

# CIVIL LIABILITY IN THE ARENA OF PROFESSIONAL SPORTS

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## I. INTRODUCTION

On February 21, 2000, Boston Bruins' defenseman Marty McSorley struck Vancouver Canucks' forward Donald Brashear on the side of the head with his hockey stick. Brashear was skating away from McSorley at the time. Immediately rendered unconscious and unable to brace his fall, Brashear fell backwards, violently banged the back of his head on the ice, and suffered a severe concussion which ended his season. The incident occurred late in the game after the outcome had already been decided in Vancouver's favour, without direct provocation and completely away from the ongoing play on the ice at that time. It was replayed on television and over the Internet across North America for days. The National Hockey League ("NHL") immediately suspended McSorley from further play while reviewing the incident, and ultimately suspended him for one entire year of play.

While hitting and violence are a part of NHL hockey, the McSorley/Brashear incident went far beyond anything that normally occurs in an NHL game – so much so that the Province of British Columbia took the rare step of charging McSorley with the crime of assault.<sup>1</sup>

Fortunately, Brashear recovered from his injuries and continued his career in the NHL the following season – a career which saw Brashear sign a new contract prior to the 2002/03 NHL season for four years at U.S.\$2 million per year. However, what might have happened if Brashear had been unable to resume his career? At the time of the McSorley/Brashear incident, there was some speculation as to whether Brashear might bring civil action against McSorley. Had Brashear been unable to resume his career and instituted civil action against McSorley and the Boston Bruins, the litigation would have been of great interest and importance since on-ice or on-field violence has rarely given rise to civil liability in the context of professional sports.

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<sup>1</sup> *R v. McSorley*, 2000 BCPC 116, [2000] B.C.J. No. 1993 (Prov. Ct.) (QL) [*McSorley*].

This paper examines the issue of civil liability of professional athletes for injuries inflicted during competition. Given the magnitude of the potential loss of future earnings that today's professional athlete faces if subject to a career ending injury, it may be just a matter of time until courts are faced with a particularly egregious incident of "in-competition" violence that may give rise to civil liability.

Part II of this paper outlines the general tort law principles that would apply if a professional athlete were to sue an opposing athlete for injuries suffered as a result of the actions of that opposing athlete. Does the aggressor owe a duty of care to the victim? If so, what are the standards of liability? How does the doctrine of "assumption of risk" factor into this context when that doctrine has traditionally operated as a bar to recovery for players injured in the course of playing professional sports?

Part III of this paper addresses the doctrine of vicarious liability; specifically, whether liability for the aggressor's actions might extend to his team, as his employer. If the aggressor's conduct was found to be actionable, would his team also have exposure to liability?

Part IV of this paper deals briefly with the team's potential exposure based on the alternative theory of negligent supervision.

Part V of this paper discusses the NHL's internal disciplinary system for on-ice violence relating to conduct that breaches the NHL's playing rules. How might this system of "supplementary discipline" and the conduct of the aggressor and his team/employer in the course of those proceedings impact on their ultimate civil liability?

Finally, Part VI of this paper briefly reviews potential insurance implications that may arise in the context of a career-ending injury suffered by an NHL player.

## II. APPLICATION OF GENERAL TORT LAW PRINCIPLES IN THE CONTEXT OF PROFESSIONAL SPORTS

### A. OVERVIEW

Sports such as hockey, football and boxing, whether played at the amateur or professional level, necessarily involve violent physical contact – contact which, outside the context of athletic competition, could attract civil, and even criminal liability. It is widely accepted that participants in these sports assume, to some extent, the risks of injury inherent in playing such sports. Consequently, the injured athlete typically finds it difficult to succeed in lawsuits for sports injuries.<sup>2</sup>

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<sup>2</sup> See Part II.B below for further analysis. Additionally, early decisions have demonstrated a concern that the law should not place unreasonable burdens on free and vigorous participation in sports. See the discussion in Parts II.A.2 and II.A.3 below.

In particular, professional sports are played by well-conditioned athletes, who have extensive knowledge of the rules and customs of the sports in which they choose to participate, as well as the inherent risks. These professional athletes are well compensated for taking those risks. Accordingly, injuries incurred as a result of participation in professional sports do not generally give rise to civil litigation. For the most part, the governing league imposes internal sanctions, such as penalties, fines and/or suspensions for injuries caused by the misconduct of a professional athlete in the heat of competition.

While the maxim *volenti non fit injuria* (there is no injury if done to the willing person) applies to most incidents of sports violence, there are exceptions; occasions where a tortfeasor's behaviour is so egregious that a resulting injury may end in an award of damages. The difficulty, of course, is in determining what constitutes excessive conduct in the sports context so that the victim cannot be said to have assumed the risks emanating from such conduct.

Until recently, personal injury litigation resulting from participation in sports has been primarily restricted to the recreational and amateur ranks, and the principles of tort law have been seen as having limited applicability in the context of professional sports. However, over the past few decades, the escalation of violence and injuries in professional sports has led to an increase in the number of injured professional athletes seeking redress through the civil courts.<sup>3</sup> Early decisions in this context demonstrate the difficulty courts have experienced in attempting to precisely determine the scope of conduct a professional athlete accepts through his or her voluntary participation.<sup>4</sup>

*Hackbart v. Cincinnati Bengals, Inc.*<sup>5</sup> is a classic example of the courts' initial reluctance to grant recovery to athletes for injuries sustained in the course of professional sporting events. This case arose out of a National Football League ("NFL") game between the Cincinnati Bengals and the Denver Broncos in which the plaintiff, Hackbart, a defensive player for Denver, was severely injured after a Cincinnati pass was intercepted near the goal line. Hackbart attempted to block the defendant, Clark, an offensive player for Cincinnati, and fell to the ground. Clark, "[a]cting out of anger and frustration, but without a specific intent to injure, . . . stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head with sufficient force to cause both players to fall forward to the ground."<sup>6</sup> Hackbart

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<sup>3</sup> Linda S. Calvert Hanson & Craig Dernis, "Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?" (1996) 6 Seton Hall J. Sport L. 127.

<sup>4</sup> The defences of consent and assumption of risk are discussed in Part II.B below.

<sup>5</sup> 435 F.Supp. 352 (D. Colo. 1977) [*Hackbart I*].

<sup>6</sup> *Ibid.* at 353.

sustained a neck injury and was subsequently released by the Broncos. He sought recovery claiming, *inter alia*, reckless misconduct and, alternatively, negligence.

The trial court held that “[t]he character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness”<sup>7</sup> and rejected Hackbart’s claim. By further concluding that the NFL “has substituted the morality of the battlefield for that of the playing field, and the ‘restraints of civilization’ have been left on the sidelines,”<sup>8</sup> the trial court made a strong policy statement to the effect that the judiciary was ill-suited to the task of allocating fault in professional football games and that the legislative branch was better equipped to regulate misconduct in this industry.<sup>9</sup> The court also suggested that, as a result of the speed and violence in NFL competition, “the difference between violations which could fairly be called deliberate, reckless or outrageous and those which are ‘fair play’ would be so small and subjective as to be incapable of articulation.”<sup>10</sup> Even if Clark had breached a duty that he owed to Hackbart, Hackbart “must have recognized and accepted the risk that he would be injured by such an act.”<sup>11</sup>

These findings and conclusions were reversed on appeal.<sup>12</sup> The Tenth Circuit Court of Appeals held that Hackbart’s claim was actionable and should not have been dismissed merely because the injury had occurred during a professional sporting event. The court stressed that “there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.”<sup>13</sup>

The Tenth Circuit’s holding in *Hackbart II* is significant in that it firmly establishes the applicability of tort principles to claims arising as a result of injuries sustained in the arena of professional sports.<sup>14</sup> This decision supports the fundamental policy of tort law that “for every injury wrongfully inflicted, some redress under the...law must be afforded since it is essential that citizens

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<sup>7</sup> *Ibid.* at 356.

<sup>8</sup> *Ibid.* at 358.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at 356.

<sup>12</sup> *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d. 516 (10th Cir. Colo. 1979) [*Hackbart II*].

<sup>13</sup> *Ibid.* at 520.

<sup>14</sup> Although *Averill v. Luttrell*, 311 S.W. 2d. 812 (Tenn. Ct. App. 1957) [*Averill*], is generally thought to be the first U.S. civil case in which a professional athlete successfully sued a fellow player for injuries sustained in the course of a sporting event (professional baseball game).

be able to look to their government for redress.”<sup>15</sup> Over the past few decades, other courts have followed the Tenth Circuit’s lead in *Hackbart II*, and the proposition that an athlete participating in a contact sport is immune from tort liability has been almost universally discredited.<sup>16</sup>

Tort law is a mechanism for protecting individuals’ rights from unreasonable interference.<sup>17</sup> It involves the judicial imposition of a duty of care and a corresponding obligation to respond in damages for its breach. Despite the increased willingness exhibited by the judiciary to apply tort law principles in the context of professional sports injury litigation, courts continue to struggle with the question of the appropriate standard to be used in assessing a professional athlete’s tort liability and with the application of the consent and assumption of risk defences. Courts in the United States and Canada have, to varying degrees, recognized three theories of tort recovery in the context of professional sports: (1) intentional torts; (2) negligence; and (3) recklessness.

The prevailing view in the U.S. is that recovery will be limited to injuries incurred as a result of intentional or reckless conduct; simple negligence is generally regarded as an inappropriate basis for recovery. Unlike their U.S. counterparts, Canadian courts do not view negligence and recklessness as distinct theories of tort recovery. Consequently, in Canada, a professional athlete injured in the heat of competition must base an action to recover on either an intentional tort or negligence. However, an analysis of Canadian jurisprudence indicates that although courts in various Canadian provinces may utilize a negligence framework to assess an athlete’s potential tort liability, cases arising out of sports injury litigation often turn more on reckless behaviour.<sup>18</sup>

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<sup>15</sup> *Supra* note 12 at 523.

<sup>16</sup> Gary A. Uberstine, ed., *Law of Professional and Amateur Sports*, looseleaf (St. Paul, Minn.: West Group, 1997) vol. 2 at §14.01[4]. The decision that first signalled the shift away from the notion of immunity for sports participants in Canada was *Agar v. Canning* (1965), 54 W.W.R. 302 (Man. Q.B.), *aff’d.* (1966), 55 W.W.R. 384 (Man. C.A.) [*Agar*].

<sup>17</sup> W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1984) at 6.

<sup>18</sup> The past few decades have not seen an increase in the number of injured professional athletes seeking redress through Canadian civil courts. Accordingly, resort must be had to the jurisprudence that has evolved in the areas of amateur and recreational sports injury litigation for guidance as to how the courts in this country might apply the principles of tort law when faced with an action brought by an injured professional athlete.

## 1. INTENTIONAL TORTS

Intentional torts, such as battery and assault, involve claims based on deliberate interference with another person, either through threats of physical contact or direct contact itself.<sup>19</sup> An act is considered to be intentional if it “achieves a desired purpose or involves a consequence that is substantially certain”.<sup>20</sup> A person who intentionally causes a harmful or offensive physical contact, however slight, with another person is liable for battery, the offensiveness being in the eyes of the recipient.<sup>21</sup> For example, a person who swings his or her fist (or a hockey stick for that matter) at another’s face, and succeeds in connecting with it, commits a battery; the physical contact being a desired purpose of, or, at least substantially certain to occur from, the swing of the fist (or the stick). The defendant need not intend to physically harm or injure the plaintiff for a battery to arise.<sup>22</sup> According to Professor Allen Linden, “[o]ffensive contact is enough, however trivial it may seem.”<sup>23</sup>

Assault is properly defined as the “intentional creation of the apprehension of imminent harmful or offensive contact” and damages are recoverable even though physical contact never actually occurs.<sup>24</sup> For example, purposely swinging a hockey stick at another constitutes assault. Although assault and battery should be distinguished, in most cases, the two are committed in rapid succession and are often referred to collectively as “assault.”<sup>25</sup>

No court is likely to dispute the proposition that an intentional tort gives rise to a plausible cause of action in the context of sports injury litigation, with the caveat that the defence of implied consent may apply.<sup>26</sup> *Averill* is an early example of a U.S. court awarding damages for injuries sustained in a

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<sup>19</sup> John Barnes, *Sports and the Law in Canada*, 3d ed. (Markham, Ont.: Butterworths, 1996) at 270.

<sup>20</sup> *Ibid.* at 271.

<sup>21</sup> Allen M. Linden, *Canadian Tort Law*, 7th ed. (Markham, Ont.: Butterworths, 2001) at 42-43.

<sup>22</sup> Lewis N. Klar, *Tort Law*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at 42.

<sup>23</sup> *Supra* note 21 at 43.

<sup>24</sup> *Ibid.* at 45.

<sup>25</sup> *Ibid.* at 46. However, it should be noted that an assault can occur without a battery (e.g. swinging at someone and missing) and that a battery can be committed without an assault (e.g. hitting someone from behind).

<sup>26</sup> Ray Yasser, “In the Heat of Competition: Tort Liability of One Participant to Another; Why Can’t Participants be Required to be Reasonable?” (1995) 5 *Seton Hall J. Sport L.* 253 at 255.

professional sports contest on the basis of an intentional tort.<sup>27</sup> This case arose out of a professional baseball game in the Southern Baseball League between the Chattanooga Lookouts and the Nashville Vols. The plaintiff, Luttrell, played for Chattanooga and was at bat when the Nashville pitcher threatened to “stick” the next pitch in Luttrell’s ear. After Luttrell dodged three pitches, the fourth brushed him. In response, Luttrell threw his bat in the direction of the pitcher’s mound. Averill, Jr., the Nashville catcher, “without any warning whatsoever, stepped up behind Luttrell and struck him with a hard blow on the side or back of the head with his fist.”<sup>28</sup> Luttrell lost consciousness, fell face-first to the ground, and fractured his jaw. Luttrell sued Averill, Jr. for assault and battery and was awarded damages in the amount of \$5,000.<sup>29</sup>

*Tomjanovich v. California Sports, Inc.*<sup>30</sup> is another important case in the history and development of the body of law that relates to civil liability in the context of professional sports injury litigation. The plaintiff, Tomjanovich, playing for the Houston Rockets of the National Basketball Association (“NBA”), was punched in the face by Kermit Washington of the Los Angeles Lakers as Tomjanovich attempted to break up a fight between Washington and a fellow Rockets player. The blow fractured Tomjanovich’s face and skull, crushed his jaw, broke his nose and caused a cerebral concussion which resulted in a loss of blood and leakage of spinal fluid from Tomjanovich’s brain cavity. Tomjanovich brought suit against the Lakers alleging both vicarious liability and negligent supervision. The jury rendered its verdict in favour of Tomjanovich, finding the Lakers liable for the injuries caused as a result of Washington’s battery. Tomjanovich was awarded approximately \$3.25 million, including \$1.5 million allocated as punitive damages.<sup>31</sup>

The leading Canadian case involving an intentional tort in the sports context is *Agar*.<sup>32</sup> Unlike the U.S. cases discussed above, which emanate from the professional ranks, this case arose as a result of injuries sustained in an amateur hockey game. The plaintiff and defendant had followed the puck into

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<sup>27</sup> Courts in other jurisdictions have also recognized the applicability of intentional torts in the context of professional sports. For example, in *Canterbury Bankstown Rugby League Football Club Ltd. v. Rogers*; *Bugden v. Rogers*, (1993) Aust. Torts Reports 81-246, [1993] NSW LEXIS 7995 (N.S.W.C.A.) (Lexis) [*Canterbury Bankstown* cited to NSW LEXIS], a professional rugby player was awarded damages for injuries sustained as a result of a deliberate blow to the face by an opponent using his forearm in order to make a head high tackle.

<sup>28</sup> *Supra* note 14 at 814.

<sup>29</sup> Luttrell also sued Averill, Jr.’s employer, the Nashville Baseball Club (“NBC”), on the basis of the doctrine of vicarious liability. See the discussion in Part III below.

<sup>30</sup> [1979] U.S. Dist. LEXIS 9282 (S.D. Tex. 1979) (Lexis) [*Tomjanovich*].

<sup>31</sup> This case was later settled for an undisclosed amount.

<sup>32</sup> *Supra* note 16.

a corner of the rink, where the defendant body-checked the plaintiff, took possession of the puck and began to skate with it in the direction of the opposite goal. The plaintiff attempted to slow the defendant down by hooking him with his stick and in so doing hit the defendant in the back of the neck. The defendant stopped, turned around, and holding his stick with both hands, brought it down on the plaintiff's face. As a result of the blow, the plaintiff lost consciousness, the effective sight of his right eye and suffered a broken nose. The trial judge assessed general damages at \$5,750, but reduced this amount by one-third on account of provocation. The judgment was upheld on appeal. Subsequent Canadian cases in the amateur sports context have similarly found hockey and other players liable for intentional blows delivered to opponents in the heat of competition.

In another Canadian case, *Holt v. Verbruggen*,<sup>33</sup> the court had no difficulty holding that the defendant, who had taken a wild, baseball-bat-type swing at the plaintiff, was liable for assault.<sup>34</sup> The problem with the application of intentional tort theory in professional sports is that, unlike cases such as *Agar* and *Holt* where the conduct is sudden and an obvious deviation from play, it is often difficult to prove the required element of intent. As discussed, even though the act need not be accompanied by intent to do physical harm, the contact resulting therefrom must be a desired purpose of the act or that which a reasonable person would be substantially certain would follow from the act. In contact professional sports, and in hockey in particular, the speed and frequency of contact may make this difficult to establish.<sup>35</sup>

At McSorley's criminal trial, he testified that it was his intention to hit Brashear in the shoulder in an attempt to provoke Brashear into a fight, and that his stick accidentally rode up and hit Brashear in the side of the head. Although the evidence did not suggest that McSorley was intending to cause any physical harm through the use of his stick, the blow to Brashear's head, coupled with McSorley's admission as to his intent to strike Brashear, would almost certainly have been sufficient to establish the requisite elements of the intentional tort of battery had the matter been tried as a civil action.<sup>36</sup>

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<sup>33</sup> (1981), 20 C.C.L.T. 29 (B.C.S.C.) [*Holt*].

<sup>34</sup> *Ibid.* See also *Pettis v. McNeil* (1979), 32 N.S.R. (2d) 146, 8 C.C.L.T. 299 (S.C.) (defendant hockey player who struck plaintiff in face with stick found liable for assault) and *Martin v. Daigle* (1969), 1 N.B.R. (2d) 755, 6 D.L.R. (3d) 634 (C.A.) (defendant hockey player punched plaintiff with fist during game found liable for assault).

<sup>35</sup> Barbara Hink, "Compensating Injured Pro Athletes: The Mystique of Sport Versus Traditional Tort Principles" (1980) 55 N.Y.U.L. Rev. 971 at 991.

<sup>36</sup> Subject to the defence of consent (as discussed in Part II.B below).

## 2. NEGLIGENCE

While it has been generally established that the intentional tort is an appropriate cause of action in the context of professional sports injury litigation, many courts, especially in the U.S., have articulated the view that simple negligence is insufficient to give rise to liability in that context. The essence of a negligence action is conduct that results in an unreasonable risk of harm to another.<sup>37</sup> Professor Linden has noted that a cause of action for negligence arises if the following elements are present:

- (1) the claimant must suffer some damage;
- (2) the damage suffered must be caused by the conduct of the defendant;
- (3) the defendant's conduct must be negligent, that is, in breach of the standard of care set by the law;
- (4) there must be a duty of care recognized by the law to avoid this damage;
- (5) the conduct of the defendant must be a proximate cause of the loss or, stated another way, the damage should not be too remote a result of the defendant's conduct;
- (6) the conduct of the plaintiff should not be such as to bar or reduce recovery, that is the plaintiff must not be guilty of contributory negligence and must not voluntarily assume the risk.<sup>38</sup>

*Hackbart II* illustrates the tendency of courts to view the negligence theory of tort recovery as insufficient to give rise to liability in the professional sports context. In *Hackbart II*, the Tenth Circuit Court of Appeals stated that "subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent."<sup>39</sup> The collegiate hockey case of *Gauvin v. Clark*<sup>40</sup> echoes this sentiment. In that case, Gauvin, the plaintiff, was struck in the abdomen with the butt-end of an opponent's hockey stick, resulting in hospitalization and surgery. His spleen was removed and he missed seven weeks of school. The court in *Gauvin* noted that the majority of jurisdictions that have considered the duty of care of participants in a sports competition have concluded that personal injury cases arising out of such competition must be based on reckless disregard for safety.<sup>41</sup> The

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<sup>37</sup> Uberstine, *supra* note 16, vol. 2 at §14.01[3].

<sup>38</sup> *Supra* note 21 at 103.

<sup>39</sup> *Supra* note 12 at 520.

<sup>40</sup> 537 N.E.2d 94 (Mass. 1989) [*Gauvin*].

<sup>41</sup> *Ibid.* at 97.

court agreed and similarly rejected the negligence cause of action stating that “[p]recluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that ‘[v]igorous and active participation in sporting events should not be chilled by the threat of litigation.’”<sup>42</sup>

Courts in a few U.S. jurisdictions have rejected the approach endorsed by *Hackbart II* and *Gauvin* and allowed actions based on mere negligence. For the most part, however, these cases involve injuries incurred in the course of recreational contact sports, as opposed to injuries arising out of professional competition.<sup>43</sup> However, there is, in at least one state, authority for the application of the negligence standard in the professional context as well.

In *Babych v. McRae et al.*,<sup>44</sup> Babych, a professional hockey player employed by the Hartford Whalers, brought suit against the defendant, McRae, of the Quebec Nordiques and the defendant’s employer, the Club De Hockey Les Nordiques, for personal injuries incurred during an NHL game. Babych alleged that McRae struck him across his right knee causing personal injury and financial losses. Babych contended that the injuries and losses were caused by McRae’s negligence in that, *inter alia*, he swung his stick when he knew or should have known that such action could cause serious injury. The defendants filed a motion to strike the claim on the ground that the negligence alleged by Babych failed to state a legally sufficient cause of action. The court noted that there was no analogous Connecticut case law barring a negligence action in the context of sports co-participant cases. The court denied the defendants’ motion to strike, holding that ordinary negligence is, in fact, a legally sufficient cause of action when one professional sports participant injures another.

Owing in large part to the fact that Canadian courts do not, at least in theory, distinguish between negligence and recklessness, the case law that has developed in Canada in the area of sports injury litigation differs from that in the U.S. Canadian courts are more likely to utilize a negligence standard in assessing a participant’s tort liability.<sup>45</sup> There appears, however, to be a jurisdictional split on the issue of negligence between those courts that are willing to impose liability based on this standard and those which are not.

The decision of the Manitoba Queen’s Bench in *Agar* is fairly consistent with the prevailing U.S. view; namely, that ordinary negligence is an

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<sup>42</sup> *Ibid.* quoting from *Kabella v. Bouschelle*, 100 N.M. 461 (1983).

<sup>43</sup> Yasser, “In the Heat of Competition,” *supra* note 26.

<sup>44</sup> 567 A.2d 1269, 41 Conn. Supp. 280 (Super. Ct. 1989).

<sup>45</sup> Although unlike their U.S. counterparts, Canadian courts have yet to consider the application of the ordinary negligence theory of tort liability to a claim arising out of a *professional* sporting event.

insufficient basis for an injured athlete to recover damages. It was suggested therein, “[a] person who engages in [the sport of hockey] must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players.”<sup>46</sup> The court went on to hold that it would be inconsistent with the notion of implied consent to impose a duty on a player to look out for the well-being of fellow players corresponding to the duty which, outside of the context of a hockey game, gives rise to a claim for negligence.<sup>47</sup>

One commentator has noted that courts in most Canadian provinces, influenced by the holding in *Agar*, require more than ordinary negligence as a basis for recovery.<sup>48</sup> *Champagne v. Cummings*,<sup>49</sup> a case involving a recreational hockey player participating in a weekend men’s tournament who alleged that the injuries he suffered during one of the games occurred as a result of the defendant’s negligence, illustrates this approach. After discussing the principle espoused in *Agar*, the court suggested that a “retaliatory blow, struck in anger, even though provoked, may go beyond the immunity conferred by this principle and amounts to actionable negligence.”<sup>50</sup> However, the judge subsequently concluded that the “...evidence does not support a finding that [the defendant] *intended to strike the plaintiff* with his stick or to injure him.”<sup>51</sup> Since an intention to act with knowledge that the action contains a risk of harm is a requirement of the recklessness standard, it can be argued that the court was actually suggesting that the recklessness standard should apply. The court clearly articulated a standard different from the “inadvertence, lack of skilfulness or failure to take precautions” that characterizes ordinary negligence.

On the other hand, courts in British Columbia tend to accept that simple negligence can give rise to tort liability in the context of athletic competition. An example of this approach is *Herok v. Wegrzanowski*.<sup>52</sup> In that case, the

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<sup>46</sup> *Supra* note 16 at 304.

<sup>47</sup> *Ibid.*

<sup>48</sup> Geoffrey M. Moore, “Has Hockey Been ‘Checked from Behind’ North of the Border? Unruh, Zapf, and Canada’s Participant Liability Standard” (1998) 5 Sports Law. J. 1 at 10. See also the discussion in Part II.A.3 below. Some Canadian cases utilize a negligence framework for assessing liability, however, require intent or recklessness if recovery is to be permitted.

<sup>49</sup> [1999] O.J. No. 3081 (Sup. Ct.) (QL) [*Champagne*].

<sup>50</sup> *Ibid* at para. 7.

<sup>51</sup> *Ibid* at para. 10 [emphasis added].

<sup>52</sup> (1985), 34 A.C.W.S. (2d) 296, [1985] B.C.J. No. 1778 (B.C.C.A.) (QL) [*Herok* cited to A.C.W.S.].

parties played in a non-contact, “fun” hockey league. On the night that gave rise to the claim, the plaintiff stole the puck and passed it to a teammate. It was close to the end of his shift, so the plaintiff skated toward his bench. As the plaintiff was skating to the bench, the defendant swung out with his stick in an attempt to recover the puck and caught the plaintiff from behind, fracturing his left cheek-bone and severely injuring his left eye. The court applied a simple negligence standard in holding the defendant liable for hooking the plaintiff in the face, rejecting the contention that unintentional acts in the course of play that cause injury to a fellow player do not attract liability.

The British Columbia Court of Appeal had an opportunity to revisit this issue in 1990 in the tragic case of *Unruh (Guardian ad item of) v. Webber*.<sup>53</sup> *Unruh* arose as a result of injuries sustained by the plaintiff, Unruh, in an exhibition game in preparation for the Midget “AA” Provincial finals between the Arbutus and Aldergrove hockey clubs. About halfway through the second period, the puck went into the area to the right of the Aldergrove goaltender, close to the boards. Unruh quickly went after the puck with the defendant, Webber, close behind. Webber hit Unruh from behind when Unruh was just past the goal line, about six to eight feet from the boards. Unruh went headfirst into the boards and broke his neck. He was rendered a C4 quadriplegic. The trial court held that Webber had not intended to inflict any injury and that the push or check was thoughtless, rather than vicious. Webber was found to be negligent and liable for damages in the total sum of \$3,751,000.

Webber appealed both the finding of liability against him and the quantum of damages. The British Columbia Court of Appeal adopted the following standard of care:

The standard of care test is – what would a reasonable competitor, in his place, do or not do. The words “in his place” imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the players might reasonably be expected to take during the game, acting within the spirit of the game ...<sup>54</sup>

The court held that the trial court’s finding was amply supported by the evidence and dismissed the liability portion of the appeal.

The judgment in *Unruh* paved the way for a finding of liability in the British Columbia case of *Zapf v. Muckalt*.<sup>55</sup> In *Zapf*, the plaintiff, Zapf, became a quadriplegic as a result of injuries incurred in a hockey game between two Junior “A” teams, the Nanaimo Clippers and the Merritt

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<sup>53</sup> (1994), 88 B.C.L.R. (2d) 353, 112 D.L.R. (4th) 83 (B.C.C.A.) [*Unruh* cited to D.L.R.].

<sup>54</sup> *Ibid.* at 96.

<sup>55</sup> (1996), 26 B.C.L.R. (3d) 201, 142 D.L.R. (4th) 438 (B.C.C.A.) [*Zapf* cited to D.L.R.].

Centennials. The injury occurred in the second period as a result of contact between Zapf and the defendant, Muckalt. The puck had been dumped into the Nanaimo end and the plaintiff, a defenceman for Nanaimo, had just checked a Merritt player forcing the Merritt player to leave the ice. As the plaintiff skated for the puck in his end, the defendant, a winger for Merritt, jumped on the ice from his bench and also skated for the puck. The defendant checked the plaintiff from behind sending him headfirst into the end boards. No penalty was called. Zapf brought an action for damages. The trial court found that the defendant had been negligent in checking the plaintiff from behind, and was in breach of a rule of the Canadian Amateur Hockey Association prohibiting such conduct. Zapf was awarded over \$4 million in damages.

The case was appealed to the British Columbia Court of Appeal. The defendant, relying on, *inter alia*, various U.S. decisions, argued that liability could only be found if he exhibited a reckless disregard for the plaintiff's safety or intended to cause him harm. The Court of Appeal stated as follows:

On the two occasions that this Court addressed the topic, it has rejected the narrow approach to the standard of care where only intentional or reckless infliction of harm will ground liability and left it to the trial judge, on his or her appreciation of the evidence, to decide what risks are assumed and what a reasonable competitor would do in the circumstances of each case.<sup>56</sup>

The court held that the trial judge understood and applied that test appropriately and dismissed this part of the appeal.

Given that the McSorley/Brashear incident occurred in British Columbia, the approach of the British Columbia courts outlined above suggests that McSorley may have also had some exposure to liability on the basis of negligence.<sup>57</sup> Given that the outcome of the game had already been decided and that Brashear was skating away from McSorley, were McSorley's actions something that a reasonable competitor in his place would take in those circumstances? Conduct similar to McSorley's striking of Brashear is extremely rare in the NHL. Players such as McSorley and Brashear are considered "enforcers" and typically engage in fisticuffs with other enforcers as part of the game. However, many of these enforcers operate under a code of conduct whereby they will not even punch another player once that player has fallen down and is in a defenceless position. Given this code of conduct, and the fact that enforcers will rarely (if ever) use their sticks against one another, it is possible to conclude that a reasonable competitor in McSorley's circumstances would not have struck Brashear in the head with his stick.

Conversely, it must be kept in mind that the decisions in the *Herok*, *Unruh* and *Zapf* cases were all in the context of recreational sports and not

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<sup>56</sup> *Ibid.* at 446-47.

<sup>57</sup> Subject to the voluntary assumption of risk defence (as discussed in Part II.B below).

professional sports. Accordingly, for the reasons specified earlier in this paper, there is no certainty that a court would apply these same principles in the professional sport context.

### 3. RECKLESSNESS

As noted earlier in this paper, the prevailing view in the U.S. appears to be that recklessness is the appropriate minimum standard of liability in the context of sports injury litigation. Courts utilizing this standard have defined recklessness as conduct which falls somewhere between an intentional and a negligent act. An individual's conduct is reckless if he commits an act "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."<sup>58</sup> In other words, to be reckless, conduct must be more than negligent. Reckless misconduct requires "a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man."<sup>59</sup> The difference between reckless misconduct and negligence is a difference in the degree of risk, but, as noted by the *Restatement (Second) of Torts*, "this difference of degree is so marked as to amount substantially to a difference in kind."<sup>60</sup>

As noted above, reckless misconduct also differs from intentional wrongdoing. A reckless individual has the intent to act, but does not intend to cause the harm which results from the act. In the context of recklessness, it is sufficient that the individual realizes or, from the facts that he knows, should realize that there is a strong possibility that harm may result (as opposed to substantial certainty, without which there can be no intention).<sup>61</sup>

One of the first cases to articulate this standard in the context of sports injury litigation was *Nabozny v. Barnhill*.<sup>62</sup> This case arose as a result of injuries sustained during an amateur soccer game between high-school aged teams from Hansa and Winnetka, both towns in Illinois. The plaintiff, Nabozny, was the goalkeeper for the Hansa team and the defendant, Barnhill, was a forward for Winnetka. Shortly after play had begun, a Hansa player passed the ball to the plaintiff. The plaintiff went down on one knee to receive the pass and pulled the ball to his chest. The defendant, who had been

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<sup>58</sup> *Restatement (Second) of Torts* §500 (1965).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> 334 N.E. 2d 258 (Ill. App. Ct. 1st Dist. 1975) [*Nabozny*].

pursuing the ball, did not turn away when the plaintiff received the ball and continued to run in his direction. The defendant then kicked the plaintiff in the left side of the head causing him severe injuries. The plaintiff commenced an action to recover damages caused by the alleged negligence of the defendant. At trial, the court directed a verdict in favour of the defendant.

The appellate court suggested that “the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth,” but noted, “some of the restraints of civilization must accompany every athlete on to the playing field.”<sup>63</sup> In attempting to strike an appropriate balance, the court held that “a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player....”<sup>64</sup> The court reversed the judgment of the trial court and remanded the case for a new trial consistent with the views expressed above.

At the professional level, the decision in *Hackbart II* was similar to *Nabozny*. Unlike the *Nabozny* court, the Tenth Circuit Court of Appeals in *Hackbart II* explained the concept of recklessness and how it could be distinguished from the intentional tort and negligence theories of tort recovery, adopting the definition put forth in the *Restatement (Second) of Torts*. The court reversed the judgment of the trial court and remanded the case for a new trial, concluding that “if the evidence establishes that the injuries were the result of acts of Clark which were in reckless disregard of Hackbart’s safety, it can be said that he established a claim....”<sup>65</sup> The decision of the Tenth Circuit firmly establishes the principle in the U.S. that, in addition to the intentional torts, such as battery and assault, recklessness is an appropriate basis for recovery in the context of professional sports injury litigation.

The recklessness standard was also endorsed by the court in *Gauvin*. After reviewing the *Nabozny* and *Hackbart II* judgments, the court concluded that, “[t]he majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety.”<sup>66</sup> The court also noted that allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for athletes to seek retribution during the contest in which the injury occurred or in future contests.<sup>67</sup> At the same time, precluding

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<sup>63</sup> *Ibid.* at 260.

<sup>64</sup> *Ibid.* at 261.

<sup>65</sup> *Supra* note 12 at 525.

<sup>66</sup> *Gauvin*, *supra* note 40 at 97.

<sup>67</sup> *Ibid.*

liability in cases of ordinary negligence, the court noted, furthers the policy that vigorous participation in sports should not be inhibited as a result of the threat of litigation.

Canadian caselaw related to sports injuries shows that Canadian courts generally do not tend to distinguish between negligence and recklessness. Although courts in most Canadian provinces may utilize a negligence framework in assessing an athlete's tort liability, recovery is often limited to injuries incurred as a result of intentional or reckless conduct. One commentator has noted that the merger of these theories of tort recovery in this context has created a "quasi-recklessness" standard in Canadian sports injury jurisprudence, imposing a higher threshold for tort liability.<sup>68</sup>

In *Temple v. Hallem*,<sup>69</sup> the plaintiff was a female competitor in a co-ed, recreational softball league. On the evening in question, the plaintiff was playing catcher. The defendant, who was rounding third base and heading towards home plate, slid and collided with the plaintiff, who had fielded the ball and attempted to tag the defendant. The plaintiff suffered minor injuries and brought a negligence action for damages. The trial court allowed the plaintiff's claim, holding that the slide constituted a violation of league rules.

The Manitoba Court of Appeal reversed the decision on the basis that the defendant had not violated any league rules. The court further noted that even if a league rule had been violated, it would not necessarily give rise to liability. Citing *Agar*, the court suggested that only a deliberate violation of the rules calculated to do injury would give rise to civil liability, stating "game conditions prevailed, under which the plaintiff assumes the risk of injury so long as the rules are not violated with an intention to do injury."<sup>70</sup>

As noted above, this analysis was endorsed in the *Champagne* case. In that case, which also involved a negligence claim, the issue of liability appeared to turn on the fact that the evidence did not support a finding that the "[defendant] intended to strike the plaintiff with his stick or to injure him."<sup>71</sup>

In *Dunn v. University of Ottawa*,<sup>72</sup> an intercollegiate football player was injured as a result of a violent hit delivered by a player on an opposing team. The plaintiff, a 150 pound punt returner for Carleton University, was preparing to return a punt when the defendant, a 225 pound linebacker for the University of Ottawa, lowered his head and drove his helmet into the plaintiff's exposed jaw. The hit was a blatant violation of the intercollegiate

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<sup>68</sup> Moore, *supra* note 48 at 10.

<sup>69</sup> (1989), 58 D.L.R. (4<sup>th</sup>) 541 (Man. C.A.) [*Temple*].

<sup>70</sup> *Ibid.* at 543-44.

<sup>71</sup> *Supra* note 49 at para. 10.

<sup>72</sup> [1995] O.J. No. 2856 (Ct. J. (Gen. Div.)) (QL).

five yard rule which creates a five yard “restraining zone” into which the tackler must not enter until the receiver has touched the football. The court held that the defendant’s conduct “fell far below the standard that might reasonably have been expected of a football player during an intercollegiate football game”<sup>73</sup> and rendered its judgment in favour of the plaintiff. In so doing, the court provided a clear example of the tendency demonstrated by other Canadian courts when faced with similar facts to impose a requirement of intention or recklessness in the context of a negligence analysis. The court stated that “[o]nly when there is a deliberate intention to cause injury or a reckless disregard for the consequences of one’s actions in an uncontrolled and undisciplined manner will a finding of negligence result.”<sup>74</sup>

While it is plausible that McSorley’s conduct in striking Brashear would have satisfied the requisite elements of the torts of battery and negligence had the matter been tried as a civil action, McSorley’s conduct may have also given rise to liability on the theory of recklessness. In light of prevailing authority, even if McSorley did not intend to strike Brashear in the head with his stick, he showed a reckless disregard for the consequences of his actions and should have realized the substantial risk of harm.

The foregoing analysis of the relevant jurisprudence that continues to evolve in both the U.S. and Canada illustrates that, although actions in the context of professional sports are rarely brought, athletes are no longer outside the reach of the civil law. In fact, courts in both countries have imposed liability on the intentional tort, negligence and recklessness theories of tort recovery when called upon to determine fault for injuries incurred in the heat of competition. However, case law from each country demonstrates that, for the most part, something more than mere negligence (i.e. intention or recklessness) is required as a basis for recovery in the context of sports injury litigation (especially in the context of professional contact sports).

#### B. THE DEFENCES OF CONSENT AND VOLUNTARY ASSUMPTION OF RISK

As discussed above, the historical tendency for both U.S. and Canadian courts to view the sports context as incompatible with traditional tort theory stems from the existence of the defences of consent and voluntary assumption of risk. One commentator has noted that, while distinct in theory, the principles of consent and assumption of risk have often been used interchangeably in cases involving sports injuries.<sup>75</sup> When consent is raised as a defence to an

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<sup>73</sup> *Ibid.* at para. 40.

<sup>74</sup> *Ibid.* at para. 36.

<sup>75</sup> Andrew J. Turro, “Tort Liability in Professional Sports” (1980) 44 *Alb. L. Rev.* 696 at 697.

action based on an intentional tort, the defendant is claiming that the plaintiff consented to the very conduct that forms the basis of the claim.<sup>76</sup> Consent may be express or may be implied by conduct.<sup>77</sup> Implied consent can be given by “entering into situations where it is generally understood that one has waived one’s right to remain free from bodily contact,”<sup>78</sup> such as participating in contact sports like hockey or football.

On the other hand, the defence of voluntary assumption of risk, used as a defence in negligence actions,<sup>79</sup> implies not that the plaintiff consented to the tortious conduct, but rather that the plaintiff was aware of a risk of injury arising from the defendant’s actions and accepted that risk.<sup>80</sup> Generally speaking, in Canada, the defence of voluntary assumption of risk has been limited to cases where the court finds the existence of “an agreement, express or implied, to exempt the defendant from liability.”<sup>81</sup> It is the operation of this defence that is primarily responsible for the reluctance demonstrated by courts in both the U.S. and Canada to base tort recovery on negligence alone. As mentioned above, it has often been suggested that subjecting another to an unreasonable risk of harm, the essence of negligence, is intrinsic in contact sports such as hockey, football and boxing.<sup>82</sup> Accordingly, as noted by one commentator, most courts hold that athletes, particularly those participating in contact sports, assume the risk of another player’s negligence.<sup>83</sup> Conversely, many courts, especially in Canada, have held that an athlete does not assume the risk of injuries inflicted in circumstances that demonstrate a definite resolve to cause serious injury to another.<sup>84</sup>

Each of the defences of consent and voluntary assumption of risk are critical in the context of sports injury litigation and may act as a complete bar to recovery.<sup>85</sup> It is thus unfortunate that the courts have been, for the most part, less than consistent in their application of these defences. As

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<sup>76</sup> Klar, *supra* note 22 at 99.

<sup>77</sup> Linden, *supra* note 21 at 68.

<sup>78</sup> *Ibid.*

<sup>79</sup> §496A of the *Restatement (Second) of Torts* states that the defence of assumption of risk may also be a defence to a recklessness-based caused of action.

<sup>80</sup> Klar, *supra* note 22 at 99.

<sup>81</sup> Linden, *supra* note 21 at 473.

<sup>82</sup> *Hackbart II*, *supra* note 12 at 520.

<sup>83</sup> Hanson & Demis, *supra* note 3 at 148.

<sup>84</sup> See *e.g.* Agar, *supra* note 16.

<sup>85</sup> This paper uses the terms “consent” and “assumption of risk” interchangeably to refer to the defence often raised in sports injury litigation.

demonstrated through a brief analysis of the relevant case law in this area though, the prevailing view appears to be that “[p]articipation in contact sports is taken to involve consent to the ordinary blows and collisions incidental to play, including contact that is in breach of game rules.”<sup>86</sup> This is commonly referred to as the “part of the game” approach. – i.e. an athlete consents to all conduct which is part of the game.

However, there exists another line of authority, primarily in the U.S., which stands for the proposition that participation in a contact sport evidences a willingness to submit to all bodily contacts not prohibited by the safety rules of the particular sport. This is referred to as the “rules of the game” approach and is articulated in the *Restatement (Second) of Torts*:

Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill.<sup>87</sup>

This was also the approach endorsed by the court in *Nabozny*, which is often cited for the proposition that, as a matter of law, an individual consents to all contacts not proscribed by safety rules.<sup>88</sup> Furthermore, the Tenth Circuit suggests in *Hackbart II* that, “it is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and there is no evidence which we have seen which shows this.”<sup>89</sup> However, the Tenth Circuit refused to decide the outer limits of the defence as it was not considered at trial.

It has been argued that the “rules of the game” approach is inappropriate in the context of professional, contact sports in that it goes too far in imposing liability.<sup>90</sup> One commentator has suggested that, for example, “a football player could be liable if he intentionally “face-masks” or “clips” another player, and the player is thereby injured.”<sup>91</sup> However, it has also been noted that, “essentially no jurisdiction has recognized batteries stemming from fairly

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<sup>86</sup> See Barnes, *supra* note 19 at 272.

<sup>87</sup> *Supra* note 58 at §50.

<sup>88</sup> See *e.g.* Uberstine, *supra* note 16, vol. 2 at §16.04 [1](c)(iii).

<sup>89</sup> *Supra* note 12 at 520.

<sup>90</sup> See *e.g.* Heidi C. Doerhoff, “Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go” (1999) 64 Mo. L. Rev. 739.

<sup>91</sup> *Ibid.* at 744.

typical rule violations, despite the frequency with which the Restatement passages are quoted.”<sup>92</sup>

In practice, most courts in the U.S. and Canada have applied the “part of the game” approach. While the issue of assumption of risk was not specifically before the court in *Hackbart I*, the court nevertheless took the opportunity to consider it, and specifically, to determine whether the act of striking the plaintiff on the back of the head as a result of his anger and frustration could properly be considered a “part of the game.”<sup>93</sup> It concluded:

The level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant Clark....Therefore, even if the defendant breached a duty which he owed to the plaintiff, there can be no recovery because of assumption of the risk.<sup>94</sup>

Although the court adopted the articulation of the assumption of risk defence most consistent with contemporary authority, it has been suggested by some that it misapplied this standard to the facts of the case.<sup>95</sup> One commentator has noted that, “Clark’s conduct ... was such a flagrant violation that it cannot reasonably be characterized as a risk incidental to the event; thus, it should have been considered outside the assumption of risk defence.”<sup>96</sup>

The “part of the game” approach was also adopted by the court in *McKichan v. St. Louis Hockey Club*,<sup>97</sup> a relatively recent case arising as a result of injuries sustained in an International Hockey League game between the Milwaukee Admirals and the Peoria Rivermen. The injuries to the plaintiff, a goaltender for Milwaukee, were sustained in the third period, when the defendant, a forward for Peoria, administered a check to the plaintiff several seconds after a second whistle had been blown, stopping play. In addressing the doctrines of consent and voluntary assumption of risk, the court stated that, “[i]n general, a voluntary participant in any lawful sport assumes all risks that reasonably inhere to the sport insofar as they are obvious and usually incidental to the game.”<sup>98</sup>

The judgment of the Court of Appeals of Missouri in *McKichan* is significant in that it provides perhaps the most thorough analysis of the

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Supra* note 5 at 356.

<sup>94</sup> *Ibid.*

<sup>95</sup> See *e.g.* Turro, *supra* note 75 at 705.

<sup>96</sup> *Ibid.*

<sup>97</sup> 967 S.W. 2d 209 (Mo. Ct. App. 1998).

<sup>98</sup> *Ibid.* at 212.

defences of consent and voluntary assumption of risk in a case arising from injuries sustained in the course of professional competition and discusses the factors that a court may consider relevant in deciding whether or not specific conduct falls within the scope of “part of the game.” The court suggested that participants in contact sports assume greater risks of injury than participants in non-contact sports. Furthermore, it noted the need to analyze the concepts of assumption of risk and consent on a case-by-case basis, taking into account such factors as the specific game involved, the ages and physical attributes of the participants, their respective skills and knowledge of the sport’s rules and customs, their status as amateurs or professionals, the presence or absence of protective equipment, the degree of “zest” with which the game is played, etc.<sup>99</sup> The court also offered some insight as to the applicability of the “rules of the game” approach by stating that hockey players regularly employ contact that is beyond that which is permitted by the rules and that because of the rough nature of the sport, players wear protective equipment such as pads and helmets.<sup>100</sup> After considering the factors listed above, the court concluded that the “body check, even several seconds after the whistle and in violation of several rules of the game, was not outside the realm of reasonable anticipation. For better or worse, it is ‘part of the game’ of professional hockey.”<sup>101</sup> Accordingly, the conduct described above was held not to be actionable and the judgment of the trial court was reversed.

In Canada, the “part of the game” approach was first adopted by the Manitoba Queen’s Bench in the leading case of *Agar*.<sup>102</sup> *Agar* has been cited for the proposition that contact sports, by their very nature, involve violent physical contact and that athletes consent to the blows and collisions inherent in playing the game.<sup>103</sup> Another Canadian decision arising from injuries suffered during an amateur hockey game, *Roy v. Canadian Oldtimers’ Hockey Association*,<sup>104</sup> has also rejected the “rules of the game” approach. In this case,

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.* at 213.

<sup>101</sup> *Ibid.*

<sup>102</sup> The defences of consent and voluntary assumption of risk have not been applied in litigation emanating from Canadian professional sports. Although litigation stemming from recreational and amateur sports may provide valuable insight as to how these defences may be applied, it is likely that the scope of conduct that a professional athlete consents to through his or her voluntary participation in a sport could be quite different from that consented to at lower levels of play.

<sup>103</sup> See *e.g.* Barbara Svoranos, “Fighting? It’s All in a Day’s Work on the Ice: Determining the Appropriate Standard of a Hockey Player’s Liability to Another Player” (1997) 7 *Seton Hall J. Sport L.* 487 at 501.

<sup>104</sup> (1997), B.C.A.C. 123, [1997] B.C.J. No. 262 (C.A.) (QL).

the plaintiff suffered a separated shoulder after colliding with the defendant during the course of an “oldtimers” hockey game. It was found that the defendant’s impact with the plaintiff was deliberate and, therefore, in contravention of a league rule prohibiting intentional body contact. Notwithstanding the defendant’s violation of league rules, the court held that the defendant was not liable because the collision fell within the risks of the game assumed by the plaintiff as evidenced by his voluntary participation therein.

At one time, the operation of the defences of consent and voluntary assumption of risk made it next to impossible for an athlete, particularly a professional athlete engaged in a contact sport, to recover in tort for injuries sustained in the heat of competition. Although varying interpretations of these defences have emerged in the context of sports injury litigation, a review of the case law in this area demonstrates that it is no longer the case, under either approach, that a professional athlete’s voluntary participation in his or her respective sport will invariably act as a bar to recovery in tort. Notwithstanding the existence of some authority for the proposition that an athlete’s consent only extends to conduct not prohibited by the sport’s safety rules, most courts in the U.S. and Canada appear to subscribe to the notion that an athlete consents to all conduct that can be considered “part of the game,” including contact which may violate its rules.

Articulation of the “part of the game” approach is one thing; applying this approach to the facts of a given case, particularly in the context of sports injury litigation, is quite another. The jurisprudence in this area suggests that, generally speaking, courts will consider the nature of the sport being played, as well as the characteristics of its participants, in determining the scope of conduct consented to or the degree of risk assumed through their voluntary participation. Accordingly, a participant in a contact sport is likely to consent to a broader scope of conduct or assume a greater degree of risk than a participant engaged in a non-contact sport. Similarly, what is considered “part of the game” in the context of competition between highly-skilled, well-conditioned, professional athletes who reap substantial financial rewards from their participation in a given sport may be considered to greatly exceed the bounds of “fair play” in the context of a recreational contest between “weekend warriors.” Ultimately, whether or not certain conduct falls within the scope of “part of the game” will depend on the particular facts of each case and it is, therefore, difficult, if not impossible, to accurately predict where the line will be drawn in every circumstance.

If the same “part of the game” analysis used in *McKichan* were applied to the facts of *McSorley*, it would be open to the court to conclude that McSorley would not be liable to Brashear notwithstanding the severity of the blow. Although rare, there have been other unusually flagrant incidents of violence in the NHL both prior to and since McSorley’s actions. These incidents (Dale

Hunter's slash on Pierre Turgeon several seconds after Turgeon had scored against Hunter's team; Tie Domi's elbow to the head of an unsuspecting Scott Niedermayer, who was 90 feet away from the play) gave rise to long suspensions by the NHL, but nothing more. Accordingly, although McSorley's conduct was a severe violation of the rules, one could not necessarily say it was outside the realm of possibility in an NHL game.

### III. VICARIOUS LIABILITY

Now that the viability of the tort action in the context of professional sports injury litigation has been demonstrated, it must be determined how far the courts are willing to extend this liability and which parties, other than the athletes themselves, could be exposed to liability.

An injured professional athlete may decide to look beyond the tortfeasor for a defendant to whom the tortfeasor's acts can be imputed. In such a case, the liability of the defendant is said to be vicarious as it is not based on any personal wrongdoing, but rather on the tortious conduct of another party. The defendant's liability arises from a relationship with the tortfeasor. In the tort law context, vicarious liability commonly arises as a result of the employer/employee relationship. Generally speaking, an employer is vicariously liable for torts committed by its employees in the course of their employment.<sup>105</sup>

For vicarious liability to exist in the employment context, there must first exist an employment relationship, for an employer is only vicariously liable for the torts of its employees. Traditionally, a problematic issue in the area of vicarious liability has been distinguishing between employees and independent contractors.<sup>106</sup> Put broadly, employees are subject to the control and direction of their employer in respect of the manner in which work is to be done, while an independent contractor is hired to produce a certain result, without being required to accomplish the task in a specified manner.<sup>107</sup>

Second, there must be legal fault on the part of the employee. Vicarious liability will only be imposed if all of the elements of a tort (e.g. a negligence action) can be established. For instance, in *McKichan*, the Court of Appeals reversed the trial court's finding that the owner of a hockey team was vicariously liable for its player's conduct (a forceful body check after the whistle) on the basis that it was an assumed risk of competition and, therefore, the player's conduct was not actionable. Similarly, in *Hackbart I*, vicarious

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<sup>105</sup> Klar, *supra* note 22 at 479.

<sup>106</sup> *Ibid.* at 481.

<sup>107</sup> *Ibid.*

liability was not presented because the defendant, Clark, was not liable to the plaintiff.

Third, an employer is vicariously liable only for the torts of employees committed in the course, or within the scope, of their employment. Canadian scholar, Lewis Klar, has noted that tortious conduct of employees can range from activities expressly authorized by employers to those that are clearly prohibited and well outside the scope of the employers' reasonable anticipation.<sup>108</sup> The doctrine of vicarious liability will not apply to extreme conduct at either end of this spectrum. For example, when an employer authorizes or participates in some other way with an employee in tortious activity, the employer's liability may be personal and direct and the doctrine of vicarious liability may not be necessary.<sup>109</sup> At the other end of the spectrum, liability will not be imputed to an employer if the employee's tortious conduct is prohibited and is so unconnected from his or her employment as to be an independent act.

Put another way by the *Restatement (Second) of Agency*,<sup>110</sup> "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment."<sup>111</sup> It has been noted that the phrase "in the course of employment," together with its interchangeable equivalent, "in the scope of employment" are not capable of precise definition. Accordingly, these phrases allow significant judicial discretion in determining whether vicarious liability may be appropriate.<sup>112</sup>

The established common law test for determining whether particular conduct falls within the scope of employment distinguishes between conduct that can be considered a "mode" of performing an act authorized by an employer, for which liability will be imputed to the employer, and conduct which is not so connected with an authorized act of employment as to be considered a mode of doing it. In the latter case, where such conduct is found to constitute an independent act, the employer will not be held responsible.<sup>113</sup> This test, known as the Salmond test (first set out in *Salmond and Heuston on the Law of Torts*), posits that an employer will be vicariously liable for "employee acts authorized by the employer" or "unauthorized acts so

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<sup>108</sup> *Ibid.* at 483.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Restatement (Second) of Agency* (1958).

<sup>111</sup> *Ibid.* at §219(1).

<sup>112</sup> See e.g. Stacy Reginald Ball, *Canadian Employment Law*, looseleaf (Aurora, Ont.: Canada Law Book, 2001) at 20-6.

<sup>113</sup> *Ibid.*

connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.”<sup>114</sup>

It also appears that U.S. courts have adopted a similar approach to the Salmond test. The Restatement (Second) of Agency states that “[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.”<sup>115</sup>

It is often very difficult to “distinguish between an unauthorized ‘mode’ of performing an authorized act that attracts liability, and an entirely independent ‘act’ that does not.”<sup>116</sup> However, various factors have been suggested as relevant to the determination of whether an employee’s tortious act has been committed in the scope of his or her employment. It has been noted that Canadian courts are more likely to find that the employee was acting within the scope of employment if the tortious act was committed with the intention of furthering the employer’s interests.<sup>117</sup> Yet, it has also been noted that, at least in Canada, the fact that an employee acts solely for his or her own benefit does not necessarily take such conduct outside the scope of his or her employment.<sup>118</sup> In the U.S., the *Restatement (Second) of Agency* goes a step further, stating that an employee’s conduct will only be considered within the scope of employment “if it is actuated, at least in part, by a purpose to serve the master” and if it “occurs substantially within the authorized time and space limits.”<sup>119</sup> Canadian courts may also consider whether the tort was committed within working hours and within the confines of the place of employment.

A particularly important consideration in the context of the “scope of employment” analysis is the degree of an employee’s wrongdoing. Vicarious liability for negligence in the course of employment is typically straightforward. It has been noted that “[n]egligence has been described as a method of performing an act: instead of it being done carefully, it is done negligently.”<sup>120</sup>

On the other hand, early common law suggested that an employer could not be liable for the intentional torts of its employees because such wrongs were independent acts, outside the scope of employment.<sup>121</sup> However, the

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<sup>114</sup> *Bazley v. Curry*, [1999] 2 S.C.R. 534 at 543 [*Bazley*].

<sup>115</sup> *Supra* note 110 at §229(1).

<sup>116</sup> *Bazley*, *supra* note 114 at 544. In fact, it has been suggested that the Salmond test is of “questionable utility” when applied in the context of intentional torts.

<sup>117</sup> *Ball*, *supra* note 112 at 20-7.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Supra* note 110 at §228(1)(b) & (c).

<sup>120</sup> *Ball*, *supra* note 112 at 20-8.

<sup>121</sup> *Uberstine*, *supra* note 16, vol. 2 at §14.01[6](a).

prevailing view in both the U.S. and Canada appears to be that an intentional tort may be regarded as coming within the scope of employment if it can be demonstrated that the act was “closely connected to the employment.”<sup>122</sup> Although it is now beyond dispute that the application of vicarious liability will not be precluded merely because the wrongdoing of an employee is deliberate, it is still much less likely that a court will find an employer vicariously liable for the intentional torts of its employees.<sup>123</sup> It has been noted that similar problems arise in respect of claims grounded on recklessness.<sup>124</sup>

The implication of the foregoing for professional team sports is clear. Although the authorities in this area of law have not extensively considered this aspect of tort liability, there is without doubt, at least a basis for the application of the doctrine of vicarious liability to professional sports franchises for the conduct of professional athletes employed by those franchises. Given the direct employer/employee relationship that exists between professional clubs and their players (as evidenced by the standard player contract required to be signed by each player), the threshold test for vicarious liability will not be at issue. Assuming that the athlete has committed a violent act that is actionable, the key issue in the context of professional sports injury litigation will be whether that violent act can be properly considered as falling within the scope of the athlete’s employment, as opposed to being an independent act, wholly unrelated to the employer’s business. Such a determination is made particularly difficult in the context of professional, contact sports as a result of the tendency of both U.S. and Canadian courts to require something more than simple negligence (i.e. intention or recklessness) as the basis for a claim.

The *Averill* case was one of the first cases to define and apply the scope of employment test to the sports industry. In addition to suing Averill, Luttrell brought action against Averill’s employer, NBC, on the basis of vicarious liability. Luttrell argued at trial that Averill was “acting within the scope of his employment as the agent, servant or employee of the Nashville Baseball Club” and in furtherance of NBC’s business. Luttrell succeeded against both defendants at trial and NBC appealed. On appeal, the judgment against NBC was reversed. The court concluded that there was no proof that Averill’s conduct was in furtherance of his employer’s business and that Averill’s conduct was an independent act outside the scope of his duties.<sup>125</sup>

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<sup>122</sup> *Ibid.*

<sup>123</sup> Klar, *supra* note 22 at 485.

<sup>124</sup> Uberstine, *supra* note 16, vol. 2 at §14.01[6](a).

<sup>125</sup> Robert C. Berry and Glenn M. Wong, *Law and Business of the Sports Industries*, 2d ed., vol. II (Westport, Conn.: Auburn House Publishing Co., 1993) at 428, n. 7.

*Averill* demonstrates the tendency of numerous U.S. courts to hold an employer vicariously liable for the tortious act of one of its employees only if the act was committed with a “purpose to serve the master.”<sup>126</sup> It has been suggested that the effect of this rule, often referred to as the “intent” rule, has been to make it more difficult to hold an employer vicariously liable as most intentional torts are “violent, impulsive acts and are thus difficult to characterize as acts that are intended to further the employer’s interests.”<sup>127</sup>

As mentioned above, *Tomjanovich* was also among the first cases to consider the doctrine of vicarious liability in the context of professional sports. This case arose as a result of a battery committed during the course of an NBA contest between the Houston Rockets and the Los Angeles Lakers, and is one of the only cases emanating from professional sports that specifically dealt with the issue of vicarious liability before being settled.<sup>128</sup> However, its precedential value is diminished substantially since the claim was predicated on a California statute which adopted a more relaxed standard for the imputation of liability than that discussed above. In fact, it has been suggested that California is often considered to have the most expansive vicarious liability doctrine in the U.S.<sup>129</sup> As noted by one commentator:

Unlike the traditional doctrine, which not only limits the imputation of intentional torts by the concept of scope of employment, but also looks to the personal motives accompanying the act, the California statute enunciates more relaxed standards for imputation of fault. Although the motive which accompanies the wrongful act may be wholly personal, so long as the act *arises from* or is *causally connected* with the employment, such motives are irrelevant to the issue of *respondeat superior* under California law.<sup>130</sup>

Consequently, the court did not have much difficulty in holding that liability could be imputed to the Lakers for the tortious conduct of their employee, Kermit Washington, on the basis of the doctrine of vicarious liability. It is somewhat questionable whether the same result would have been reached had the California statute not been in existence.<sup>131</sup>

U.S. courts, in seeking to achieve the fundamental policy objective of vicarious liability – the proper allocation of risk – have demonstrated a

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<sup>126</sup>Steven I. Rubin, “The Vicarious Liability of Professional Sports Teams for On-the-Field Assaults Committed by Their Players” (1999) 1 Va. J. Sports & L. 266 at 280. As discussed above, this is reinforced by §228(1)(c) of the *Restatement (Second) of Agency*, *supra* note 110.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.* at 282.

<sup>129</sup> *Ibid.*

<sup>130</sup> Turro, *supra* note 75 at 710, n. 93 [emphasis in original].

<sup>131</sup> *Ibid.*

willingness to broaden the doctrine of vicarious liability in the context of employment that “demand[s] or engender[s] aggressiveness or even violence in employees.”<sup>132</sup> It has been suggested “[c]ourts have determined that the employer should bear a greater risk of employee torts in employment situations that inherently foster aggressiveness in employees.”<sup>133</sup> The same commentator has argued that professional sports is an example of such employment in that it fosters, and often, demands violence. When such an employment relationship exists, it has been noted that the employer is often held vicariously liable for intentional tortious conduct in spite of the fact that the employee in no way intends to further the interests of the employer.<sup>134</sup>

*Canterbury Bankstown* demonstrates a similar approach. This case arose as a result of injuries sustained in the course of a professional rugby match in New South Wales, Australia. In holding a professional rugby club liable for the deliberate tortious conduct (an illegitimate tackle) of one of its players, the appellate court stated that:

It was within the scope of [the defendant’s] employment, ie, it was one of the things that as a player he was to do, to grapple with [the plaintiff], stop him and bring him to the ground. He was allowed to do this by using his forearm against [the plaintiff’s] chest or shoulders; that was proper under the rules. But it was contrary to the rules of the Rugby League to do it by applying his forearm to [the plaintiff’s] head. That is agreed. In the relevant sense, what [the defendant] did was to do to the head what he was authorized to do to the body and he did it for the purpose for which he was employed by the Club. That, in my opinion, supports the conclusion that the Club is liable upon the scope of employment basis.<sup>135</sup>

The court also noted that

Rugby league is a professional game: it may be inferred that the club benefits from the success of its players; that the players are paid for what they do; and that they are apt to be paid more if they are successful in doing it. Therefore there is, to put the matter no higher, a temptation to do what will win games and ensure that the player appears of use to the club in achieving its purposes. In the circumstances of this case there was, I believe, a clear risk that a player who was "revved up" might yield to the temptation to "stop" [the plaintiff] by whatever means could be employed. These things are, on one view, obvious. But it is proper that, having regard to the way in which the case has been conducted, they be spelled out. And they are, in my opinion, relevant in determining the responsibility of the Club. The court may take a degree of notice of the role

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<sup>132</sup> Rubin, *supra* note 126 at 283.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Canterbury Bankstown*, *supra* note 27 at 12-13.

which "motivation" or the like may play in achieving success in sporting and other areas of activity. It may be that, in professionalised sport, winning, and not playing, is the object. But motivating to win carries with it consequences. The risk that motivation will, in some, lead to illegitimate means of winning is, I believe, plain. There is a line between what is permitted and what is not. If an employer encourages action close to the line he may, in such circumstances, have to bear the consequences of action over the line. These matters are not conclusive. But, in my opinion, they are relevant in determining, *inter alia*, whether what was done was within the scope of the employment.<sup>136</sup>

Since Canadian courts have not yet considered the application of the theories of tort recovery to the context of professional sports, the issue of vicarious liability of professional teams for the tortious conduct of their players has obviously not arisen. However, the modern position in Canada regarding the doctrine of vicarious liability and its applicability to intentional torts is illustrated by the unanimous decision of the Supreme Court of Canada in *Bazley*, where a children's foundation was found to be vicariously liable for an employee's sexual abuse of a child living in one of the foundation's homes. Generally speaking, the key issue before the court was whether an employer could be vicariously liable for an employee's unauthorized, intentional wrong.

Both parties to the appeal agreed that the Salmond test was the applicable test for determining vicarious liability and that only the second branch (vicarious liability for unauthorized acts) was at issue. However, while the foundation argued that its employee's sexual assaults were not "modes" of doing an authorized act, *Bazley* submitted that courts have often found employers vicariously liable for intentional wrongs of employees comparable to sexual assault. Writing for a unanimous court, McLachlin J. (as she then was) noted that it is often difficult to distinguish between an unauthorized "mode" of performing an authorized act, for which an employer is liable, and an entirely independent "act," for which it is not, and that oftentimes it is possible to characterize a tortious act as either.<sup>137</sup>

Accordingly, McLachlin J. suggested that the second branch of the Salmond test might be usefully approached in two steps:

First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales ...<sup>138</sup>

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<sup>136</sup> *Ibid.* at 15-16. This approach is somewhat similar to that articulated by McLachlin J. in *Bazley*. See discussion below.

<sup>137</sup> *Supra* note 114 at 544.

<sup>138</sup> *Ibid.* at 545.

Following her dictate, McLachlin J. proceeded to review the cases and concluded that there existed little helpful precedent to aid the court in determining whether the employee's tortious conduct should be viewed as an "unauthorized mode of an authorized act," or as an "independent act" altogether.<sup>139</sup> She did, however, note that cases where courts have held employers vicariously liable for the unauthorized torts of employees could be grouped into three general categories: "(1) cases based on the rationale of 'furtherance of employer's aims'; (2) cases based on the employer's creation of a situation of friction; and (3) the dishonest employee cases."<sup>140</sup>

After reviewing the three categories of cases, McLachlin J. attempted to articulate a unifying principle. She concluded that in each case "the employer's enterprise had created the risk that produced the tortious act"<sup>141</sup> and that "[t]he common theme resides in the idea that where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong."<sup>142</sup>

As precedent did not resolve the issue, McLachlin J. proceeded to the second stage of the inquiry – an examination of the policy reasons for supporting a finding of vicarious liability.<sup>143</sup> She reviewed the various authorities considering these objectives and held that "[f]irst and foremost is the concern to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee"<sup>144</sup> and that "[t]he second major policy consideration underlying vicarious liability is deterrence of future harm."<sup>145</sup>

In determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, McLachlin J. held that courts should be guided by the following principles:

- (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".

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<sup>139</sup> *Ibid.* at 544.

<sup>140</sup> *Ibid.* at 546.

<sup>141</sup> *Ibid.* at 548.

<sup>142</sup> *Ibid.* at 548-49.

<sup>143</sup> *Ibid.* at 551.

<sup>144</sup> *Ibid.* at 553.

<sup>145</sup> *Ibid.* at 554.

- (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
- (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
  - (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
  - (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
  - (d) the extent of power conferred on the employee in relation to the victim;

- (e) the vulnerability of potential victims to wrongful exercise of the employee's power.<sup>146</sup>

Applying these general considerations to the context of professional team sports, there must be a significant connection between the risk created or enhanced by the club's enterprise and the wrong complained of. In *Hackbart I*, John Ralston, the coach of the 1973 Denver Broncos football team testified that:

[P]re-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.<sup>147</sup>

This heightened state of emotion fostered by NFL coaches in their players will occasionally result in violence and may even lead to the commission of a tort. In that case, a strong argument could be made that there is a significant connection between the "systematic cultivation of rage"<sup>148</sup> (the risk created or enhanced by the employer's enterprise) and the resulting tortious conduct. Accordingly, liability could be imputed to an NFL club on the basis of the doctrine of vicarious liability.

Similarly, in the *Tomjanovich* case, it could be argued that Washington's violent actions were linked to the enterprise of the Lakers and that the Lakers contributed to the opportunity for Washington to commit his tortious act. On the one hand, Washington's blow to Tomjanovich was connected to the employment enterprise in time and place and basketball has elements of friction and confrontation. On the other hand, basketball is not typically a sport in which violent outbursts are encouraged or desired as part of the game. Evidence presented in the *Tomjanovich* case suggested that the Lakers had hired a player with a known history of violence against other players. In particular, evidence was presented that the Lakers encouraged Washington to appear in a *Sports Illustrated* article on basketball's "enforcers" and had paid Washington's league-imposed fine.<sup>149</sup> Based on this evidence that the Lakers did create or materially enhance the risk of Washington's intentionally tortious

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<sup>146</sup> *Ibid.* at 559-60 [emphasis in original].

<sup>147</sup> *Supra* note 5 at 355.

<sup>148</sup> Rubin, *supra* note 126 at 284.

<sup>149</sup> Raymond L. Yasser, *Torts and Sports: Legal Liability in Professional & Amateur Athletics* (Westport, Conn.: Quorum Books, 1985) at 22.

behaviour, they might have been found vicariously liable for Washington's actions even if the expansive California statute discussed above had not been in place.

Conversely, if the court in *Averill* had applied the approach put forth by McLachlin J. in *Bazley*, the result would likely have been the same. Since the wrong committed by *Averill* was independent of his employment and due to the fact that there was no evidence that NBC created or enhanced the risk of *Averill*'s tortious conduct by creating an atmosphere of friction or confrontation, NBC would not likely have been found vicariously liable for *Averill*'s actions.

While there is no precedent for imposing vicarious liability for an intentional tort in the context of professional hockey, application of the principles enunciated in *Bazley* to the McSorley/Brashear incident gives rise to a real possibility that the Boston Bruins (as McSorley's employer) would have been found vicariously liable for McSorley's conduct. With no cases of precedential value to look to in determining whether vicarious liability existed, Canadian courts would consider whether McSorley's act was sufficiently related to the conduct authorized by the Boston Bruins to justify the imposition of vicarious liability. Did the Bruins' enterprise and that of the NHL game create or enhance the risk that produced McSorley's tortious act, and was that act so closely tied to the risk that the enterprise created that the Bruins should be held vicariously liable?

There is no dispute that NHL teams typically employ an "enforcer" as a deterrent against other teams using aggressive play against elite players. The category of "enforcer" is so well recognized and accepted in NHL hockey that salary arbitration cases in the NHL have developed a body of precedent specifically dealing with the attributes of enforcers (e.g. how many fighting penalties a player has). A coach of an NHL team will often put the team's enforcer on the ice for the purpose of engaging in a fight with the other team's enforcer in order to rally that coach's team or to try to obtain revenge for a cheap shot taken at one of the team's elite players. Furthermore, enforcers are often utilized by coaches in situations where the outcome of the game has already been decided in order to establish a tone for future games.

McSorley was put on the ice at a time when the outcome of the game had been decided and in order to provoke a rematch with Brashear from a fight that occurred earlier in the game. Given the culture that exists in the NHL and the way that McSorley was used in the game leading up to the blow to Brashear's head, a convincing argument could be raised that the Bruins (and other NHL teams for that matter) regularly foster, create or enhance the risk of violent conduct by their players. It is certainly not outside the realm of reasonable anticipation that an enforcer's aggressive play may sometimes escalate to the level of tortious conduct. If such is the case, a convincing argument can be made that there is a strong connection between how an NHL

team typically deploys its “enforcer” (the risk created or enhanced by the employer’s enterprise) and the wrongful act committed by McSorley. Consequently, vicarious liability might follow.

From a policy point of view, holding the Bruins liable would satisfy the objective of providing a remedy to Brashear as a player who suffered the consequences of McSorley’s wrongful act. Further, the second major policy consideration – deterrence of future similar acts – might also be served by a finding of liability requiring teams such as the Bruins to refrain from conduct fostering an environment of excessive violence and friction.

As discussed above, the applicability of the principles of tort law in the context of professional sports injury litigation has been firmly established. Although most authority relating to claims arising in this context focuses on the applicable theories of tort recovery and the defences of consent and voluntary assumption of risk, a review of the jurisprudence in this area of law has demonstrated that there is a developing basis for the application of the doctrine of vicarious liability to employers of professional athletes. Courts in many jurisdictions have begun to endorse a less mechanical approach to the traditional “scope of employment” analysis. In cases involving claims of intentional misconduct, courts have put less emphasis on trying to distinguish between unauthorized “modes” of performing authorized acts and entirely independent acts. Instead, there is now authority for the proposition that an employer may be held vicariously liable for the tortious act of an employee if it can be demonstrated that a significant connection exists between the employer’s creation or enhancement of a risk and the employee’s wrongful act.

This latter approach should sound warning bells for NHL clubs. In today’s NHL, commentators widely believe that “stick” incidents and blows to the head have increased dramatically. In that environment of escalating violence and serious injuries, the doctrine of vicarious liability may inevitably bite an NHL team that fosters or enhances the risk of an environment in which a McSorley-type incident might occur. If a player suffers a career-ending injury and the consequent loss of substantial future income, the offending player’s team faces a real possibility of a claim for liability.

#### IV. NEGLIGENCE SUPERVISION

Vicarious liability occurs by operation of law – an employer is imputed with liability not for its own act but for the act of another person. This must be distinguished from cases where an employer is held personally liable because of its own tortious conduct. This type of action is grounded in the theory of negligent supervision – the belief that an employer itself creates unreasonable

risks of harm by improper or unreasonable selection and supervision of an employee.<sup>150</sup>

To prove a claim of negligent supervision, a plaintiff must prove both that the employee had a propensity for violence and that the employer had notice of this propensity.<sup>151</sup> In the *Tomjanovich* case, it was argued that the Lakers hired a player with a known history of violent conduct against other players and then not only failed to properly train and supervise him to avoid and control violence, but encouraged him by promoting his appearance in *Sports Illustrated* and in paying his league-imposed fine. As such, it was argued that the Lakers impliedly authorized Washington's conduct. The jury at trial agreed and awarded Tomjanovich approximately \$3.25 million (the Lakers appealed and the plaintiffs settled out of court).

The theory of negligent supervision may be particularly well suited to professional sports. Since the theory is based on a straightforward causal connection between employer fault (i.e. negligence in supervising an employee) and an employee's tort, a defendant cannot raise the defence that the employee was acting outside the scope of employment (as may occur with a claim based on vicarious liability).<sup>152</sup>

Commentators have suggested that injured athletes would be wise to consider the advantages of structuring their claims against employers on the basis of both vicarious liability and negligent supervision given the advantages in proceeding with the negligent supervision cause of action. It has been suggested that a claim of negligent supervision may eliminate the defence of assumption of risk in that such defence only applies between the tortfeasor and the injured plaintiff.<sup>153</sup> A claim based on negligent supervision also arguably eliminates the need to demonstrate a tortious act on the part of the tortfeasor as liability is predicated on the conduct of the employer. Finally, commentators have noted that a claim grounded on negligent supervision also provides the plaintiff with the possibility of claiming punitive damages, something that is not available in a claim based on vicarious liability.<sup>154</sup>

## V. INTERACTION BETWEEN LEAGUE DISCIPLINARY PROCESS AND POTENTIAL FOR CIVIL LIABILITY

Each of the four major professional sports leagues (i.e. NFL, NBA, Major League Baseball and NHL) has disciplinary procedures in place to deal with

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<sup>150</sup> Turro, *supra* note 75 at 709.

<sup>151</sup> *Restatement (Second) of Agency*, *supra* note 110 at §213.

<sup>152</sup> Turro, *supra* note 75 at 713.

<sup>153</sup> *Ibid.* at 712-13.

<sup>154</sup> *Ibid.* at 713-14.

incidents that occur during the course of a game. These leagues use a combination of both suspensions and fines to punish offenders.

The NHL uses its own discretionary system of supplementary discipline to punish on-ice conduct that is in violation of league playing rules, including the use of excessive and unnecessary force and careless acts resulting in injury. While certain actions by players may require automatic suspensions under NHL rules (e.g. a player making deliberate contact with an official), other incidents of violence often result in the NHL imposing supplementary discipline on a discretionary basis.<sup>155</sup> Typically, the NHL conducts its own preliminary review of the incident, which generally consists of an examination of game tapes, reports from on-ice officials and the game supervisor (if in attendance) and a telephone conversation with the player. For inappropriate conduct that falls short of warranting a suspension, the NHL may fine a player an amount not to exceed \$1,000.

The NHL may also suspend a player for a maximum of four games following a preliminary review without holding a formal hearing. If a preliminary review suggests that a suspension of more than four games may be warranted, a formal hearing is held. The player is suspended pending the results of the hearing. The NHL's Director of Hockey Operations, who is an executive officer with the league, typically presides. These hearings do not involve stringent rules of procedure or evidence but do allow a player to be represented by counsel and to present evidence. Representatives of the player's club and the NHL Players' Association are also entitled to be present and typically participate in the hearing. The victim is *not* represented in these hearings and does not appear.

Teams such as the Boston Bruins regularly participate in supplementary discipline hearings involving their players and, in an effort to ensure that suspensions are kept to a minimum, will defend those players strenuously in cases involving on-ice violence. All players, as well as the NHL, have come to expect that this type of support will be given to the offending player. This active involvement may support the argument that the teams create or enhance the risk of violent conduct even if they do not specifically authorize it. Conversely, the fact that all NHL players know and accept that supplementary discipline has been established as the NHL's sole method of addressing

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<sup>155</sup> In the NHL, suspensions also result in a loss of salary, the magnitude of which depends on the length of the suspension and whether the player is a repeat offender. The fines and other amounts collected do not in any manner compensate the victim of the offending conduct. Fines and forfeited amounts of salary arising from supplementary discipline of players go to a fund that is administered by the NHL to benefit destitute former players. The imposition of supplementary discipline by the NHL is principally designed to punish a player for egregious breaches of League Playing Rules. Arguably, the suspension/fines resulting from a breach of those rules serve as a deterrent factor as well.

violent on-ice conduct may constitute further evidence of assumption of risk by the victim as a participant in a violent contact sport.

## VI. POTENTIAL INSURANCE IMPLICATIONS

While this paper assumes that the victim of a violent incident that occurs on the ice during the course of an NHL game might be a plaintiff in a potential civil action against the tortfeasor, there is a risk that an additional plaintiff will bring action against the tortfeasor.

The majority of players in the NHL take out their own disability insurance policies to compensate for potential loss of future earnings in the event of a career-ending injury. The amounts insured have become higher and higher as salaries have risen in the NHL.

If a player were to suffer a career-ending injury in circumstances similar to the McSorley incident and an insurer were required to pay out under that player's individual insurance policy, that policy would typically entitle the insurer to subrogation rights. Those subrogation rights would entitle the insurer to proceed with any claims that the insured player might have against anyone whose conduct gave rise to the insurer's liability; namely, the offending player and his team. Accordingly, it is not unlikely that one of these insurers, if faced with a large liability under these policies resulting from a particularly egregious on-ice incident, might bring suit against the offending player and his club under the same principles outlined in this paper.

## VII. CONCLUSION

The business of professional sports has grown exponentially over the last decade. In the case of the NHL, players who earned an average salary of \$200,000-\$300,000 per year in the early 1990s are now averaging almost \$1.8 million per year. The average NHL player can now expect to earn over \$25 million during the course of a 15-year career. Elite players may earn five times as much.

During this same period, professional hockey players have become bigger, stronger and faster. Advances in technology have led to equipment that is made of hard plastics and not soft fabrics. These factors have produced an increased risk of serious injury. If an NHL player were to suddenly suffer a career-ending injury as a result of a flagrant incident of on-ice violence and the player chose to bring an action in tort, the courts could provide an important remedy. While most violent on-ice incidents would not likely give rise to liability given (1) the open and notorious violent nature of the NHL game, (2) the fact that incidents of aggression do not typically amount to tortious conduct, and (3) the doctrine of assumption of risk, incidents like the one involving Marty McSorley may be viewed as so egregious as to give rise to liability against the offending player and his team.

The application of tort principles in the context of such flagrant incidents of violence in professional sports should not be seen as a radical departure from established law, nor should the difficulty of drawing distinctions between different types of violent conduct influence the court's application of traditional tort principles. To the extent that civil liability operates as an effective deterrent to excessively violent behaviour, it can help to protect players from unnecessary violence that could end their careers and provide them with adequate compensation for economic loss suffered as a result of that violence.