality.

Later, the Ross court suggest that the Nabozny finding attempted to "balance the desire not to place an unreasonable onus on competitive sport participation, with the awareness that some restrictions must serve to limit overzealous conduct on the playing field (p. 14)." In summary, the simple negligence standard of care at the amateur and professional sport levels fail to generate support for plaintiffs at the appellate levels. Thus, player-on-player

violence continues to prevail in amateur and professional sport settings. Are there any deterrents to player-on-player violence in the horizons?

Control attributes. McKichan briefly mentioned the mechanisms that professional sport organizations have in place to control the violence. The remaining comments focuses on the effectiveness of four courses of action that presently exist to control violence in sport. The first action rests with civil action. The second remedy finds the defendants seeking criminal action. The third response resonates through administrative remedies. The fourth behavior reflects players taking actions in their own hands to intimidate and protect oneself from harm.

Schubert, Smith, and Trentadue (1986) asserted that civil action after player-on-player violence represents "one method apparently favored by the courts... Exposure to civil liability for injuries to other participants may encourage team owners as well as athletes to curtail much of the unnecessary sport violence (p. 283)". After twelve years, the court proceedings fail to verify that claim. In fact, plaintiffs seeking relief from player-on-player violence in sport have found a paucity of some support at the trial court level but fail to detect compensation at the appellate level. Yasser (1995) contends that athletes generally base civil action to recover on three theories: (1) an intentional tort such as battery or assault, (2) recklessness, and (3) ordinary negligence. The review of our cases suggest that recovery requires at least recklessness. Perhaps, the courts prefer that the perpetrator of violent acts in sport be punished via administrative procedures.

Criminal prosecution appears as another option for controlling or punishing the offender (Champion, 1993; van der Smissen, 1990). Criminal prosecution of sports participants for conduct injurious to another participant that occurs while playing the game is rare. Most criminal prosecutions have occurred in Canadian Hockey, specifically the National Hockey League (Hanson & Dernis, 1996). However, prosecutors appear reluctant to bring sport violence cases to trial because they are difficult to win. The assignment of criminal liability under assault and battery in hockey embodies a particularly difficult task for the courts (Moore, 1996). Criminal action implies the behavior that occurred within the athletic arena characterized crimes against society. Defenses such as self-defense and consent make conviction of an accused athlete in a contact sport very difficult to achieve. Perhaps jurors show a reluctance to find athletes guilty of prevalent acts in modern sports. Society, spectators, and players alike have created a separate set of values for sporting events; determining whether a player is liable for injuries caused to a fellow player must necessarily be analyzed in a slightly different context (Svoranos, 1997).

"I mean, the guy only got a fat lip. I just slapped him a bit with my stick. Of course, it's going to look a lot worse in slow motion" a quote from Phoenix Coyotes player Rick Tocchet, upset with the NHL office because he was suspended for two games for hitting an opponent with a hockey stick (Kansas City Star, April 16, 1998). The leadership in professional and amateur sport attempts to utilize disciplinary rules to deter unnecessary roughness. Each professional team and league, through their player representative and their collective bargaining agreement, encompass established rules and procedures to penalize and control unnecessary violence that represents an inherent part of the sport. These procedures utilize independent arbitrators to decide disciplinary disputes between the players and the league.

The courts have supported efforts of leagues, conferences, and clubs to establish and enforce rules and sanctions for safe play, ejections, suspensions, and fines, as opposed to jumping into the legal arena. The United Hockey League suspended Gary Coupal, a left wing for the Muskegon Fury for life. Officials penalized him for spearing toward the end of the game. He argued the penalty, earning a 10-minute misconduct. As the official was leading him off the ice, he broke his fiber glass stick over his knee and threw it into the crowd (Waco Tribune-Herald, December 31, 1997, p. 2D). However, McKeon (1998) pointed out that fans reject the notion of suspending players for violations because that's who they pay to see play. Perhaps, the McKichan court prefer to watch the violent

portions of sport contests.

The amount of unnecessary violence evident in today's professional sports has not diminished. The failure of civil, criminal, and administrative actions, the first three deterrents, has naturally evolved into players fighting to defend oneself and intimidate opponents. "All players can do now is resort to fighting" McKeon p. 1 6E" ... Teemu Selanne is quoted as saying that "these things are going to keep happening if the league doesn't stop the hits to the head" (McKeon, p. 16E). Players are going to take the law into their own hands.

Van der Smissen (1990) reports that "all cases tend to support the argument that sport *(especially professional sport)* (emphasis added) is an exception as related to consent and intent." p.25 If van der Smissen is correct than this separating out of professional sport action from all that is serious in American life has been one of the most persistent barriers to meaningful analysis of the relationship of sport to society. But litigation in sport cannot be examined as isolated from the social, economic, political, and cultural context in which it is situated. No question that sport represents a set of social practices and relations that are structured by the culture in which they exists, and any adequate legal account of sport must be couched in an understanding of its location within society.

Thus, a real necessity for appellate courts rests with truly understand the importance that court finding have on the sociocultural role of sport in American society. Do appellate courts approach their reasoning always asking, "What are the interconnections and influence that my finding might impart on American society"?

The commentary must conclude with questions for further investigation: (1) Are the appellate courts providing society with what it really espouses, an "ethic of approved violence"?; (2) Do court findings encourage sport violence?; and (3) Do court holdings encourage unnecessarily aggression in athletic actions? The McKichan court signaled their approval, thus society's approval of professional sport violence and improper conduct, regardless of their claims to the contrary. If there are problems here and unwarranted breaches of social justice and human equality, lets identify them and work to transform things to make sport safer and ultimately better. I am also a sport enthusiast; I still participate in sport as a player (noon league basketball); fan (love those Braves, Seahawks, Black Hawks, Celtics); coach (AAU girls basketball); a professional study (written texts). I support Yasser (1995),

> The simple truth is that sports must be placed back in perspective. (It is not as important as political speech). Insulating sports participants from liability or ordinary negligence sends all the wrong messages. Even in the heat of competition, participants can and should be expected to behave reasonably. (p.20)

Referring to the scenario that graced the beginning of this commentary. I would dissent for the reason stated above.

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