

**STEPPING IN TO STEP OUT OF LIABILITY: THE PROPER STANDARD OF
LIABILITY FOR REFEREES IN FORESEEABLE JUDGMENT-CALL SITUATIONS**

*Michael Mayer**

INTRODUCTION

Imagine that it is the 2006 Stanley Cup Finals.¹ The Detroit Red Wings² and the Toronto Maple Leafs³ are battling it out in a classic “original six”⁴ match-up. Steve Yzerman,⁵ looking for a fourth Stanley Cup in his twenty-third season in the National Hockey League⁶ (“NHL”), skates to the corner during a blowout⁷ by the Red Wings in Game 1. There he meets up with veteran enforcer Tie Domi,⁸ who decides to give his team some spark⁹ going into the next game. The two players bump, exchange words, and then “drop their gloves”¹⁰ before fighting – a

*Michael S. Mayer, J.D. candidate, DePaul University College of Law, 2006; B.B.A. University of Michigan, 2003. The author wishes to thank Jason Hitchings and the *DePaul Journal of Sports Law & Contemporary Problems*’ editors for their contributions. He also thanks his friends and family for their continuous support.

¹ The Stanley Cup Finals is the final round of playoffs in the National Hockey League (“NHL”). In this best-of-seven match, the winning team is presented with the Stanley Cup trophy. This article assumes that the NHL has ended its lock-out and other labor problems by that time so that there will actually be a 2006 NHL playoffs. For more information on the NHL access its website, *available at* <http://www.nhl.com>.

² Member of the National Hockey League, *available at* <http://www.detroitredwings.com/>.

³ Member of the National Hockey League, *available at* <http://www.mapleleafs.com/>.

⁴ The National Hockey League originally had only six teams: Detroit Red Wings, Toronto Maple Leafs, New York Rangers, Boston Bruins, Montreal Canadians, and Chicago Blackhawks. *At* http://www.nhl.com/hockeyu/history/game7_1.html and <http://www.nhl.com/nhlhq/faq/trivia.html>.

⁵ *At* <http://sports.espn.go.com/nhl/players/statistics?statsId=5>.

⁶ *At* <http://www.nhl.com>.

⁷ A blowout is defined as: “when any player or team beats their competitor by a huge margin. *At* <http://www.sportsdictionary.com/wordview.aspx?Word=Blowout&Sport=General%20Sports%20Term>.

⁸ *At* <http://sports.espn.go.com/nhl/players/profile?statsId=192>.

⁹ Players in the NHL start fights for a number of reasons. A player might start a fight to boost team morale when they are not playing well. He might also act to protect a fellow teammate from intimidation tactics of the opponent. Thus, fighting and physicality play an important role in hockey (and other contact sports) and add excitement to the game. *See* Jennifer Marder, Article, *Should the Criminal Courts Adjudicate On-ice NHL Incidents?*, 11 SPORTS LAW. J. 17, 17-18 (2004).

¹⁰ “Drop their gloves” is a phrase referring to the action before a fight begins in the NHL. Players take their gloves off to engage in a “more formal” and distinct fight.

tradition in hockey for years. The other players on the ice are clutching, grabbing, and “trash-talking”¹¹ with each other, which occupies the two linesmen and one referee.¹²

The head referee rushes to oversee the fight between Yzerman and Domi. Though completely overmatched in almost all aspects, Yzerman puts up a decent fight. The Detroit fans cheer and chant “Stevie! Stevie! Stevie!” as they watch their hero. He gets hit in the back of the head by a punch and wobbles, barely able to stand, but it looks like he continues to fight back. The referee goes in to break up the fight, but, as Yzerman gets hit in the head again, it appears that he is grappling and throwing more punches so he backs off, choosing instead to have the fight run its course.

An octopus is thrown onto the ice by a rabid Detroit fan,¹³ and it slides across the ice in front of the referee. The referee picks up the octopus and turns to slide it away from the fighting. The referee turns back around in time to see Domi standing over a slouched Yzerman. Domi pulls back and lands a haymaker¹⁴ into Yzerman’s temple, causing him to drop to the ice. The crowd goes silent as the referee pulls Domi away from the fallen player and calls for a stretcher. Yzerman is carted off to a standing ovation, but a CAT-scan¹⁵ later shows that Yzerman suffered severe brain injuries from the blow and will be bed-ridden for the rest of his life.

¹¹ Trash talking is defined as: “To speak disparagingly, often insultingly or abusively about a person or group.” *At* <http://www.yourdictionary.com/ahd/t/t0328580.html>.

¹² NHL Rule 34(a) provides: “The Commissioner shall appoint one or two Referees (as appropriate), two Linesmen, Game Timekeeper, Official Scorer, two Goal Judges and a Video Goal Judge for each game.” *Available at* <http://nhl.com/hockeyu/rulebook/rule34.html>.

¹³ “One...tradition is the throwing of octopi onto the ice at Red Wings games. Here is the history....The octopus first made it's [sic] appearance on April 15, 1952, during the Red Wings' Stanley Cup playoff run. Two Detroit brothers, Pete and Jerry Cusimano, who owned a fishmongers in the Eastern Market, threw one on the ice at Olympia Stadium. Each tentacle of the octopus was symbolic of a win in the playoffs. Back then, the NHL consisted of just the original six teams, and eight wins (two best-of-seven series) were needed to win the Stanley Cup. The Red Wings swept the series that year, and the Octopus has come to be the good luck charm ever since.” *At* <http://www.detroitredwings.com/history/octopus.asp>.

¹⁴ Haymaker is defined as: “A powerful blow with the fist.” *At* <http://www.yourdictionary.com/ahd/h/h0093200.html>.

¹⁵ A CAT-scan is an image from “[a] device that produces cross-sectional views of an internal body structure using computerized axial tomography.” *At* <http://www.yourdictionary.com/ahd/c/c0167200.html>.

Should the referee have stopped this obviously lopsided fight before it even started? Could he have foreseen this horrible injury before it happened? Was he under a duty to break up the fight after he saw Yzerman wobbling and barely able to stand? Should he have to pay for Yzerman's medical bills and wage losses if he is found to have been negligent, but not reckless, in failing to break up the fight? How is the fact that fighting is a part of the game of hockey relevant, and the theory¹⁶ that the NHL encourages fighting because it entices fans to buy tickets?

Injuries inevitably occur in body-contact sports.¹⁷ Fighting and other injury-prone situations are inherent in contact sports and play a vital role in making those sports enjoyable for participants. There are times when referees have to make a decision of whether to step in and (attempt to) stop the competition or allow it to continue. On the one hand, a referee who steps in too often can negatively affect the flow of the game by causing too many stoppages in play. The old mantra of officiating is to blend in with the game and not be noticed. On the other hand, one could argue that a referee is there to help protect the players, who are often caught up in the emotion of the game.

The decision of whether to step in can be an important one for a referee – one that can prevent serious injury. When, if ever, should referees be under a duty to break up fights and make other judgment-calls that may prevent catastrophic injury? If sued, should the legal standard for a referee's duty of care be negligence or recklessness?¹⁸ Instead, should there be a

¹⁶ See, e.g., J.C.H. Jones, Kenneth G. Stewart, Article, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorely Decisions*, 12 SETON HALL J. SPORT L. 165, 168 (2002).

¹⁷ 7 AM. JUR. *Trials* 213 § 1 (2005). "A lawsuit involving a contact sports injury will often pivot on the maxim that 'no legal damage is done to him who consent,' from which has evolved the doctrine of assumption of risk." *Id.* at § 3.

¹⁸ "Recklessness,' in a sporting context, is action taken with knowledge or reason to know of facts which would lead [a] reasonable man to realize, not only that his conduct creates 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...." See *Bentley v. Cuyahoga Falls Bd. Of Edn.*, 709 N.E.2d 1241 (9th Dist. Summit County 1998).

complete bar from claims by those who have been allegedly injured because a referee didn't step in and stop the competition? Should it matter if the sport directly involves fighting (as in boxing or karate), tolerates fighting (as in hockey), or occasionally involves some fighting (as in baseball or basketball)?

These are all difficult questions because they involve an area where referees do have some control over the situation, unlike injuries that are an unforeseeable accident or intentionally inflicted sports injuries.¹⁹ Setting too high a standard can have negative effects for referees, players, and the sport. This article attempts to answer these questions, analyze some of the reasons for and against a heightened legal standard of care ("negligence" versus the traditional "gross negligence" or "recklessness" standard) in these situations, and concludes that, upon weighing those reasons, a gross negligence or recklessness standard is the correct one.

The situations that this article focuses upon are those in which the referee can foresee the type of situation that can lead to serious injury or death, but doesn't necessarily foresee the actual injury or death. Thus, unforeseeable accidents – for example, a vicious slide-tackle in a soccer game that flips an opposing player who breaks her neck – are not the type of situations questioned here. Instead these are situations, like a fight in hockey, scrum in rugby, boxing match, or soccer game played in easily observable adverse weather conditions, where the referee is required to make a judgment-call of whether to step in and stop the action or allow it to continue.

Part II of this article provides background on legal duty in sports, describes the defenses of assumption of risk and consent, and goes through the elements of a tort claim in the context of potential referee liability. Part III contains some current NHL, boxing, and kickboxing rules, regulations, and guidance for referees in a judgment-call situation. Part IV focuses on the

¹⁹ The difference in these situations, and their usual outcome in a lawsuit, will be explained throughout this article.

reasons for advocating a heightened “negligence” standard of care in these situations. Part V is a retort to those reasons and describes why the gross negligence/recklessness standard is appropriate. This article concludes that, unless the referee acted intentionally or in a grossly negligent or reckless manner, he or she should not be liable for injuries suffered in a judgment-call situation.²⁰

II. DUTY IN SPORTS

Sports injury cases are tort law cases that involve breach of a duty. Liability results from the “breach of some duty which results in a...cause of action.”²¹ Duty is “a legal obligation.”²² Whether that duty is breached depends upon the standard of liability a court imposes.²³ Based on the conduct involved, civil suits, or even criminal liability, may be pursued for sports injuries if that standard of liability is breached.²⁴

²⁰ This Article joins the opinion of the majority of articles that have been written on the subject of referee liability in general (i.e. not on the specific topic of judgment-call situations) that a recklessness or gross negligence standards of liability is proper. See Kenneth W. Biedzynski, Comment, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 419-420 (1994).

²¹ Shlomi Feiner, Article, *The Personal Liability of Sports Officials: Don't Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 217 (1997).

²² At <http://dictionary.law.com/default2.asp?selected=598&bold=|||>.

²³ The main issue that this Article looks at is what the appropriate standard of liability should be for referees in “judgment-call situations” that result in sports injury.

²⁴ Lawsuits for sports injuries typically involve tort law. A tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages. The primary functions of tort law are to recognize when a duty has been breached and when compensation for this breach is appropriate. Jeffrey M. Schalley, *Eliminate Violence From Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW. J. 181, 183-184 (2001). In general, criminal cases in this area would only be pursued if there is intentional detrimental conduct (including that on the part of referees). Feiner, *supra* note 21, at 215. For example, in most states it is a criminal offense for a sports official to accept any consideration to influence the outcome of a sporting event. Referees also have affirmative duties under common law to avoid intentional harm to others without justification. For example, “it is apparent that an official may be found to have committed an intentional tort if the plaintiff can establish that the official’s deliberate conduct resulted in monetary harm.” But in this situation the official must have had the intent to cause the injury. *Id.* at 215-16.

Duty in sports differs from that of a duty in other contexts:

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. In the sports setting, however, the nature of a defendant's duty depends heavily on the nature of the sport at issue, because conditions or conduct that might normally be viewed as illicit or dangerous are often an integral part of the sport itself.²⁵

Courts have found that conduct which might be "unreasonable" in everyday society is not actionable because it occurred on the athletic field.²⁶ The reason is that, in contact sports, physical contact and injuries among participants is inherent and unwarranted judicial intervention might inhibit the game's vigor.²⁷ Playing sports provides benefits to children (and adults) that might be reduced or eliminated if a lawsuit was filed for each injury.²⁸ The policy of promoting vigorous participation in recreational sports is furthered by the application of a recklessness or intentional conduct standard of liability.²⁹

A. Standards of Liability

There are numerous participants in each sporting event, and officials play perhaps the most important supporting role.³⁰ In cases involving personal injury sustained during sports activities, the question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the sport or activity in question and on the parties' general relationship to the activity.³¹ A breach of a duty is found when an official does not comply with the standard of care imposed.³²

²⁵ Ian Forman, Article, *Boxing in the Legal Arena*, 3 SPORTS LAW. J. 75, 78 (1996).

²⁶ *McKichan v. St. Louis Hockey Club*, 967 S.W.2d 209, 211-212 (1998).

²⁷ *Id.* at 212.

²⁸ At <http://www.babyzone.com/features/content/display.asp?TopicID=37&ContentID=1010> (stating that sports can promote learning in cooperative play, teamwork, sportsmanship, exercise, friendship, fair play, and promote self-esteem).

²⁹ See *Schick v. Ferolito*, 167 N.J. 7, 767 A. 2d 962 (2001).

³⁰ Biedzynski, *supra* note 20, at 376.

³¹ See *Knight v. Jewett*, 834 P.2d 696 (1992).

³² *Feiner*, *supra* note 21, at 219.

Negligence is one typical standard of care in tort law. Negligence is the “failure to exercise the care toward others which a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not.”³³ “Negligence is accidental as distinguished from “intentional torts” (assault or trespass, for example) or from crimes....”³⁴

For a plaintiff to state a prima facie claim in negligence, he or she must prove the existence of four elements by alleging facts demonstrating (1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant’s breach of the duty.³⁵

There are other standards of care besides negligence. Qualified immunity is another term that has been adopted by a number of states to protect referees from claims of “ordinary negligence.”³⁶ In general, it provides “that unless the sports official partakes in actions or conduct which constitute either ‘gross negligence’ or ‘recklessness’ the sports official should not be held liable for his or her acts.”³⁷ The four elements necessary to establish a prima facie claim are the same with a ‘recklessness’ standard of liability, but more is necessary to show the second element (that the defendant breached that duty). The move from a ‘negligence’ standard of liability to a ‘gross negligence’ or ‘recklessness’ standard is a trend that has emerged.³⁸ “Courts and legislatures have espoused the view that torts, which might be actionable in other arenas if

³³ At <http://dictionary.law.com/default2.asp?selected=1314&bold=|||>.

³⁴ At <http://dictionary.law.com/default2.asp?selected=1314&bold=|||>.

³⁵ Patton v. United States of America Rugby Football, 381 Md. 627, 635-636 (2004) (citations removed).

³⁶ Biedzynski, *supra* note 20, at 379. The states that, in 1994, had enacted statutes to limit civil liability for sports officials to gross negligence or recklessness were Arkansas, Georgia, Indiana, Louisiana, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island, and Tennessee. *Id.* at 388-98.

³⁷ *Id.* at 379. For the most part, the terms ‘gross negligence’ and ‘recklessness’ can and will be used interchangeably to just signify a standard of liability that is “lower” from the perspective of referees. Part IV. A. does contain more precise definitions and some material specific to each one.

³⁸ See Mel Narol, *Sports Torts: A Standard of Care Issue*, N.J. LAWYER THE MAGAZINE, May/June 1990, at 41.

negligence is shown, should only be actionable in the sports arena if gross negligence or reckless disregard is demonstrated by the aggrieved person.”³⁹

B. Duty of One Athlete to Another

It is helpful before looking at referee liability to see what, if any, duty one athlete has to another athlete. The basic standard seems to be: “A player would be liable in tort if his conduct is such that it is either deliberate, willful or with reckless disregard for safety of other player so as to cause injury to that player.”⁴⁰ For example, a hockey player who purposefully swings his stick to hit another player in the head will almost certainly be held liable for such conduct (and could face assault and battery charges as well).⁴¹

[A]lthough a sports participant consents to all risks incidental to a particular activity, he never assumes the risk of injury from co-participants engaging in intentional or reckless conduct that is outside the range of the ordinary activity

³⁹ *Id.*

⁴⁰ W.R. Habeeb, Annotation, *Liability for Injury to or Death of Participant in Game or Contest*, 7 A.L.R. 2d 704 (2004), citing *Nabozny v. Barnhill*, 31 Ill App 3d 212, (1975).

“The first court to adopt the reckless disregard, or gross negligence, ‘standard of care’ was the Illinois Court of Appeals. In 1975, in *Nabozny v. Barnhill*, the court held that in an amateur youth soccer game a player injured by an opponent could only recover damages if he could demonstrate that the opponent acted with reckless disregard for others’ safety. Proof of ordinary negligence was insufficient....Wrestling with providing Nabozny a right to redress his injury and the competing principle of unhindered athletic participation by our youth, the court established a middle ground approach. It found that for Nabozny to sustain his claim, he must prove that Barnhill acted in reckless disregard for his safety. The court emphasized, however, that this particular duty imposed upon an amateur player to not act recklessly and coached by knowledgeable personnel, a recognized set of rules governing the game, a violation by the defendant of a safety rule of the sport, and the fact that the incident did not occur during a heated play....The court emphasized that it was a decision for the jury whether Barnhill’s action was ‘part of the game.’ If so, no liability would attach to him for his conduct.” Narol, *supra* note 38, at 41-42. A Louisiana court extended this line of thinking to adults in 1976 in *Bourque v. Duplechin* 331 So.2d 40 (La. Ct. App. 1976). This incident occurred “during a[n] [adult] recreational softball game....After Bourque had released the ball to the first baseman and had moved away from the base, Duplechin ran full speed into Bourque and brought his left arm up under Bourque’s chin, resulting in his suffering a fractured jaw and broken teeth....The critical issue was whether Duplechin’s actions were ‘part of the game.’....Duplechin was found to have violated his duty to not act recklessly. He did so by running into Bourque and putting his arm under Bourque’s chin in violation of softball rules.” Narol, *supra* note 38, at 42. Finally, the same standard was applied to professional sports in *Hackbart v. Cincinnati Bengals, Inc.* 435 F. Supp. 352 (D. Col. 1977), rev’d 601 F.2d (10th Cir. 1979), cert. denied 444 U.S. 931 (1979). “[T]he U.S. Court of Appeals for the Tenth Circuit held that, despite the violence of professional football, a football player may be held responsible for an injury caused to an opponent if he acted with reckless disregard for that opponent’s safety.” Narol, *supra* note 38, at 42.

⁴¹ A similar incident happened when a body-check by Todd Bertuzzi on Steve Moore in March 2004 caused Moore’s neck to be broken. Moore later filed civil suit against Bertuzzi and others, charging civil conspiracy, assault, battery, negligence and outrageous behavior. At <http://proxy.espn.go.com/nhl/columns/story?id=1993954>.

involved in the sport. This principle...has been stated by courts in jurisdictions throughout the country.⁴²

“With this type of standard, very few plaintiffs will prevail.”⁴³ The defenses of consent and contributory negligence come into play,⁴⁴ and a recognized duty of care must also be breached.⁴⁵ Along the same lines, the “‘competitive contact sports doctrine’ provides that participant[s] in [] a sport may recover damages from another participant only if that other participant intentionally or recklessly injures the first in a way not contemplated by the sport...”⁴⁶ This doctrine, it is said, balances the need to protect athletes with the need to maintain and encourage a competitive spirit.⁴⁷ In amateur contact sports, Illinois courts have held that ordinary negligence is insufficient to state a claim for an injury caused by a co-participant.⁴⁸ Instead, liability must be predicated on “willful and wanton or intentional misconduct.”⁴⁹ Based on this, Illinois enacted the Sports Volunteer Immunity Act, which sets forth standards for a manager, coach, umpire or referee in sports programs involving participants who are primarily 18 years of age or younger.⁵⁰

⁴² Forman, *supra* note 25, at 84.

⁴³ Walter T. Champion, Jr., Database, *Fundamentals of Sports Law*, SPORTSLAW § 6:1 (2004).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 7 AM. JUR. *Trials* 213 § 1 (2005), *citing* Moore v. Phi Delta Theta Co., 976 S.W.2d 738 (Tex. App. Houston 1st Dist. 1998).

⁴⁷ *Id.*

⁴⁸ *See, e.g.* Pfister v. Shusta, 167 Ill.2d 417, 212 Ill.Dec. 668, 669, 657 N.E. 2d 1013, 1014 (1995).

⁴⁹ *Id.*

⁵⁰ 745 ILL. COMP. STAT. 80/1 (1987) provides:

“§ 1. Manager, coach, umpire or referee negligence standard. (a) General rule. Except as provided otherwise in this Section, no person who, without compensation and as a volunteer, renders services as a manager, coach, instructor, umpire or referee or who, without compensation and as a volunteer, assists a manager, coach, instructor, umpire or referee in a sports program of a nonprofit association, shall be liable to any person for any civil damages as a result of any acts or omissions in rendering such services or in conducting or sponsoring such sports program, unless the conduct of such person falls substantially below the standards generally practiced and accepted in like circumstances by similar persons rendering such services or conducting or sponsoring such sports programs, and unless it is shown that such person did an act or omitted the doing of an act which such person was under a recognized duty to another to do, knowing or having reason to know that such act or omission created a substantial risk of actual harm to the person or property of another. It shall be insufficient to impose liability to establish only that the conduct of such person fell below ordinary standards of care.

C. Referees

Moving from duties between athletes to those between an athlete and a referee, sometimes athletes who allege that their injuries were due to an action or omission of a supervising official seek a remedy through litigation.⁵¹ If a referee's conduct falls below the accepted standard of liability required then a court will assign liability for injuries that are

(b) Exceptions.

(1) Nothing in this Section shall be construed as affecting or modifying the liability of such person or a nonprofit association for any of the following:

(i) acts or omissions relating to the transportation of participants in a sports program or others to or from a game, event or practice.

(ii) acts or omissions relating to the care and maintenance of real estate unrelated to the practice or playing areas which such persons or nonprofit associations own, possess or control.

(2) Nothing in this Section shall be construed as affecting or modifying any existing legal basis for determining the liability, or any defense thereto, of any person not covered by the standard of negligence established by this Section.

(c) Assumption of risk or comparative fault. Nothing in this Section shall be construed as affecting or modifying the doctrine of assumption of risk or comparative fault on the part of the participant.

(d) Definitions. As used in this Act the following words and phrases shall have the meanings given to them in this subsection:

"Compensation" means any payment for services performed but does not include reimbursement for reasonable expenses actually incurred or to be incurred or, solely in the case of umpires or referees, a modest honorarium.

"Nonprofit association" means an entity which is organized as a not-for-profit corporation under the laws of this State or the United States or a nonprofit unincorporated association or any entity which is authorized to do business in this State as a not-for-profit corporation under the laws of this State, including, but not limited to, youth or athletic associations, volunteer fire, ambulance, religious, charitable, fraternal, veterans, civic, county fair or agricultural associations, or any separately chartered auxiliary of the foregoing, if organized and operated on a nonprofit basis.

"Sports program" means baseball (including softball), football, basketball, soccer or any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (36 U.S.C. 371 et seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for the physically handicapped or mentally retarded.

(e) Nothing in this Section is intended to bar any cause of action against a nonprofit association or change the liability of such an association which arises out of an act or omission of any person exempt from liability under this Act."

⁵¹ Feiner, *supra* note 21, at 214.

proximately caused by that conduct.⁵² Thus, the four elements previously mentioned to state a claim of negligence need to be proved in this context (i.e. duty, breach, injury, and causation).

1. Existence of Legal Duty

a. Introduction

Generally, whether there is adequate proof of negligence is a question of fact to be determined by the fact-finder. The existence of a legal duty is a question of law to be decided by the court.⁵³ So the first question posed is: should referees even have a duty to protect athletes from injury? Duty is characterized as an obligation to conform to a particular standard of conduct toward another.⁵⁴ Just because someone wasn't acting "morally" doesn't mean that he or she will have a legal duty to act.⁵⁵ In determining the existence of a duty, courts consider, among other things:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.⁵⁶

Some of these factors are also useful in determining the appropriate standard of liability (see Sections III and IV), and therefore determining the existence of a duty and the standard of care are intertwined.

This article does not fully explore whether there should be a duty for referees to protect athletes. In general, there is no duty to control a third person's conduct so as to prevent personal harm to another, unless a "special relationship" exists either between the actor and the third

⁵² *Id.*

⁵³ *Patton v. United States of America Rugby Football*, 381 Md. At 636.

⁵⁴ *Id.* at 636-37.

⁵⁵ *See id.* at 638. "A tort duty does not always coexist with a moral duty."

⁵⁶ *Patterson*, 381 Md. at 637.

person or between the actor and the person injured.⁵⁷ It seems inherent in the role referees play, the monetary compensation provided, and the desire to prevent harm to athletes that referees would possess that “special relationship” with the athletes and have some duty to protect or control the athletes they oversee.

b. Foreseeability

Where the failure to exercise due care creates risks of personal injury, the principal determinant of duty is foreseeability.⁵⁸ The foreseeability test is simply intended to reflect current societal standards with respect to an acceptable nexus between the negligent act and the ensuing harm.⁵⁹ The existence of foreseeability alone usually does not suffice to establish a duty under law.⁶⁰ Ordinary care does not require that a person prevision unusual, improbable or extraordinary occurrences.⁶¹ The damages must be reasonably foreseeable.⁶² Failure to anticipate remote possibilities does not constitute negligence.⁶³ This is why “freak accidents,” like a baseball bat splintering and hitting a player in the eye, would not result in liability for an umpire.

Foreseeability of injuries in sporting events is extremely high, especially in contact sports that involve judgment-calls by referees (of course *both athletes and referees* can foresee the possibility of injuries, which will be discussed more in Sections III and IV). Thus, foreseeability can also be used to bolster an assumption of risk or consent defense.

⁵⁷ *Id.* at 637-38.

⁵⁸ *Id.* at 637.

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Rolison v. City of Meridian*, 691 So.2d 440, 444 (1997).

⁶² *Id.*

⁶³ *Id.*

*Reckling v. Pontiac*⁶⁴ is a case that involved the scope of a referee's duty during an arm wrestling contest and the role of foreseeability in that determination. The plaintiff broke her arm during the contest⁶⁵ and alleged that the referee failed to stop, prevent, or otherwise intervene to prevent the injury when the referee should have known to do so.⁶⁶ The "plaintiff testified that her opponent was not trying to injure her."⁶⁷ The court found that the "[p]laintiff consented by her participation in the arm wrestling match to the risk of events such as a broken arm, which are known, apparent and are reasonably foreseeable."⁶⁸ The court concluded that the plaintiff failed to establish that the defendant referee owed her a duty.⁶⁹

A judgment-call some referees face is deciding whether or not to stop a game due to inclement weather. Generally, before the game it is the referee's responsibility to decide whether the game should be played.⁷⁰ For example, "it is conceivable that a referee could be held liable for allowing play to continue if a football field is overly muddy and thus unsafe."⁷¹ "The key is

⁶⁴ *Reckling v. Pontiac 358 Inc.*, 1999 WL 33455104 (Mich.App.) (1999).

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ *Champion, Jr.*, *supra* note 43, at 3:4. An exception is Major League Baseball, where the home team's manager decides whether to start the game or not because of unsuitable weather conditions. MLB Rule 3.11 states: "3.10 (a) The manager of the home team shall be the sole judge as to whether a game shall be started because of unsuitable weather conditions or the unfit condition of the playing field, except for the second game of a doubleheader. EXCEPTION: Any league may permanently authorize its president to suspend the application of this rule as to that league during the closing weeks of its championship season in order to assure that the championship is decided each year on its merits. When the postponement of, and possible failure to play, a game in the final series of a championship season between any two teams might affect the final standing of any club in the league, the president, on appeal from any league club, may assume the authority granted the home team manager by this rule. (b) The umpire in chief of the first game shall be the sole judge as to whether the second game of a doubleheader shall not be started because of unsuitable weather conditions or the unfit condition of the playing field. (c) The umpire in chief shall be the sole judge as to whether and when play shall be suspended during a game because of unsuitable weather conditions or the unfit condition of the playing field; as to whether and when the play shall be resumed after such suspension; and as to whether and when a game shall be terminated after such suspension. He shall not call the game until at least thirty minutes after he has suspended play. He may continue the suspension as long as he believes there is any chance to resume play. The umpire in chief shall at all times try to complete a game. His authority to resume play following one or more suspensions of as much as thirty minutes each shall be absolute and he shall terminate a game only when there appears to be no possibility of completing it." At http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/game_preliminaries_3.jsp.

⁷¹ *Champion, Jr.*, *supra* note 43, at 3:4.

reasonable judgment; the responsibility to call a game rests solely on the shoulders of the official.”⁷² Yet, in this type of situation it seems again that accidents are as foreseeable to the participants as to the referee.

In *Patton v. United States of America Rugby Football*, a father and son (plaintiffs) were struck by lightning at an amateur rugby tournament.⁷³ “At the start of the match, rain commenced [and] lightning could be seen and thunder could be heard proximate to the lightning flashes. By this time, the National Weather Service had issued a thunderstorm ‘warning’ for the [] area.”⁷⁴ The referee decided to proceed with the match.⁷⁵ “[T]he match continued as the rain increased in intensity, the weather conditions deteriorated, and the lightning flashed directly overhead. Other matches at the tournament ended.”⁷⁶ The plaintiff son “continued to play the match through the rain and lightning and his father continued to observe as a spectator until the match was stopped just prior to its normal conclusion.”⁷⁷ When the match was finally ended, plaintiff father and son “fled the playing fields to the area under the trees where they left their possessions. As they began to make their exit from under the trees to seek the safety of their car, each was struck by lightning.”⁷⁸ The father died and the son “sustained personal injuries and was hospitalized, but recovered.”⁷⁹

⁷² *Id.*

⁷³ *See Patton v. United States of American Rugby Football*, 381 Md. at 630.

⁷⁴ *Id.* at 631.

⁷⁵ *Id.*

⁷⁶ *Id.* at 631-32.

⁷⁷ *Id.* at 632.

⁷⁸ *Id.*

⁷⁹ *Id.*

The plaintiffs argued that:

a participant in a sporting event, by the very nature of the sport, trusts that his personal welfare will be protected by those controlling the event. Stated another way, it is reasonably foreseeable that both the player, and the player's father, will continue to participate in the match, as []long as the match is not stopped by the governing bodies in charge. It also is reasonably foreseeable that, when matches are played in thunderstorms, there is a substantial risk of injury from lightning. And finally, it is reasonably foreseeable that a father will not abandon his son, when he sees those who have assumed responsibility for his son's welfare placing his son in a perilous condition....⁸⁰

The court noted that the plaintiffs were free to leave the game at any time.⁸¹ The inherently unpredictable nature of weather and the patent dangerousness of lightning made it unreasonable to impose a duty upon defendants (rugby tournament organizers, referee, and related organizations) to protect spectators from the type of injury that occurred here.⁸² The court emphasized that because the “approach of a thunderstorm is readily apparent to reasonably prudent people...it would be unreasonable to impose a duty...to warn...of a condition that the spectator is fully able to observe and react to on his own.”⁸³ It stated that “in the absence of

⁸⁰ Patton v. United States of America Rugby Football, 381 Md. at 638. This seems to be a more valid argument than the court makes it out to be. Participants usually look to the league, tournament officials, or a referee for its judgment on these types of matters – they are seen as the authorities and probably have access to information regarding the current weather conditions.

⁸¹ See *id.* at 634. This same point was emphasized in *Pirchardo v. North Patchogue Medford Youth Athletic Assoc., Inc., et al.*, 172 A.D.2d 814 (1991), where a 19 year old shortstop was struck and killed by lightning. The plaintiff contended that the defendants were negligent in allowing a baseball game to continue when threatening weather became apparent. However, the court said that by electing to continue to play baseball in weather conditions which were readily apparent (at some point in the game, thunder was heard and some lightning was seen in the distance), the plaintiff's decedent assumed the risks inherent in continued play. The court further stated that the plaintiff failed present evidence of economic compulsion or other circumstances which impelled the decedent to continue to play, which would have negated a voluntary assumption of the risk.

⁸² See Patton v. United States of America Rugby Football, 381 Md. at 634.

⁸³ *Id.* at 643 n. 6, quoting *Dykema v. Gus Macker Enterprises, Inc.*, 492 N.W.2d 472, 475 (Mich.App.,1992). Similarly, in *Pirchardo*, 172 A.D.2d 814, baseball players were precluded from recovering for their injuries where they elected to continue to play baseball after observing thunder and lightning and failed to present evidence that they were ordered or compelled to continue to play. W.R. Habeeb, Annotation, *Liability for Injury to or Death of Participant in Game or Contest*, 7 A.L.R. 2d 704 (2004), citing *Pirchardo v. North Patchogue Medford Youth Athletic Assoc., Inc.*, 569 NYS2d 186 (1991).

evidence that Appellants created a greater hazard than brought about by natural causes, there is no duty to warn and protect.”⁸⁴

c. Imputing the Duty to Others: Respondeat Superior and Vicarious Liability

There is not much case law on referee liability in itself because of the doctrines of sovereign immunity and vicarious liability. Many lawsuits that involve referee liability also involve sport entity and/or facility liability. This is because referees are either volunteers or employees of sports leagues or facilities.

Liability can be “attached” to someone through vicarious liability if the negligent person was acting as an agent of another.⁸⁵ Similarly, if a defendant is “found to have committed a negligent act(s) [while] in the employ of another, then his or her employer may also be liable for damages under the theory of respondeat superior.”⁸⁶ These doctrines seem to be why referees are named in a lawsuit – to get to the deeper pocket of their employing league or facility where they work.⁸⁷ The *Patton* case provides an example of respondeat superior – the rugby tournament organizers were sued on the basis that if the referee was found to have breached his duty, his employer (rugby tournament organizers) may also be liable for damages.

A determination that the negligent actor was an “independent contractor” is a barrier to respondeat superior and vicarious liability.⁸⁸ Some argue that courts often “characterize a sports

⁸⁴ *Patton*, 381 Md. At 634. While this result may seem harsh, the referee was almost certainly reprimanded and the tournament, at the least, received bad publicity, which would help raise awareness of these issues and (hopefully) make referees and tournaments take greater precautions regarding inclement weather.

⁸⁵ Biedzynski, *supra* note 20, at 381.

⁸⁶ *Id.*

⁸⁷ Referees are almost certainly not a “deep pocket” that could provide a large sum of money to cover all of the medical expenses and other damages arising out of a sports injury case, at least relative to a league or facility.

⁸⁸ Biedzynski, *supra* note 20, at 381.

official as an ‘independent contractor,’” and therefore “the tortious doctrines of respondeat superior and vicarious liability will rarely prevail against sports officials.”⁸⁹

d. Conclusion

Courts have decided that referees may have the duty to control participants.⁹⁰ In some cases, part of a referee’s duty is to provide non-negligent supervision, which includes a duty to protect and warn participants of reasonably foreseeable dangers.⁹¹ This duty can “include protecting participants from other more aggressive players or penalizing or warning participants of their inappropriate conduct.”⁹² However, referees do not have to insure the safety of participants.⁹³

Having determined that a referee is under some duty to protect athletes from injury, the proper standard of liability must be determined so that the jury can make a decision, based on the evidence, as to whether the referee breached that duty, whether the plaintiff suffered actual injury or loss, and whether that injury or loss was caused by the referee. Next, this article looks to some of the factors and defenses that come into play in determining liability. Defenses to a tort action include lack of causation, contributory negligence, and assumption of risk⁹⁴

2. *Breach of Duty: Assumption of Risk and Consent Defenses*

Two major doctrines of defense come into play (and somewhat overlap) in sports injury cases: assumption of risk and consent. In general, a voluntary participant in any lawful sport

⁸⁹ *Id.* “Many courts conclude that where the school, entity, or institution does not retain some sort of control over the sports official, or (depending on the jurisdiction) where the sports official is not acting within the ‘ordinary course’ of some sort of employment relationship, the sports official remains an ‘independent contractor’ and not an employee.” *Id.* at 382. If the school or municipality “furnished” the referee then a different outcome is possible. *Id.* at 383-84.

⁹⁰ *Feiner, supra* note 21, at 217.

⁹¹ *Champion, Jr., supra* note 43, at 3:4. This might include something such as playing a soccer match during an electrical storm.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Biedzynski, supra* note 20, at 384.

assumes all risks that reasonably inhere to the sport insofar as they are obvious and usually incident to the game.⁹⁵ Participants in team sports assume greater risks of injury than non-participants or participants in non-contact sports.⁹⁶ On the other hand, a party should not be immunized from liability just because he or she is able to describe that conduct as part of the game.⁹⁷

“The elements of...assumption of the risk are: (1) the plaintiff has knowledge of the facts constituting a dangerous condition, (2) he knows the condition is dangerous, (3) he appreciates the nature or extent of the danger, and (4) he voluntarily exposes himself to the danger.”⁹⁸ The doctrine states that “a party who voluntarily assumes a risk of harm resulting from another party’s conduct is precluded from recovery if the harm in fact materializes.”⁹⁹

The assumption of risk defense is important because it is often utilized in an attempt to obscure the distinction between unpreventable injuries, resulting from inherent risks of the sport, and preventable injuries, resulting from negligent administration and supervision of a sports program.¹⁰⁰ Before concluding that a sports-related negligence case comes within the doctrine of assumption of risk, a court must examine the nature of the sport, along with the defendant’s role in, or relationship to, that sport.¹⁰¹

The case of *Classen v. Izquierdo* shows how far the principle of assumption of risk has been extended.¹⁰² During the course of a boxing match, Willie Classen received a number of blows to the head.¹⁰³ Following the ninth round, the defendant ringside physician examined

⁹⁵ *McKichan*, 967 S.W.2d at 212.

⁹⁶ *Id.*

⁹⁷ *See Pfister*, 167 Ill.2d 417.

⁹⁸ Forman, *supra* note 25, at 80-81.

⁹⁹ Feiner, *supra* note 21, at 223.

¹⁰⁰ *See* 15 AM. JUR. *Proof Of Facts* 2d 1 § 8 (2005).

¹⁰¹ *See Saffro v. Elite Racing, Inc.*, 98 Cal. App. 4th 173 (4th Dist. 2002).

¹⁰² *Classen v. Izquierdo*, 520 N.Y.S.2d 999, 1000 (1987).

¹⁰³ *Id.*

Classen and determined that he was able to continue the fight.¹⁰⁴ The defendant referee then permitted the tenth round to begin.¹⁰⁵ Seconds into the tenth round, Classen was struck by his opponent, lost consciousness, and died five days later as a result of a subdural hematoma.¹⁰⁶

The defendants (the two ringside physicians and Madison Square Garden)¹⁰⁷ moved for summary judgment on the argument that Classen willingly participated in the event and, in doing so, assumed all risks inherent in the sport including negligence on the part of the defendants.¹⁰⁸ The court stated that a professional athlete who elects to engage in a sport assumes all risks which are inherent in that sport and thus any injuries that are reasonably foreseeable as a consequence of participation.¹⁰⁹ The exception to this rule includes injuries caused by intentional or reckless acts.¹¹⁰ The court also found that whether a risk is inherent in a particular sport depends on various factors including the nature of the sport and the foreseeability of the danger based on the athlete's prior experience.¹¹¹

The court determined that as a professional boxer who had participated in approximately twenty bouts within the past two years, Claussen knew or should have known of the risks of injury inherent in the sport of professional boxing.¹¹² Thus, the only duty of Madison Square Garden was to avoid reckless or intentional acts.¹¹³ The court found that the referee and ringside

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* An acute subdural hematoma (SDH) is a rapidly clotting blood collection below the inner layer of the dura but external to the brain and arachnoid membrane. Frequency is related directly to the incidence of blunt head trauma. At <http://www.emedicine.com/EMERG/topic560.htm>.

¹⁰⁷ The referee was also sued in the case, but was not represented by counsel at the time of the motion for summary judgment. *Classen*, 520 N.Y.S.2d at 1000.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1000-01.

¹¹² *Id.* at 1001.

¹¹³ *Id.*

physicians were independent contractors and therefore Madison Square Garden was not responsible for any negligent acts committed by those defendants.¹¹⁴

Going along with the doctrine of assumption of risk, “consent centers on the scope of the conduct that a person agrees to through his voluntary participation in the activity and concentrates on the acts themselves rather than the consequences of conduct.”¹¹⁵ It is generally said that there is affirmative consent to injuries accidentally inflicted by the opposition upon a participant in a contact sport, but injuries that are intentionally inflicted by the opponent, in violation of the rules of the game, constitute battery.¹¹⁶ The participant assumes the risks inherent to the game, but he does not assume any extraordinary risks unless he knows of them and voluntarily assents to them.¹¹⁷

The following case shows some of the overlap between consent and assumption of risk in a judgment-type situation. In *Lee v. Maloney*,¹¹⁸ Maloney was one of two spotters in a bench-press competition assigned to plaintiff Lee, a nationally-ranked weightlifter.¹¹⁹ Upon losing control of the bar, plaintiff contended “that Maloney failed to timely grab it, waiting instead for the judge to yell ‘grab it’ or ‘take it.’”¹²⁰ “The bar dropped to the left, where Maloney was

¹¹⁴ *Classen*, 520 N.Y.S.2d at 1001-02. The court found that the referee and physicians were selected by the New York State Athletic Commission, not Madison Square Garden. Furthermore, Madison Square Garden did not provide them with training, instruction or supervision. Motions for defendant physicians were denied on the ground that “[o]nce the physicians rendered medical care to the decedent, they had a duty to provide it in a non-negligent manner.” *Id.*

¹¹⁵ Forman, *supra* note 25, at 79.

¹¹⁶ See *Barton v. Hapeman*, 674 N.Y.S.2d 188 (App. Div. 4th Dep’t 1998), involving a thirteen-year-old participant in a youth hockey game who was allegedly “charged” and “cross-checked” from behind by an opposing player. The participant could not recover for injuries sustained, even though the conduct violated league rules, because the risk of such conduct was an assumed risk. The participant had played hockey since age three and was aware that the league allowed checking and that the risk of injury existed. Additionally, the opposing player’s conduct was determined to be not flagrant or unrelated to the normal method of playing hockey.

¹¹⁷ 7 AM. JUR. *Trials* 213 § 3 (2005).

¹¹⁸ *Lee v. Maloney*, 270 A.D.2d 689 (2000).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 690.

spotting, landing partially on plaintiff's chest and arms which caused him injuries that required surgery."¹²¹

The court stated that the doctrine of assumption of risk dictates "that voluntary participants in sports activities may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of their participation."¹²² As "long as a defendant fulfills a duty to exercise reasonable care, to protect participants from unassumed, concealed or unreasonably increased risks, its application is justified when the consenting participant is aware of the risk, has appreciation of the nature of the risks and voluntarily assumes the risk."¹²³ The court added that "awareness of the risk is not to be determined in a vacuum," but instead is "to be assessed against the background of the skill and experience of the particular plaintiff."¹²⁴

In its determination, the court found that the plaintiff was "held to have assumed the risks inherent therein which reasonably includes the knowledge that a heavily weighted bar might slip out of his control and injure him *despite the assistance* that a *fully attentive* spotter might be able to provide."¹²⁵ The injury was found to be instantaneous, giving the spotters little time to react.¹²⁶ There was "no viable evidence [to] support [] that [plaintiff's] injuries could have been prevented by Maloney."¹²⁷ Thus, finding no evidence to support a claim that there was reckless or intentional conduct by Maloney or that the risks inherent in the sport were concealed or unreasonably increased, the court found that summary judgment was properly granted.¹²⁸

¹²¹ *Id.*

¹²² *Id.* (citations removed).

¹²³ *Id.* (citations omitted).

¹²⁴ *Lee*, 270 A.D.2d at 690-91, *quoting* Maddox v. City of New York, 66 N.Y.2d 270, 278.

¹²⁵ *Lee*, 270 A.D.2d at 691 (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

This case demonstrates the line of thinking that the proper standard of liability is ‘recklessness.’ Courts like the one in *Lee* seem to believe that “[a]lthough the hazard may be an extraordinary one, a participant who knows about it and voluntarily assumes it will be precluded from recovering for injury or death....”¹²⁹

There is another line of thinking, however, that seems to be more in line with a negligence standard: “the voluntary participant in a lawful game or contest is deemed to have assumed only the natural and ordinary risks of that game or contest and not the extraordinary risks thereof.”¹³⁰ This line argues that if the plaintiff succeeds in proving negligence, then no assumption of risk instruction is appropriate, since a sports participant does not assume the risk that his activity will be negligently administered or that he will be negligently instructed or supervised.¹³¹ This line of thinking continues by saying that one is never held to assume the risk of another’s negligence or incompetence,¹³² no matter who is the defendant – the operator of the game or contest, opponent, or other participant therein.¹³³ The problem with the negligence line of thinking is that we have already seen that the standard of care for athletes to one another is not mere negligence, but recklessness or gross negligence. So the question becomes whether referees should be held to a different standard from athletes.

These two different lines of thinking will be discussed more thoroughly in Sections III and IV.

¹²⁹ W.R. Habeeb, Annotation, *Liability for Injury to or Death of Participant in Game or Contest*, 7 A.L.R. 2d 704 (2004), citing *Hotels El Rancho v. Pray*, 187 P2d 568 (1947).

¹³⁰ W.R. Habeeb, Annotation, *Liability for Injury to or Death of Participant in Game or Contest*, 7 A.L.R. 2d 704 (2004).

¹³¹ See, e.g., *Whipple v. Salvation Army*, 495 P2d 739, 261 Or. 453 (Or. 1972); *Carabba v. School Dist.*, 435 P2d 936, 72 Wash. 2d. 939 (Wash. 1967).

¹³² *Carabba v. School Dist.*, 435 P2d 936, 72 Wash. 2d. 939.

¹³³ 7 AM. JUR. *Trials* 213 § 3 (2005).

3. Proper Causation

The final element previously identified in stating a prima facie case is proving the loss or injury proximately resulted from a referee's breach of duty. Causation is complicated in the context of referee decisions because referees are often alleged to be liable for their *lack* of action instead of their action.¹³⁴ Even if an official's conduct is found to be the cause of the injury, he or she can still be protected if the injury is too remote or unforeseeable.¹³⁵

In *Whipple*, a 15-year-old boy injured his knee during a youth program game when he was tackled by four players.¹³⁶ There was evidence that the referee-supervisor (employed by defendant youth program) failed to whistle the play to a stop after the plaintiff was brought down.¹³⁷ The court directed a verdict for the defendant youth program.¹³⁸ It found no evidence that piling on of tacklers occurred after the plaintiff was stopped, when the referee's whistle should have sounded.¹³⁹ Thus, the plaintiff failed to prove that the defendant's failure to give a timely whistle caused his injury, even though that failure may have constituted a violation of a duty of care.¹⁴⁰

III. CURRENT RULES AND REGULATIONS

Having generally outlined the existence of a referee's duty, one interesting question is whether referees even know that they have a legal duty to protect athletes from injury or are given adequate guidance in judgment-call situations from their employing leagues. There seems to be little written in rule books about a referee's responsibility during a physical altercation. For many sports, like swimming or motor car racing, a physical altercation is a very rare occurrence.

¹³⁴ Feiner, *supra* note 21, at 222.

¹³⁵ *Id.*

¹³⁶ *Whipple v. Salvation Army*, 495 P2d 739.

¹³⁷ *Id.* at 742.

¹³⁸ *Id.* at 743-44.

¹³⁹ *Id.* at 741-42.

¹⁴⁰ *See id.*

In many of these sports there might not even be a referee (sometimes just as a scorekeeper or a judge). But even for sports where there are occasional altercations (like baseball¹⁴¹ or basketball), or sports where altercations are frequent or the main object of the sport (like boxing or karate, which are the focus of this article), there is still little official guidance for a referee.

For professional hockey, NHL Rule 56 Note 3 provides the only real direction for a referee regarding when to stop a fight. It states: “Referees are directed to employ every means provided by these rules to stop “brawling” and should use this Rule and Rule[...]41(f)¹⁴²....” Rule 56 Note 2 states: “The Referee is provided very wide latitude in the penalties which he may impose under this Rule. This is done intentionally to enable him to differentiate between the obvious degrees of responsibility of the participants either for starting the fighting or persisting in continuing the fighting. The discretion provided should be exercised realistically.” Thus, in the NHL’s official rules, there is nothing about whether it is the referee’s duty to stop every fight, what constitutes ‘brawling,’ what role a linesman plays versus a referee, etc. Having a negligence standard for liability might impose a greater duty and responsibility than he or she is aware.

Boxing is unique because each jurisdiction can have its own rules and regulations. Generally, “the winner [of a boxing match] may win by the referee stopping the contest, which occurs when the referee believes the fighter has been outclassed and injury or other harm may

¹⁴¹ MLB’s official rules from their website only state the following in regard to any altercation situation: “Each umpire has authority to disqualify any player, coach, manager or substitute for objecting to decisions or for unsportsmanlike conduct or language, and to eject such disqualified person from the playing field.” At http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/umpire_9.jsp.

¹⁴² NHL Rule 41(f) states: “Any player who persists in continuing or attempting to continue a fight or altercation after he has been ordered by the Referee to stop, or who resists a Linesman in the discharge of his duties shall, at the discretion of the Referee, incur a misconduct or game misconduct penalty in addition to any penalties imposed.” At <http://www.nhlofficials.com/rule41.asp>

occur if the bout continues.”¹⁴³ Similar to the NHL rules, there is little guidance and no definition of “outclassed.” There are no easy answers to when a referee should stop a one-sided fight.¹⁴⁴ The executive director of the Nevada Athletic Commission stated that the commission “does not have an official policy on when a referee should stop a fight.”¹⁴⁵ He added that, “First of all, [when to stop a fight] is the ultimate judgment by the official.[.] That decision separates the great referees from the average referees.”¹⁴⁶ He continued that “You cannot have a hard and fast rule[.] There is no black and white. You have to judge each fight on the fight itself. You have to officiate it with no preconceived notions. It would be wrong of the commission to get involved beforehand.”¹⁴⁷

A referee in Las Vegas added his perspective: “When a fighter can no longer protect himself, the fight is over with, period. That is the most important thing – the safety of the fighter. There are telltale signs – a guy’s eyes, the legs are shot, he can’t protect himself or he can’t keep his hands up.”¹⁴⁸ He added that “One punch can affect a life,”¹⁴⁹ which demonstrates the seriousness of these split second-decisions.

Similar in its nature to boxing, the International Kickboxing Federal has released “IKF Referee Duties.”¹⁵⁰ Rule 4 provides:

The referee will not step in to give a standing 8 count if the opponent getting beat is still able to hold up his/her hands to chin height. This prevents a recovery period when one fighter is clearly beating the other. If the referee feels he/she must step in, he should also consider stopping the fight at that time. If

¹⁴³ Jonathan S. McElroy, Article, *Current and Proposed Federal Regulation of Professional Boxing*, 9 SETON HALL J. SPORT L. 463, 467 (1999).

¹⁴⁴ Royce Feour, “Ref has to decide when to say when,” LAS VEGAS REVIEW-JOURNAL, available at http://www.reviewjournal.com/lvrj_home/2000/May-28-Sun-2000/sports/13665936.html.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ At <http://www.ikfkickboxing.com/Referees.htm>

questionable, the referee should call upon the ringside physician to make the decision whether the bout should continue.¹⁵¹

Additionally, Rule 10 appears to provide the referee some direction on when to stop a fight:

If a fighter looks helpless and receives several blows to the head but continues to stand, not move and not be able to defend him or herself, the referee will step in and give the fighter a standing 8 count and if the referee feels necessary, he may stop the fight at that time. The Referee shall not stop the bout when a fighter is still standing, unless either a knockdown has happened within the round in question or at least 1 standing 9 count has been given to the fighter in trouble within the same round. The referee will not step in to give a standing 8 count if the opponent getting beat is still able to hold up his hands to chin height and still protect him/herself.... At ANY time, the referee may also request the ringside physician to come up to the ring and make a true medical determination whether a fighter should continue or not.¹⁵²

The rules also contain the language, “Let the fighters fight out of it” regarding breaking up any “clinch.”¹⁵³ The referee is to stop the fight, though, if a fighter fails to stand after the count of 10 or “limps in pain once up.”¹⁵⁴

The courts will, at times, defer to rules and regulations self-imposed by leagues. For example, in *Collins* a trainer removed the interior padding of his boxer’s gloves prior to the match, which contributed to serious eye and head injuries to the opposing boxer (*Collins*).¹⁵⁵ These injuries resulted in the end of Collins’ boxing career and were a contributing factor in his subsequent suicide.¹⁵⁶ While the trainer was criminally convicted, the referee of the match (along with the promoter, state boxing commission, and arena) was also sued. “As to the referee, the court found that the regulations of the Boxing Commission only required an inspection of the exterior of the boxers’ gloves and bodies for detrimental foreign substances; there was no duty

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Forman, *supra* note 25, at 86, *citing* *Collins v. Resto*, 746 F. Supp. 360 (S.D.N.Y. 1990).

¹⁵⁶ Forman, *supra* note 25, at 86.

for a further examination of the gloves.”¹⁵⁷ Thus, sometimes rules and regulations help determine the scope of a referees’ liability.

Overall, it seems that the referee is given little guidance for what to do during physical altercations by the rules and regulations of sporting leagues. Instead, the guidance seems to mostly come from common sense, experience, and direct instruction by supervisors. Some of these “rules” seem to correspond with a negligence standard, while other rules seem to allow negligent conduct on the part of the referee. A possible problem here is providing two different standards for referees to follow. The legal standard will exist whether or not a referee knows of it (and might be necessary to protect athletes), but rules provided by the league can provide valuable guidance to referees tailored to their duties in the sport.

The next two sections will examine potential effects of the two major standards of care on the sport, participants, and referees in “judgment-call situations.” Policy concerns help determine which standard is appropriate. The standard of care comes into play in determining the extent of a referee’s duty and whether or not the duty was breached. It will (most likely) affect the referee’s behavior¹⁵⁸ and the amount of potential lawsuits. “[T]he difference in the standard of liability will usually determine the outcome of the suit.”¹⁵⁹

IV. ADVOCATING A HEIGHTENED DUTY – NEGLIGENCE

There is a valid argument for imposing the heightened standard of liability of negligence on referees in judgment-call situations. Though this duty should not be one of strict liability

¹⁵⁷ *Id.* at 87.

¹⁵⁸ This Article, for the most part, makes an assumption that referees, leagues, and facilities understand their potential liability during a sporting event. There is a good possibility that all three of these entities are unaware of that potential and therefore their behavior might not change depending on what standard is set.

¹⁵⁹ Biedzynski, *supra* note 20, at 407.

(which is almost certainly too extreme),¹⁶⁰ a negligence standard seems to be one that has a number of possible benefits. Reasons for imposing a heightened duty on referees include greater prevention of serious injuries or death, the foreseeability of these incidents by the referees themselves, the potential lack of extricability by the athlete himself or herself from the situation, and the nature of paid employment.

Again, negligence is conduct that poses an unreasonable risk of harm to other participants.¹⁶¹ “The purpose for using an ordinary negligence standard [would be] to prevent recurrence of unacceptable conduct[] and [to] deter officials from departing from the norm.”¹⁶² There is a valid argument that a referee is supposed to be the expert on the sport, be familiar with dangerous situations which may arise, and have more experience with the rules of the game than the participants. The referee is looking at the situation from an outside, objective perspective instead of being engaged in the “heat of the moment,” and therefore he or she should be prepared to make a level-headed decision. Hesitance by an official is what can be the difference between preventing and not preventing an injury.

Some jurisdictions have used a negligence standard for sports-related injuries.¹⁶³ *Carabba v. Anacortes School District*¹⁶⁴ is the main case in support of a reasonableness standard looking to negligence of a sports official in finding liability.¹⁶⁵ The case also involves what could be seen as a judgment-type situation had the referee not been sidetracked. *Carabba*

¹⁶⁰ Imposing a duty of strict liability on referees would make referees liable for all sports injuries. This could include injuries that are intentionally inflicted by other players or even fans, and injuries that are pure accident and unforeseeable. Thus, the amount of people who would volunteer or be employed as referees would almost certainly plummet. Based on my own personal research, I have found no authorities that support a strict liability standard.

¹⁶¹ Schalley, *supra* note 24, at 185.

¹⁶² Feiner, *supra* note 21, at 220.

¹⁶³ Schalley, *supra* note 24, at 189. For example, the Wisconsin Supreme Court held that the negligence standard is the proper standard to apply to recreational sports. “[The Wisconsin Supreme Court] did not believe that maintaining a negligence standard would discourage sports-related activities, since when all surrounding circumstances of a sports tort are considered, the negligence standard is flexible enough not to impede competition.” This decision was later superceded by a statute. *See id.*, at 189-90.

¹⁶⁴ *Carabba*, 435 P.2d 936.

¹⁶⁵ Biedzynski, *supra* note 20, at 386.

involved an incident during a wrestling match where a referee was momentarily distracted by a separation in the mats (which he then fixed).¹⁶⁶ While the referee's attention was diverted, an illegal 'full nelson' hold was applied to Carabba, resulting in the severance of a major portion of his spinal cord.¹⁶⁷ The court found that an official "must exercise the care of an ordinary, prudent referee under similar circumstances."¹⁶⁸ Therefore there was a duty on the referee "to provide non-negligent supervision."¹⁶⁹ "The referee's non-enforcement of the safety rule, which prohibited applying a 'full nelson,' and his failure to properly supervise the contest were found to be the proximate cause of the injury."¹⁷⁰ Thus, the referee 1) was under a duty; 2) breached that duty (meaning that, for this court, he was negligent); 3) plaintiff suffered injuries; and, 4) the injury was proximately caused by the defendant's negligence (i.e. a breach of duty). This case raised the possibility of imposing liability on an official for failing to properly supervise an athletic event.¹⁷¹

A. *Prevention of serious injuries or death*

There is no doubt that sports injuries can be very serious. This is especially true in many of the situations in high contact sports like hockey and boxing. Fighting invites itself to injury and, although numerous safeguards have been put in place,¹⁷² many serious injuries (and even deaths) happen each year. A reasonable way to reduce these injuries would be to impose a higher duty of care on referees so that they will be more aware in avoiding preventable

¹⁶⁶ *Carabba*, 435 P.2d at 939.

¹⁶⁷ *Id.*

¹⁶⁸ *Feiner*, *supra* note 21, at 219.

¹⁶⁹ *Carabba*, 435 P.2d at 948.

¹⁷⁰ *Champion, Jr.*, *supra* note 43, at 3:4.

¹⁷¹ *Feiner*, *supra* note 21, at 219. Additionally, the question of whether the defendant school district was negligent was narrowed down to a question of whether or not the referee was negligent during the match. *Carabba*, 435 P.2d at 943 n.6.

¹⁷² Like harsher penalties for breaking rules and more protective equipment.

injuries.¹⁷³ It is logical to assume that increasing a referee's risk of legal liability would cause a referee to be more alert during physical altercations and break up more altercations/fights before serious injury can occur. Although a defendant referee generally has no legal duty to eliminate, or protect a plaintiff against, the risks inherent in a sport, a defendant referee generally does have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.¹⁷⁴ Negligently allowing conduct to continue that can result in serious injury can be said to increase the risk inherent in a sport.

“Toughman” contests provide an example of a “league” where the amount of serious injuries might be decreased if the standard for referee liability is changed to mere negligence. These contests pit people ‘off the streets’ against one another in a three-round boxing match. “Toughman” contests are notorious for being especially brutal and dangerous – as of July 2003 there were 14 deaths since its inception in 1979 plus an additional five cases of brain damage.¹⁷⁵ That fatality rate is more than quadruple that of organized amateur boxing.¹⁷⁶ A recent death involved Stacy Young, a 30-year old mother of two who had no fight training, but was encouraged on the day of the event to step into the ring to fight a trained, conditioned woman who was ten years younger than her.¹⁷⁷ The referee was alleged not to be looking out for the safety of the boxers, but instead merely watching the match and trying to ensure that the promoter's (his boss) wish for a “3 round cat fight” came true.¹⁷⁸ One account stated:

Even when Young dropped her gloves and stumbled to her corner while members of the audience called for the bout's end, the referee never even stepped in to break the two to separate. He just stood by and watched Kobie [the opponent] pummel Young! Kobie landed punch after punch on Young who was visibly out

¹⁷³ Accidents that the referee has no control over will always happen.

¹⁷⁴ See *Knight v. Jewett* 834 P2d 696 (1992).

¹⁷⁵ At <http://www.ikfkickboxing.com/OpinionToughman.htm>

¹⁷⁶ *Id.* The author of the article attributes “Toughman's” ‘deadliness’ to loose rules and lack of regulation.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

of shape (at 240 lbs) and spent much of the fight backed into a corner trying to defend herself as best she could....By round 3, Young couldn't even hold her gloves up to protect herself. As she walked toward her corner before the match was over, Kobie punched her three times on the side of the head. The referee didn't step in as Young went down on the third punch. Young absorbed 14 unanswered punches to her head. Twice, Kobie went after Young when Young's back was turned to her, and neither time did the referee intervene. Nobody knows which punch rendered Young brain dead but the last time she turned her back to Kobie, Kobie jabbed the back of her head with a left and then cocked her right fist and delivered a blow squarely on Young's brain stem, snapping Young's head from side to side. From the final blow, Young collapsed, and never got up....[T]he fight doctor who was suppose [sic] to be there to protect fighters never tried to stop the match even though it was clear Young was being overwhelmed with punches and couldn't defend herself.¹⁷⁹

Another Toughman Contest incident involved a referee who wouldn't allow a fighter to give up.¹⁸⁰ It has been said that the referees "are allowed to work [Toughman] bouts even when they don't meet the sport's minimal requirement[.]...[that] they have been 'involved in so many fights in the past.'"¹⁸¹ Thus, lack of adequate training and guidance appears to be a contributing factor for poor officiating during "Toughman" contests. The officiating can certainly be seen as negligent (and probably reckless or grossly negligent) in many of these instances.

Raising the standard of liability would cause the promoters of "Toughman" contests, for example, to provide better training and supervision of referees so that the referees are not negligent in their officiating. This is because the promoters and leagues themselves can be liable for a referee's actions through the theory of respondeat superior. If referees are sued and leagues are found vicariously liable, the leagues will have more incentive (both financially and legally) to prevent serious injuries and train their referees. Referees themselves would have more incentive to be properly trained and break up injury-prone situations earlier because of the threat

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* This is based on statements by the opponent. The referee denies the account.

¹⁸¹ *At* <http://www.ikfkickboxing.com/OpinionToughman.htm> (emphasis removed). The author states that one referee had worked only five fights.

of personal liability. A reduction in negligence on the part of referees will almost certainly lead to fewer injuries and death in these “leagues.”

B. Foreseeability by referees themselves

Again, the situations that this article focuses upon are those in which the referee can foresee the type of situation that can lead to serious injury or death, but doesn't necessarily foresee the actual injury or death. Since the referee is aware of these types of situations it is reasonable to think that a negligence standard is not too much to ask. The argument is that the referee in *Carabba* should know that serious injuries could result in a match and that he is there to prevent it. Injury during a full nelson is foreseeable. If he wanted to fix the mat he should have stopped the match. Instead his negligence led to injury. On the other hand, an injury during a slide tackle in soccer might not be foreseeable and therefore a duty should not be imposed at all to prevent the injury.

One author has argued that “[u]nder the auspices of negligent supervision, it may be sufficient [to impose liability] if [an] unforeseeable intervening cause results in a type of harm which is foreseeable.”¹⁸² He continued: “The duty of control arises...because the defendant has actual control in the relationship sufficient to direct other parties' conduct.”¹⁸³ The referee is in a position of authority over the athletes, and this control is enough to impose a duty on the referee.¹⁸⁴

The referee can't control every action of a participant, but the referee does have the ability to change and influence a situation. For example, if two players are getting into a heated argument that the referee witnesses then he or she has the ability to step in between the players, order one off of the playing field, give verbal warnings, etc. to prevent the situation from

¹⁸² Feiner, *supra* note 21, at 223.

¹⁸³ *Id.* at 218.

¹⁸⁴ *Id.*

escalating into a serious one that could result in injury.¹⁸⁵ This type of action by a referee would seem to surpass the negligence standard and insulate the referee from liability, even if the players then ignored the referee and the injury still resulted, because the referee exercised the care of an ordinary, prudent referee.

C. Extricability of athlete from situation

In *Rolison v. City of Meridian*, the court was unwilling to place a duty to protect on the City against someone getting hit with a bat when it was thrown after a routine “pop fly.”¹⁸⁶ The court stated that it was unwilling to impose a common law duty on defendants to supervise the activities of their patrons in the conduct of their games to ensure that the participants obey the standard rules or do not take unreasonable risks since that burden would be unduly onerous and patronizing.¹⁸⁷ The court did state, though, that a duty to supervise might arise where the nature of the activity carries with it the possible danger from which a participant could not extricate himself.¹⁸⁸ The court identified an example of a public swimming pool or beach where there may be a duty to provide a lifeguard.¹⁸⁹

In contrast to the argument that an athlete can choose to stop playing or avoid a fight in hockey, there are certain situations that an athlete cannot or does not know that his or her safety is in danger. For example, a boxer can 1) suffer large lacerations on his face but be unaware of them so, therefore, he doesn't know to remove himself from the situation, or 2) be repeatedly hit in the head and suffer brain trauma, but not be physically able to remove himself from the

¹⁸⁵ This brings up an incident that occurred during the drafting of this Article involving a Temple player who was “order[ed] by Temple coach John Cheney to engage in] rough play [and] [] who proceeded to foul out in four minutes against Saint Joseph's and broke an opponent's arm.” *At* http://www.usatoday.com/sports/college/mensbasketball/atlantic10/2005-02-25-temple-chaney_x.htm. Some have questioned the why the referees did not intervene before the Saint Joseph's player's arm was broken. *At* http://sportsillustrated.cnn.com/2005/writers/seth_davis/03/08/hoop.thoughts/1.html.

¹⁸⁶ *Rolison v. City of Meridian*, 691 So.2d 440, 443 (1997).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

situation because the other athlete continues to pound on him and/or because his nerve functions have failed. In these situations it is very important that the referee intervene to save the athlete from further injury.

Applying what was said previously in Section II, the creation of a “special duty” by virtue of a “special relationship” between the parties can be established by one party undertaking to protect or assist the other party, and thus inducing reliance upon the conduct of the acting party.¹⁹⁰ If there is an element of dependence then there can be such a duty.¹⁹¹ A referee during a boxing match or hockey fight seems to take on a duty to protect one of the fighters in case that person cannot defend himself (or herself). There can be dependence¹⁹² by a fighter who is being knocked unconscious and therefore cannot remove himself or herself from the situation.

The *Classen* case is one in which this principal can be illustrated. The boy in the full nelson had no ability to remove himself from the hold that caused his injury (or else he would have broken the hold and there would have been no injury). The boy relied on the referee to make sure he wasn't put into that hold or at least to break up the hold when it occurred. The referee's negligence prevented the referee from fulfilling this duty to the athlete and the result was a very serious injury.

Every situation where an athlete cannot extricate himself or herself can potentially be very serious. The athlete needs the help of a referee more than ever. Many judgment-call

¹⁹⁰ *Patton*, 381 Md. at 639.

¹⁹¹ *Id.* at 640.

¹⁹² In *Muthukumarana v. Montgomery County*, 370 Md. 447, 496 (2002), the court reasoned that for a “special relationship” to exist between an emergency telephone operator and a person in need of assistance, it must be shown that the telephone operator affirmatively acted to protect the decedent or a specific group of individuals like the decedent, thereby inducing specific reliance by an individual on the telephone operator's conduct. A step in the direction of not finding a duty in these types of situations, in *Patton*, 381 Md. At 642 n.5, the court stated that there may be a degree of dependency and ceding of control that could trigger a “special relationship” in, for example, a Little League game where children playing in the game are reliance on the adults supervising them.

situations are these types of situations. Therefore a duty to supervise non-negligently seems appropriate.

D. Referees are paid officials, not common bystanders

For the most part, this article has not distinguished between volunteer and compensated referees. The differences seem subtle enough where much of the information and analysis are applicable to both; if anything, the fact a referee is being compensated should be taken into consideration for application of vicarious liability, the assumption of risk defense, or remedies.

An argument for a heightened standard is strengthened when the defendant referee is one that is paid instead of a volunteer. The monetary reward for officiating a game further justifies the duties placed upon a referee. Referees are held out to the participants as having enhanced knowledge of the sport, and they are compensated for their knowledge and ability to apply that knowledge to the game. Most importantly, they are being compensated, in part, to make sure that they do not perform their job negligently and to assure the safety of the players. In that sense, referees serve as a type of insurance for their employer (a league or stadium). As an extreme example of when compensation should come into play, "Toughman Contest" referees seem to be paid by the promoters to be negligent in allowing the competition to continue even when injury seems imminent (the idea being that paying spectators want to see a fight unimpeded by referees). That is not a good incentive if an overall goal is to prevent injuries and death in sports.

V. ADVOCATING A LESSER DUTY – RECKLESSNESS OR GROSS NEGLIGENCE

Even though a negligence standard seems to have some advantages, “other commentators [and state legislatures] take the position that the threshold for civil liability (in cases not involving intentional torts)[] should focus on [a] recklessness [standard] rather than reasonableness.”¹⁹³ “According to this school of thought, an official is liable only for his or her reckless acts or omissions.”¹⁹⁴ “Whereas negligence is the failure to exercise ordinary care, recklessness involves...a conscious indifference to a known risk of serious harm.”¹⁹⁵ Reckless behavior is not behavior that is intentional, but is behavior that involves a state of mind that is treated in many respects as if it were so intended – such as willful or wanton conduct.¹⁹⁶ There is the argument that since participants only owe fellow players a duty to not act recklessly; recklessness, and not ordinary negligence, should define the sports official’s duty as well.¹⁹⁷

If the *Carabba* court used a recklessness standard it would be harder to find the referee liable for breaching a duty of care. The referee did not show a conscious indifference to a known harm. The referee was not aware of the situation to make any conscious decision. In fact, it can be argued that he was protecting the athletes from a known harm – the separation in the mats.

Another possible standard of liability that is similar to recklessness (in the sense that it provides a lesser duty than negligence) is gross negligence. “Gross negligence is deemed to constitute conduct beyond the normal, inherent risk associated with” sports, and “[a] gross

¹⁹³ Biedzynski, *supra* note 20, at 387. The states, in 1994, included Arkansas, Georgia, Indiana, Louisiana, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island, and Tennessee. *Id.* at 388-98.

¹⁹⁴ *Id.* at 387-88.

¹⁹⁵ Schalley, *supra* note 24, at 184.

¹⁹⁶ *Id.* at 184-85.

¹⁹⁷ Biedzynski, *supra* note 20, at 411-12.

negligence standard serves to indicate the threshold between conduct presumed to be accepted as inherent to the activity, and conducted outside such a realm.”¹⁹⁸

Foreseeability by participants, assumption of risk, the nature of sports, profit motives, the inability to guarantee fewer injuries, and a drop in the number of referees willing to be accountable for a higher negligence standard of liability, all support a recklessness standard of care.

A. Foreseeability by participants/assumption of risk/consent

Although foreseeability, assumption of risk, and consent can be used as defenses against referee liability, they are also helpful to take into consideration in determining the proper standard of liability. Again, assumption of risk focuses on the conduct of the plaintiff in attempting to limit the sphere of the defendant’s liability.¹⁹⁹ In sports, participants are aware that injuries often result from aggressive play regardless of the competency of a supervising official.²⁰⁰ Mark Messier, a current NHL player, has admitted that “[e]verybody knows it’s a dangerous game and we all know injuries can happen.”²⁰¹ Sporting contests, by their nature, “involve an elevated degree of danger.”²⁰² “If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks.”²⁰³

¹⁹⁸ Feiner, *supra* note 21, at 220.

¹⁹⁹ *Id.* at 223.

²⁰⁰ *Id.* Alternatively, it may be argued that participants cannot assume a risk of an unknown danger, such as negligent officiating that results in an injury. *Id.*

²⁰¹ Marder, *supra* note 9, at 17-18. One court found that karate is not a commonly observed sport such as football or baseball, where dangers are apparent to anyone who has engaged in the activity, and therefore it was not clear to the particular plaintiff in this case that risks to which he was to be exposed by participating in sparring would have been ‘known, apparent or reasonably foreseeable’ to him. *See Deangelis v. Izzo* 596 NYS2d 560 (1993).

²⁰² *Turcotte et al. v. Fell et al.*, 68 N.Y.2d 432, 437 (1986).

²⁰³ *Id.*

In some situations, the careless conduct of others is considered an inherent risk of a sport for which recovery is barred.²⁰⁴ Thus, while the possibility of harm in contact sports in general is foreseeable to all, the specific act that might cause harm is usually not. *Classen* held that whether a risk is inherent in a particular sport depends on various factors including the nature of the sport and the foreseeability of the danger based on the *athlete's* prior experience.²⁰⁵ Thus, even if the referee can foresee the possibility of a serious injury, it is not the referee's perspective from which a judgment of assumption of risk is taken.

“When a plaintiff voluntarily consents and enters into a situation where the negligence of the defendant is obvious, the defendant may be relieved of any duty to the plaintiff under the doctrine of assumption of risk.”²⁰⁶ There is a strong argument that negligence on the part of a referee is bound to happen during an intense sporting event. This is because there are distractions from fans, a number of athletes on the playing field at once, a variety of rules, etc. Additionally, it is extremely difficult to determine the intent of players. Some players might just be horsing around; some might “snap” and cause injury; others might be playing hurt, and therefore might be more susceptible to injury, but yet the referee is unaware of such a condition. Negligence on the part of a referee in this situation might lead to an injury that could have been prevented (or minimized) had the athlete not concealed the fact that he or she was playing hurt. A Las Vegas boxing referee stated: “Unfortunately [referees] are put in a tough position when guys are too tough for their own good. Fighters can take quite a bit of punishment, and some (hurt) guys come back and throw punches and actually score.”²⁰⁷ He adds that, as a referee with experience as a fighter, “[y]ou can see the fear in his eyes. He is practically begging you to stop

²⁰⁴ See *Knight*, 834 P2d 696.

²⁰⁵ See *Classen*, 520 N.Y.S.2d at 1000-01 (emphasis added).

²⁰⁶ Schalley, *supra* note 24, at 185.

²⁰⁷ Royce Feour, “Ref has to decide when to say when,” LAS VEGAS REVIEW-JOURNAL, available at http://www.reviewjournal.com/lvrj_home/2000/May-28-Sun-2000/sports/13665936.html.

the fight but is too much of a ‘macho man’ to surrender. They are looking for the referee to come to their rescue.”²⁰⁸

Officials are often placed in difficult positions and must react almost immediately.²⁰⁹ This is true even if the referee is aware that a fight is happening and injuries in general are therefore foreseeable to him or her. In contact sports “decisions are made within split seconds and under an adrenaline rush.”²¹⁰ This is true for both the players and the referees. Actions are taken almost instantaneously, and therefore a higher standard such as negligence might not conform to the decision-making capabilities of a standard referee. In that case, lawsuits holding the referee personally responsible for negligence could increase substantially. Thus, a policy to avoid a flood of litigation over sports accidents is furthered by the application of a heightened, recklessness or intentional conduct standard of liability to all recreational sports.²¹¹

*Kline v. OID Assoc., Inc.*²¹² is a typical example of a case where foreseeability, assumption of risk, and a recklessness/gross negligence standard come together in providing an adequate defense for the referee. Kline was injured during a co-ed adult indoor soccer game.²¹³ The two teams were playing aggressively and there was a physical altercation between them minutes before the incident that resulted in the lawsuit.²¹⁴ Moore, an opposing player, attempted to score on Kline, who was playing goalie at the time.²¹⁵ Kline blocked the shot by diving to the

²⁰⁸ *Id.*

²⁰⁹ Feiner, *supra* note 21, at 220.

²¹⁰ Schalley, *supra* note 24, at 191.

²¹¹ *Schick*, 767 A. 2d 962.

²¹² *Kline v. OID Assocs., Inc.*, 609 N.E.2d 564.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

side and covering the ball with his body.²¹⁶ “Moore thereafter attempted to either kick the ball or to intentionally kick Kline,” resulting in a broken wrist and elbow.²¹⁷

The court in *Kline* concluded that the plaintiff had “failed to provide any evidence that [the] [r]eferee...had superior knowledge,” compared to Kline or the other players, that Moore or his team had a propensity for violence or were likely to intentionally cause injury.²¹⁸ The court further found that there was no evidence that the referee “either recklessly or negligently allowed the game to be continued.”²¹⁹ The court continued:

From the evidence presented, it appears that Kline, with his thirty years of soccer experience, had at least as much knowledge of any potential for injury in the game as [the referee]. If it was so obvious that the level of play was too dangerous, Kline could have elected not to play. By continuing to play, Kline assumed the ordinary risks of the game, including the possibility of being injured. Getting kicked is a common occurrence in soccer, because of the closeness of the players who are also trying to kick or block the ball. Kline failed to establish that the [referee] knew that the game involved any risk greater than the ordinary risk a player assumes when he plays soccer. Nor did he show that his injuries were a result of intentional conduct or recklessness on the part of appellees.²²⁰

Thus, *Kline* shows the use of the gross negligence or recklessness standard and how foreseeability and assumption of risk fit in with the standard. This outcome seems reasonable and in line with the expectation of sports participants.

B. Nature of game

Closely related to the defenses of assumption of risk and consent is the nature of contact sports and their history. For example, there is a violent spirit in the sport of hockey.²²¹ Players trip opposing players, slash at them with their hockey sticks, and fight on a regular basis, often

²¹⁶ *Id.* at 564-65.

²¹⁷ *Kline*, 609 N.E.2d at 565.

²¹⁸ *Id.* at 566.

²¹⁹ *Id.*

²²⁰ *Id.* (citations omitted)

²²¹ *McKichan*, 967 S.W.2d at 212.

long after the referee blows the whistle.²²² Players regularly commit contact beyond that which is permitted by the rules, and sometimes they do it intentionally.²²³ They wear pads, helmets and other protective equipment because of the rough nature of the sport.²²⁴

In *McKichan v. St. Louis Hockey Club*, the defendant player continued skating toward the plaintiff after a second whistle was blown by the referee.²²⁵ Holding his stick, defendant player partially extended both arms and hit plaintiff with his body and the stick, knocking plaintiff into the boards.²²⁶ Plaintiff fell to the ice and was knocked unconscious.²²⁷ The court found that this body check, even though it was several seconds after the whistle and in violation of several rules of the game, was not outside the realm of reasonable anticipation.²²⁸ The court found that, for better or for worse, it is ‘part of the game’ of professional hockey. The court thus held that this conduct was not actionable.²²⁹

Professional hockey is played at a high skill level with well-conditioned athletes who are financially compensated for their participation.²³⁰ They are players with knowledge of hockey’s rules and customs, including the violence of the sport.²³¹ These leagues have their own internal mechanisms for penalizing players and teams for violating rules and for compensating persons who are injured.²³² Courts recognize this²³³ and should not interfere if the league’s rules do not produce an unjust result.

²²² *Id.* at 212-13.

²²³ *Id.* at 213.

²²⁴ *Id.*

²²⁵ *Id.* at 211.

²²⁶ *McKichan*, 967 S.W.2d at 211.

²²⁷ *Id.*

²²⁸ *Id.* at 213.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *McKichan*, 967 S.W.2d at 213.

²³² *Id.*

²³³ *See id.*

The NHL, for example, currently uses referees, fines, and suspensions as ways to deter against injuries and dangerous play. “Hockey...is an aggressive game in which violence, albeit an unintended spontaneous by-product, can have therapeutic (for players) and cathartic (for fans[]) properties.”²³⁴ “League self-regulation is seen as the quickest, most effective, and only equitable way of policing violence.”²³⁵

Additionally, the NHL and other contact sports leagues do not seem to have an interest in reducing the level of violence.²³⁶ Referees and rules seem to be there to prevent as many injuries as possible, but they can only do so much. Today’s athletes are usually bigger and outnumber the referees on the playing surface. Going back to the Yzerman hypothetical, there is a conflict of interest in the NHL between encouraging fighting and preventing serious injuries that can result from fighting. Fighting can encourage some fans to attend the games, which gives the NHL a financial incentive to allow fighting. But on the other hand, there is a concern for the safety of the players, the introduction of the legal system into the NHL’s own governance, and the possible backlash by fans against violence.

Some believe that hockey crowds, for example, are attracted to violence and therefore revenue is increased “by the exercise of violence irrespective of the game’s outcome.”²³⁷ This is another factor to be used in a cost-benefit analysis for determining the proper standard of liability. “If this is correct, there is a predictable positive relationship between violence and attendance.”²³⁸ Crowds at sporting events that sometimes feature violent acts usually want to see

²³⁴ Jones, *supra* note 16, at 168.

²³⁵ *Id.* The article supports this by stating: “The major alternative, the court system, is problematic because games are played in two different countries and numerous sub-national jurisdictions (states or provinces), all of which have either different laws or different interpretations of the same laws.” *Id.*

²³⁶ *Id.* Former pro player Bob Clark stated: “If they cut down on the violence too much, people won’t come out to watch...Violence sells!” *Id.* at 170.

²³⁷ *Id.* at 171.

²³⁸ *Id.*

the violent act, like in today's Toughman Contests or in the Roman gladiator fights of the first century. This is also evident in the popularity of boxing, hockey, and football.

The games of hockey, boxing, and the like are unlikely to change based on what a referee's legal standard of care is in judgment-call situations. What it would do is merely cause referees to break up situations that could lead to a potential injury earlier, which in turn will upset crowds (and probably coaches and players) screaming to "let them play!" This could lead to less revenue for the leagues, which is obviously not what they desire. Referees should not be held to a standard of negligence when the league and sport sets them up to breach that standard even when using their best efforts to prevent injury.

As sad and tragic as some of the injuries or deaths are (such as in *Classen*), some athletes are getting paid a great deal of money to take on those risks.²³⁹ Boxing is a perfect example. Each time professional boxers step into the ring they are fighting for an exorbitant amount of money. Boxers receive this level of salary due to their superb athletic ability, but also to take part in a ruthless sport that people are willing to pay a great deal of money to watch. Not everybody is willing to take the risk of serious injury by stepping into the ring. Those athletes that do understand what they are getting into are handsomely rewarded for taking that risk. Yet even amateur athletes who don't get paid still understand the risk and consciously decide that the cost of a potential injury is outweighed by the benefits of playing the sport (including the possibility of eventually turning pro).

It is difficult to establish a bright line as to when a referee should step in to break up a fight or call the game for adverse weather conditions. This is where the athlete's own free will to

²³⁹ Of course, there are many amateur boxers who are not paid money for their participation. While the argument that they are willing to take a risk of serious injury in order to get paid doesn't work as readily in this situation, amateur boxers still seek fame and money in the long term. Amateurs hope to become professional boxers someday and get endorsement deals. In order to do so on a professional level they (usually) must work their way through the amateur ranks.

remove himself or herself from the situation should come into play. It seems that the leagues don't even know where to draw the line themselves and, instead, they leave it up to the referees to use their own judgment. For example, as was evident in the statements by the Nevada Athletic Commission above, there is little guidance for referees when deciding whether to break up a fight or prevent incidents that could lead to injury.²⁴⁰ If this is the case then less personal responsibility, in the legal sense, should be placed on the referees themselves and more should be placed on the players and the leagues. You can't fault the referee for making personal judgments that he subjectively believes are reasonable (as long as they are not excessively unreasonable, i.e. reckless or grossly negligent) when he was given no instruction. One way to protect the referees and the nature of the game is to have a recklessness/gross negligence standard.

C. Continued amount of injuries

Even though judgment-call situations are usually foreseeable, there is no guarantee that injuries will decrease if you increase potential liability to referees. Certainly, injuries will not cease altogether. While the total amount of injuries might decrease, the amount that are decreased due to an increase in potential referee liability would be extremely hard to verify.

There are many injuries that referees can do nothing about. For example, in 1990 Tony Twist, an NHL player who at that time was playing for a "farm team,"²⁴¹ skated at full speed from his blue line at an opposing player.²⁴² The referee blew his whistle at Twist, but Twist ignored it and, with his stick outstretched, checked the opposing player "in the back and side, into the boards, and into unconsciousness."²⁴³

²⁴⁰ See Royce Feur, "Ref has to decide when to say when," LAS VEGAS REVIEW-JOURNAL, available at http://www.reviewjournal.com/lvrj_home/2000/May-28-Sun-2000/sports/13665936.html.

²⁴¹ A farm team is "a minor-league team that is owned by a major-league team." At <http://dictionary.reference.com/search?r=2&q=farm%20team>.

²⁴² Jones, *supra* note 16, at 188.

²⁴³ *Id.*

Additionally, referees are already deterred from making decisions which would “depart from the norm,” which is one of the purposes of a negligence standard. A referee can lose his or her job for failing to adequately perform their duties. The truth is that “any sports official wants to make the proper call and prevent injury.”²⁴⁴ This is especially true in judgment-call situations where the referee is more aware that this is a situation where the potential for injury is heightened. A negligence standard forces the ordinary “official to become cautious in his calls or non-calls when facing the threat of legal culpability for making the wrong decision.”²⁴⁵ It “focuses the official’s attention on the wrong thing – the ramifications of a call or ruling beyond the confines of the playing field.”²⁴⁶

Next, while some injuries might be avoided, the amount of sports injuries that occur in “judgment-call” situations are few – especially those which would not fall under an assumption of risk defense. Any interference with the nature of the game would probably be held as too high a cost to fans and the players themselves to warrant possibly preventing more injuries. There would need to be more training, the games might have a lower quality, and there could be an increased number of lawsuits. In relation, the expected accident costs that would be avoided seem marginal. Having a ‘recklessness’ or ‘gross negligence’ standard brings about a “middle ground” to make sure that the game is not affected too much, but players are still protected.²⁴⁷

As stated by Mel Narol in his article on the standard of care for ‘sports torts’:

The courts are weary of imposing wide tort liability on sports participants, lest the law chill the vigor of athletic competition. Allowing the imposition of liability in cases of reckless disregard of safety, diminished the need for players to seek retaliation during the game or future games. Precluding the imposition of liability in cases of negligence without reckless misconduct, furthers the policy that

²⁴⁴ Biedzynski, *supra* note 20, at 418.

²⁴⁵ *Id.* at 419.

²⁴⁶ *Id.*

²⁴⁷ *See* Narol, *supra* note 38, at 41.

‘[v]igorous and active participation in sporting events should not be chilled by threats of litigation.’²⁴⁸

D. Lack of referee applicants

The amount of people willing to officiate athletic contests might be greatly diminished if their mere negligence could result in personal liability.²⁴⁹ The costs of hiring referees would increase, which would cause the cost of participation to go up too. Amateur sports could lose a great deal of their volunteer referees,²⁵⁰ who would be putting themselves at a greater legal and financial risk without receiving any monetary benefit; or they might have to start paying their referees. The leagues might not be able to survive this cost increase. Finally, “the cost of liability insurance for volunteers has been prohibitive, and is often simply not obtainable.”²⁵¹

“[T]he most obvious effect [of potential tort liability] has been to discourage many volunteers from undertaking or continuing volunteer services.”²⁵² It is better to have officials not be liable for negligent acts than to have no officials present at all. In the latter case, the “propensity for injuries may be increased, or the possibility of participation in athletic activity may be reduced.”²⁵³ “Courts have endeavored to [encourage]...free participation in sports,” and therefore “a balance should be drawn so that officials are held accountable for reckless conduct while not discouraging their participation.”²⁵⁴

A change in the standard would impact amateur sports more so than professional sports, but could still affect the salaries of professional referees. The injuries that result from fighting and the like are usually serious. Professional referees would demand higher salaries in order to

²⁴⁸ *Id.* at 42, quoting *Gauvin v. Clarke*, 537 N.E.2d 94, 96-97 (Mass. 1989).

²⁴⁹ Biedzynski, *supra* note 20, at 414.

²⁵⁰ *See id.*, at 415.

²⁵¹ *Id.*, citing Joseph H. King, Jr., Article, *Exculpatory Agreements for Volunteers in Youth Activities – The Alternative to “Nerf” Tiddlywinks*, 53 OHIO ST. L.J. 683, 685, 689 (1992) (footnotes omitted).

²⁵² Biedzynski, *supra* note 20, at 415, citing King Jr., *supra* note 251, at 689 (footnotes omitted).

²⁵³ *Feiner*, *supra* note 21, at 221.

²⁵⁴ Biedzynski, *supra* note 20, at 414.

compensate for the increased amount of potential liability (or insurance and legal costs) to which they would then be exposed. This cost would most likely be passed on to the fans of professional sports.

While referees play a very important role in sporting events, they usually do not benefit from the revenues of professional sports or gain the public spotlight in a favorable way.²⁵⁵ Good professional referees are tough to find, and their job is physically demanding. NHL referees, for example, are a special breed where “[t]aking a misplaced uppercut to the face when breaking up a fight is a rite of passage.”²⁵⁶ NHL referees “describe concussions, broken bones and stints in physical rehabilitation in the casual manner office workers might discuss the travails of a rush-hour commute.”²⁵⁷ “The pace of the sport has hastened immeasurably. Players have become masses of rippling muscle and fortified bone...the demands of officiating [have been amplified] [[y]et, for the most part, the officials remain unseen on the ice – and that is how they prefer it.”²⁵⁸ “Linesmen must have an innate feel about when to disrupt a fight and how to best protect the fighters, and himself, from absorbing a dangerous level of punishment.”²⁵⁹ One former player stated: “I learned a long time ago that when you’re in a fight you’re relying not only on [the referees] to hold you back, but to also hold the other [fighter] back so you don’t get hit after you’ve been restrained....”²⁶⁰

Sports leagues can’t afford to lose good referees or cause the price of sports to increase for fans and participants just so that a plaintiff that voluntarily entered a judgment-call situation can have another pocket to go to when a lawsuit is brought for injury.

²⁵⁵ *Id.* at 376.

²⁵⁶ Jason La Canfora, *Earning Their Stripes; NHL Refs: Rugged Breed, Dangerous Job*, WASHINGTON POST, January 12, 2003, at D01, available at 2003 WL 2367846.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

VI. CONCLUSION

A referee who performs his or her job correctly can mean the difference between a serious injury (or death). This is especially true when a referee makes a personal decision of whether to allow the competition to continue or step in and (attempt to) stop the competition. Overall, in determining the proper standard of liability for officials in “judgment-call situations,” it seems that the costs of imposing a negligence standard outweigh the benefits. “[A negligence] standard would prevent [some] injuries, but at a price few of us are willing to pay.”²⁶¹ Especially in judgment-call situations, “the detrimental effect on the officials’ ability to utilize discretion necessary to perform their jobs outweighs any benefit of imposing additional overly burdensome [liability] constraints...on officials.”²⁶²

While there is a strong argument for a negligence standard, a lesser standard of recklessness should be imposed on referees in the judgment-call situations described in this article.²⁶³ Athletes in these situations foresee potential injury, assume the risk, and consent to the harsh nature of the game. Additionally, there is no guarantee that imposing a heightened standard will avoid more serious injuries from occurring since sports are inherently dangerous. Finally, imposing a heightened standard would chill referee applications at all levels and lead to an increase in costs and lawsuits. Such a standard encourages referees to stop the vigorous physical activity inherent in sport that fans and participants love.

Additionally, carving out a special area to have a negligence standard for judgment-calls, as opposed to the popular recklessness/gross negligence standard for sports injuries, would blur the lines of liable conduct and negatively affect predictability for the referees themselves.

²⁶¹ Schalley, *supra* note 24, at 191.

²⁶² Feiner, *supra* note 21, at 215.

²⁶³ The reckless standard prevails today. *See* Schalley, *supra* note 24, at 189.

Referees should continue to try their best to prevent sports injuries and make good judgment-calls, while only being legally liable for grossly negligent or reckless conduct.