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In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable

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**IN THE HEAT OF COMPETITION: TORT LIABILITY
OF ONE PARTICIPANT TO ANOTHER; WHY CAN'T
PARTICIPANTS BE REQUIRED TO BE
REASONABLE?**

Ray Yasser¹

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Had the parties been upon the playgrounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the playgrounds.²

Playing at Hand-Sword, Bucklers, Foot-ball, Wrestling, and the like, whereby one of them receiveth a hurt . . . some are of the opinion that this is a [wrong] . . . some others are of opinion, that this is no [wrong] . . . but that they shall have their pardon, of course, as for misadventure, for that such their play was by consent, and again, there

1. Professor of Law, University of Tulsa College of Law; J.D., Duke University, 1974; B.A., University of Delaware, 1971. I would like to acknowledge the extraordinary contribution of my research assistant, Sam Schiller. Sam is a Consensus All-American research assistant.

2. *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891). *Vosburg* is a landmark torts case that has been used to confound and befuddle generations of law students by obfuscating the meaning of intent. To my knowledge, it has not been cited in the sports law context. As one who has taught torts for 20 years now (using *Vosburg* as my leadoff case), and who has an abiding interest in sports law, I confess to feeling a profound sense of order and symmetry in using *Vosburg* to kick off this piece.

was no former intent to do hurt, or any former malice, but done only for disport, and trial of Man-hood.³

I. INTRODUCTION

Participation in sports carries with it special risks. It is probably fair to say that sports activities—baseball, basketball, football, tennis, racquetball, and wrestling, for example (not to mention Hand-Sword, Bucklers and the like)—create greater risks of physical harm than do most other human activities. Typically, injuries incurred in athletic competition are not of tortious origin, but they occur rather as a result of the normal risks associated with participation in the sport. For example, when a basketball player breaks his ankle by jumping and inadvertently landing on his opponent's foot, good lawyers would not argue that the opponent is a tortfeasor. However, injuries can occur as a consequence of arguably tortious behavior by a participant.⁴ This article explores the theories of tort liability that are available to one participant in a suit against a fellow participant, for injuries that occur "in the heat of competition." In addition, this article includes a prediction of the future of liability for the sports participant.

Generally, an athlete so injured can base an action to recover on three theories: (1) an intentional tort such as battery or assault, (2) recklessness, and (3) negligence. Even though decisions that allow a simple negligence cause of action can be found in jurisdictions stretching from Washington state to Connecticut to Louisiana, the

3. M.Dalton, *The Countrey Justice* Cap. 96, 246 (1635). The problem is not a new one. The focus of this paper is on civil, not criminal, liability. For a good history of the consent issue as it pertains to criminal liability in the sports context, see Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 169-172 (1976). I have also found that it lends a serious air of credibility to a law review article to quote something that was written a long, long time ago. See C. Steven Bradford, *As I Lay Writing*, 44 J. LEGAL EDUC. 13 (1994).

4. A broad definition of "participant" could include referees, cheerleaders, and coaches. A tort case against a referee might well involve a theory of negligent supervision. *Carraba v. Anacortes School Dist. No. 103*, 435 P.2d 936 (Wash. 1967) (concerning a referee's negligence in failing to detect an illegal wrestling hold). For example, a referee who permits a boxing match to continue when a reasonable referee would stop it might be named as a defendant in a lawsuit by the injured boxer. On the other hand, a referee attacked by a disgruntled participant might initiate a lawsuit of his own on a battery theory. The potential liability of a coach is vast. See generally RAY YASSER, *LIABILITY FOR SPORTS INJURIES, IN LAW OF PROFESSIONAL AND AMATEUR SPORTS* § 1405 (1994). A cheerleader who is injured when performing an acrobatic cheer also may well be the victim of a tortfeasor-co-participant. Although there are no reported cases thus far, look for one to come to your neighborhood soon. The focus of this article is on torts that occur in the heat of competition, when one participant (in the narrow sense) injures a co-participant.

prevailing view appears to be that the participant to participant sports injury case requires at least recklessness.⁵

II. INTENTIONAL TORTS

A simple definition of battery is the intentional, unprivileged, harmful or offensive contact by the defendant with the person of another.⁶ An assault is committed when the defendant, without privilege, intentionally places the plaintiff in apprehension of an immediate harmful or offensive touching.⁷ Sports activities are rife with what arguably can be termed assaults and batteries. A review of the cases indicates that a defense of privilege is often the key issue in such litigation.⁸ The *Restatement (Second) of Torts* categorizes privileges in terms of whether they are consensual or nonconsensual.⁹ Commonly accepted nonconsensual privileges include self-defense, defense of others, and defense of property. In sports, the consent privilege weighs heavily.

As a starting point, in a series of cases beginning around the turn of the century the courts dealt with the issue of consent in the "mutual combat" context.¹⁰ The courts were repeatedly faced with

5. The recklessness required relates to the theory of recovery, not the conduct of legal counsel.

6. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984).

7. *Id.* § 10, at 43.

8. *Griggas v. Clausen*, 128 N.E.2d 363 (Ill. Ct. App. 1955)(regarding a basketball player punched by an opponent); *Gibeline v. Smith*, 80 S.W. 961 (Mo. Ct. App. 1904)(holding that an adult who voluntarily engaged in play consented to bodily contacts inherent in game); *Averill v. Luttrell*, 311 S.W.2d 812 (Tenn. Ct. App. 1957)(concerning a batter struck by opposing team's catcher); *Tomjanovich v. California Sports, Inc.*, No. 11-78-243 (S.D. Tex. Oct. 10, 1979) (pertaining to a professional basketball player struck in face by opposing team member); *Hogenson v. Williams*, 542 S.W.2d 456 (Tex. Ct. App. 1976) (regarding an athlete's helmet struck by irate coach).

9. RESTATEMENT (SECOND) OF TORTS § 10 (1965). The Restatement defines privilege as: § 10. PRIVILEGE

(1) The word "privilege" is used . . . to denote the fact that conduct which, under ordinary circumstances, would subject the actor to liability, under particular circumstances does not subject him to such liability.

(2) A privilege may be based upon (a) the consent of the other affected by the actor's conduct, or (b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise.

Id.

10. *McNeil v. Mullin*, 79 P. 168 (Kan. 1905)(reasoning that even where both participants consent, either has a cause of action against the other for damages resulting from injuries received in a fight); *Parmentier v. McGinnis*, 147 N.W. 1007 (Wis. 1914)(stating that whether or not a participant in a boxing contest knew of or consented to the nature of the fight, the jury may come to conclusions on liability as a question of fact); *Hart v. Geysel*, 294 P. 570 (Wash. 1930)(determining that a prize fighter who expressly consents to and engages in a fight should not have a right to recover damages sustained from the combat); *McAdams v. Windham*, 94 So. 742 (Ala. 1922)(holding that there is no cause of action in a mutually en-

the task of determining precisely to what risks a voluntary participant consents.¹¹ The intentional tort theory is the clearest basis for an action, as the available defenses are well established and generally agreed on.¹² The prevailing view is that although participation in an athletic contest involves manifestation of consent to those bodily contacts which are permitted by the rules of the game and foreseeable, an intentional act causing injury, which goes beyond what is ordinarily permissible in an unforeseeable way, is an assault and battery for which recovery may be had.¹³

In one New York case, the court held that justification for an assault, even in the sports context, cannot be presumed.¹⁴ Similarly, an Illinois court ruled that a wanton and unprovoked assault in a game of basketball is sufficient to sustain a cause of action.¹⁵

tered boxing match without evidence of negligent or reckless conduct).

11. See *infra* note 36 and accompanying text.

12. For the consent defense see *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891); *Dicenzo v. Berg*, 16 A.2d 5 (Pa. 1940). For a self-defense case, see *Courvoisier v. Raymond*, 47 P. 284 (Colo. 1896); *Pearson v. Taylor*, 116 So.2d 833 (La. Ct. App. 1959); *Maichle v. Jonovic*, 230 N.W.2d 789 (Wis. 1975). To argue the defense of others, see *State v. Totman*, 80 Mo. App. 125 (1899); *Fink v. Thomas*, 66 S.E. 650 (W. Va. 1909); *Lopez v. Surchia*, 246 P.2d 111 (Cal. Ct. App. 1952). See also cases discussed under *recklessness*, *infra* notes 16-36.

13. *Overall v. Kadella*, 361 N.W.2d 352 (Mich. Ct. App. 1984). In *Overall*, the plaintiff brought an action against the defendant for injuries he sustained during a fight after a hockey game. During the fight, the defendant hit the plaintiff, rendering him unconscious and causing severe eye injury. *Id.* at 352, 353. The trial court entered a judgment for the plaintiff in the amount of \$46,000. The appellate court affirmed the trial court's decision, holding that "there is general agreement that an intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and batter for which recovery may be had." *Id.* at 355, citing 4 AM.JUR. 2d., Amusements & Exhibitions, § 86, at 211.

14. *People v. Freer*, 381 N.Y.S.2d 976 (Dist. Ct. 1976). The complainant and the defendant were playing as participants on opposite teams in a football game. The defendant was carrying the ball when the complainant tackled him. In the course of the tackle the complainant punched the defendant in the throat. Both fell to the ground and there was a pile up. After all the players got off of the defendant, he punched the complainant in the eye, causing damage that included a laceration requiring plastic surgery. While the court recognized two defenses to assault by participants in sporting events, namely, that the act was consented to as being part of the game (consent) or that the act was justified as an act of "self defense," the court rejected both of these defenses in this case. It reasoned that where an attack which the defendant may have believed was being made upon him is terminated and time has passed, the defendant is deprived of any reasonable basis to believe that he is in danger and that he may justifiably engage in a further act of defense. Moreover, the plaintiff cannot be deemed to have consented to such an attack. *Id.*

15. *Griggas v. Clauson*, 128 N.E.2d 363 (Ill. App. Ct. 1955). The plaintiff and defendant were on opposing teams in an amateur basketball game. The plaintiff alleged that while he had his back to the defendant, the defendant maliciously, wantonly and wilfully, and without provocation, assaulted the plaintiff. He further alleged that the defendant struck the plaintiff violently in the head and knocked the plaintiff unconscious to the floor. The appellate court rejected the defense's argument that it was error for the trial court to instruct the jury that they consider as an aggravation of wrong the mental suffering of the plaintiff, arising from the insult and the indignity of the defendant's blow, for assessment of damages. *Id.*

Clearly no court disputes the view that an intentional tort theory is a viable cause of action in the sports participant to participant context, with the caveat that a defense of privilege may prevail.

III. RECKLESSNESS

Recklessness is conduct that creates a higher degree of risk than that created by simple negligence.¹⁶ The defense of assumption of risk may be a defense to the recklessness-based cause of action.¹⁷

The decisions of the Illinois Appellate Court are illustrative of the handling of the recklessness cause of action in the sports context. A soccer match between two amateur high school teams was the setting for *Nabozny v. Barnhill*.¹⁸ Barnhill, a forward, entered the opposing goalkeeper's penalty area and kicked the plaintiff, Nabozny, in the head as he was receiving a pass. The contact caused permanent skull and brain damage to Nabozny. Barnhill's action was a violation of the F.I.F.A. rules, which prohibited a player from making contact with a goalkeeper in possession of the ball in the penalty area.¹⁹ The defendant in this case was alleged to have been negligent; this was the first Illinois case involving organized athletic competition where one of the participants was so charged. The trial court's decision directing a verdict for defendant Barnhill was reversed, and a new trial was ordered. It is important to note, however, that the plaintiff did not recover on a negligence theory. The Illinois appellate court revisited this issue on five year intervals for the next ten years.

In 1980, the court again held that the plaintiff in a sports injury case must show something worse than ordinary negligence on the

16. RESTATEMENT (SECOND) OF TORTS § 500. The Restatement states it thus:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

17. See *infra* note 36. What the court might actually be saying when it allows an assumption of risk defense is that there is no duty owed by the defendant to the plaintiff, under the circumstances, to refrain from the kind of conduct about which the plaintiff complains. This appears to be particularly true in the negligence cases and some courts and many commentators have pointed out that the assumption of risk defense, in the negligence context, is unnecessary if duty and comparative negligence are properly applied. See *Meistrich v. Casino Arena Attractions*, 31 N.J. 44, 155 A.2d 90 (1959).

18. 334 N.E.2d 258 (Ill. App. Ct. 1975).

19. *Id.* at 261. The appellate court stated that: "a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player." *Id.*

part of the defendant.²⁰ The plaintiff in the case, Oswald, was injured when he was kicked while playing basketball in a required high school gym class. The court went out of its way to distinguish the cause of action in this case from that in the non-contact sport context case by stating that "participants in bodily contact games such as basketball assume greater risks than do golfers and others involved in non-physical contact sports."²¹

In 1985, the Illinois appellate court again addressed liability in the participant to participant sports injury case.²² Since the court based its ruling on a negligence analysis, however, a discussion of the rationale is reserved for the treatment of "negligence" cases to follow.

Finally, in 1994 an Illinois appellate court revisited the issue in *Lundrum v. Gonzalez*.²³ The plaintiff in *Lundrum* was playing first base in an informal softball game. The defendant ran into the plaintiff while running the bases, causing him to fall on his shoulder and sustain serious injury. Relying on *Nabozny*, the court concluded that the plaintiff could not recover, since he had not shown wilful or wanton conduct on the part of the defendant.²⁴

In *Hackbart v. Cincinnati Bengals, Inc. (Hackbart I)*,²⁵ a Denver Bronco defensive player (Hackbart) was severely injured after a Cincinnati pass was intercepted near the goal line. Hackbart attempted to block a Bengal offensive player (Clark) and fell to the ground. Clark, "acting out of anger and frustration, but without specific intent to injure . . . stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head."²⁶ Hackbart sustained a neck injury and sought recovery on the theories of reckless misconduct and failure of the Bengals to instruct and control Clark. The trial court held that the plaintiff could not recover because professional football is inherently violent and because adequate sanctions were available through the imposition of monetary penalties and expulsion from the game.

*Hackbart II*²⁷ reversed the trial court's findings and conclusions. The Tenth Circuit Court of Appeals found that "there are no principles of law which allow a court to rule out certain tortious

20. *Oswald v. Township High School Distr. No. 214*, 406 N.E.2d 157 (Ill. App. Ct. 1980).

21. *Id.* at 160.

22. *Ramos by Ramos v. City of Countryside*, 45 N.E.2d 418 (Ill. App. Ct. 1985).

23. 629 N.E.2d 710 (Ill. App. Ct. 1994).

24. *Id.* at 715.

25. 435 F.Supp. 352 (D. Colo. 1977).

26. *Id.* at 353.

27. *Hackbart v. Cincinnati Bengals, Inc. (Hackbart II)*, 601 F.2d 516 (10th Cir. 1979).

conduct"²⁸ simply because it occurs in a generally rough game. Additionally, the questioned conduct by Clark was explicitly prohibited by the rules of the game.²⁹ The appellate court also ruled that the appropriate standard for liability was recklessness, where intent cannot be shown. The plaintiff Hackbart was entitled to have the case tried on the assessment of his rights and not on the trial court's determination that "as a matter of social policy the game was so violent and unlawful that value lines could not be drawn."³⁰

In *Gauvin v. Clark*,³¹ the standard of care that participants owe one another was again at issue, this time in the setting of a hockey game. Clark "butt-ended" Gauvin by taking the back end of his hockey stick and striking Gauvin in the abdomen, causing serious injuries. The court ruled that Clark was not liable because he had not acted recklessly, reasoning that preclusion of liability where there is only negligence furthers the policy that "vigorous and active participation in sporting events should not be chilled by the threat of litigation."³²

*Bourque v. Duplechin*³³ involved injuries suffered by a second baseman in a summer league softball game. Bourque, the second baseman, was standing five feet away from the base when he was hit under the chin and severely injured by the base runner, Duplechin. A double play throw had forced Duplechin out, but he continued to run toward Bourque at full speed. To make contact with the second baseman, Duplechin left the basepath. Although the defendant alleged that Bourque had assumed the risk of injury, the court concluded that the runner's "negligent" conduct was not a risk assumed by softball players. Duplechin was found liable and Bourque recovered for his injuries.

Bourque is really more accurately viewed as a case in which the defendant was liable because he was reckless and not because he was negligent. The court pointed out that the sports participant assumes "all risks incidental to that particular activity which are obvious and foreseeable" but does not assume "the risk of injury

28. *Id.* at 526.

29. *Id.* In some instances a plaintiff has tried to base the theory of recovery on the breach of a safety rule. This approach has generally been rejected by the courts in favor of analysis based on traditional theories of negligence and recklessness. See Oswald, 406 N.E.2d 157; Marchetti v. Kalish, 559 N.E.2d 699 (Ohio 1990); Gauvin v. Clark, 537 N.E.2d 94 (Mass. 1989). But see Overall v. Kadella, 361 N.W.2d 352 (Mich. Ct. App. 1984)(holding that defendant's actions violated a safety rule and thus gave rise to tort liability).

30. *Hackbart I*, 435 F. Supp. at 355.

31. 537 N.E.2d 94 (Mass. 1989).

32. *Id.* at 97, quoting *Kabella v. Bouschelle*, 672 P.2d 290, 294 (N.M. Ct. App. 1983).

33. 331 So.2d 40 (La. Ct. App. 1976).

from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating.³⁴ The thrust of the *Bourque* opinion was that the sports participant invariably assumes the risks created by the co-participant's negligence but not necessarily by his recklessness.

The relevant case law now clearly supports the view that an injured sports participant can recover on a showing of recklessness or intention.³⁵ The suggestion in *Hackbart I* that the sports participant is insulated from tort liability has been almost universally discredited. *Hackbart II* reflects the modern view that recklessness is an appropriate cause of action.

The outcome of the litigation will often depend on the availability of the defenses. In the recklessness context, the primary defense is akin to assumption of risk.³⁶ It is interesting to note, however,

34. *Id.* at 42.

35. A substantial verdict (\$3.1 million) was returned in a case involving an assault and battery in a professional basketball game. See R. YASSER, TORTS AND SPORTS 21-22, 26 (1985) for the account of the celebrated case, *Rudy Tomjanovich v. California Sports, Inc.*, No. H-78-243 (S.D. Tex. Oct. 10, 1979), *appeal docketed*, No. 79-3889 (5th Cir. Dec. 3, 1979).

See also Oswald, 406 N.E.2d at 157 (deciding that liability for injuries sustained in physical education class may not be predicated on ordinary negligence); *Ross v. Clouser*, 637 S.W.2d 11 (Mo. 1982) (regarding a case remanded for retrial under a theory of recklessness); *Kabella v. Bouschelle*, 672 P.2d 290 (N.M. 1983) (determining injured youth in informal football game could not recover on mere negligence); *Novak v. Lamar Ins. Co.*, 488 So. 2d 739 (La. Ct. App. 1986) (concluding that a softball player who injured a first baseman was not liable since he did not act with reckless lack of concern); *Martin v. Buzan* 857 S.W.2d 366 (Mo. Ct. App. 1993) (ruling that a base runner in softball game was not liable for injuries to catcher resulting from collision between the two, where mere negligence, and not recklessness, was found); *Connell v. Payne*, 814 S.W.2d 486 (Tex. Ct. App. 1991) (concluding that polo player striking another player with his mallet was not liable when he did not act "recklessly" or "intentionally"); *Picou v. Hartford Ins. Co.*, 558 So.2d 787 (La. Ct. App. 1990) (resolving that a base runner on a church league softball team was not liable for injuries resulting from collision at second base where wanton or reckless disregard for another participant was lacking); *Ordway v. Superior Ct. (Casella)*, 243 Cal. Rptr. 536 (Cal. Ct. App. 1988) (holding that a jockey who caused another jockey's horse to fall was not liable for injuries to the other jockey in the absence of reckless or intentional conduct); *Keller By and Through Keller v. Mols*, 509 N.E.2d 584 (Ill. App. Ct. 1987) (concluding that plaintiff floor hockey player was precluded from recovery on a negligence claim as a matter of law where he had consented to participation in a contact sport); *Santiago v. Clark*, 444 F. Supp. 1077 (N.D.W. Va. 1978) (barring a specific intent to injure or cause an accident on the part of another jockey, there can be no recovery for injuries caused as a result of "jockey error" or "careless riding" in a horse race).

36. RESTATEMENT (SECOND) OF TORTS § 496A. The assumption of risk defense is simply defined by the Restatement as an instance when a plaintiff cannot recover from such harm caused by the negligence or recklessness of the defendant, because the plaintiff voluntarily assumed such risk of harm. *Id.* In its simplest form, assumption of risk means:

that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care is relieved of that responsibility and is no longer under any duty to protect the plaintiff.

that other defenses to a recklessness-based cause of action have not been clearly delineated. The practitioner would be well advised to plead the well established intentional tort defenses of consent, self-defense, defense of others, and defense of property, along with the well established negligence defenses of assumption of risk and contributory negligence, and let the court decide.

IV. NEGLIGENCE

No court in the land would hold that intentional conduct fails to state a cause of action; none have said that recklessness is not a basis for recovery; but many have stated that negligence is insufficient.

Nabozny, *Hackbart I*, *Hackbart II*, and *Gauvin* articulate the view that the simple negligence claim should fail. Although negligence was pleaded in *Nabozny*, the opinion stressed that "a player is liable if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player."³⁷ The implication of *Nabozny* is that simple negligence will not suffice. The plaintiff in *Hackbart* did not rely on a negligence theory. As the *Hackbart II* court pointed out, "this [was] in recognition of the fact that subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football."³⁸ *Gauvin* rejected the negligence cause of action in accepting recklessness as the appropriate minimum standard. Some courts have held that ordinary negligence will not support a cause of action in such contact sports as "pickup" basketball,³⁹ an informal game of touch football,⁴⁰ or even an unorganized neighborhood game.⁴¹ One court ruled that actions in a juvenile game of "bombardment" failed to support a negligence action.⁴²

Id., cmt. 1.

Implied assumption of risk exists when a plaintiff, who understands the risk of harm involved within the defendant's conduct, and who nevertheless voluntarily chooses to "enter, or remain, or to permit his things to enter or remain within the area of that risk," manifests his acceptance of such risk and is precluded from recovering for the harm suffered. RESTATEMENT (SECOND) OF TORTS § 496A(1).

37. *Nabozny*, 334 N.E.2d at 261.

38. *Hackbart II*, 601 F.2d at 520.

39. *Dotzler v. Tuttle*, 449 N.W.2d 774 (Neb. 1990).

40. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992)(holding that even ordinary recklessness would not impose liability).

41. *Marchetti*, 559 N.E.2d 699 (Ohio 1990).

42. *Ramos by Ramos*, 45 N.E.2d at 418. The facts of this case highlight that the key for this court was whether or not the activity could be considered a sporting event. The plaintiff, Alfonso Ramos, Jr., an 8 year old boy, was injured while playing a game of "bombardment" in a city's summer recreational program for elementary age children. The plaintiff alleged that Stephen Best, 14 years old, threw a ball at the plaintiff and struck his left eye, injuring him.

Yet a growing number of jurisdictions are rejecting this approach and allowing the negligence action. One reason for this may be that, as *Hackbart II* notes, the distinction between recklessness and negligence is not bright-line.⁴³

Generally the courts have taken one of two positions: 1) that more than negligence is required to state a cause of action or 2) that negligence is sufficient for recovery. As the discussion on recklessness has shown, the language used to differentiate negligence from "more" generally includes phrases such as "recklessness or wilful" or "recklessness or wanton."⁴⁴

What is really going on in these cases is that courts are struggling to figure out whether or not they will allow a simple negligence cause of action. By now it should be fairly obvious that this is one of the battle lines in the "torts in sports" debate. But the courts are also grappling with the more general problem of what makes the conduct reckless (or wanton or wilful) in the first place? If the conduct can be declared intentional or reckless, its a slam dunk.⁴⁵ If it is negligence at most, the situation is more comparable to shooting at a moving basket - a tough shot to make.

The basis of negligence as a cause of action is conduct that results in an unreasonable risk of harm to another. Of course, almost all human activities involve some risk of harm. The gist of a negligence-based claim is that the conduct involves a risk of harm that is not outweighed by the benefits to be derived from engaging in the conduct.⁴⁶ Increasingly, the courts have shown a willingness

This court specifically found that such activity as a game of "bombardment" is a sporting event, stating that "we do not believe there is a legal distinction between 'bombardment' and basketball or soccer." *Id.* at 420. Sports, at least to this court, has its own legal rules of the game, even where minors are concerned. And participants cannot recover against other participants on a negligence theory. *Id.*

43. *Hackbart II*, 601 F.2d 516. As Oliver Wendell Holmes noted:

If the manifest probability of harm is very great . . . we say that it is done intentionally; if not so great but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.

Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

Today we may add a third category in saying that if the manifest probability of harm is not very great but quite considerable, it is recklessness. The distinctions are not clear, and as has been shown in this article, recklessness has relatively recently emerged as a separate and distinct cause of action.

44. To further complicate the analysis, as with recklessness, sometimes a violation of the rules of a game may be the basis of a negligence finding. See *La Vine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir. 1977); *Stewart v. D. & R. Welding Supply Co.*, 366 N.E.2d 1107 (Ill. App. Ct. 1977); *Toone v. Adams*, 137 S.E.2d 132 (N.C. 1964).

45. Score it.

46. RESTATEMENT (SECOND) OF TORTS § 291:

§ 291. UNREASONABLENESS: HOW DETERMINED: MAGNITUDE OF RISK AND UTILITY OF CONDUCT.

to allow the application of this principle in the participant to participant sports injury as they do in virtually any other area of our lives.

In a 1993 decision, the Wisconsin Supreme Court ruled that liability in the sports injury case may be based on negligence, depending on the specific circumstances.⁴⁷ Robert F. Lestina, the plaintiff, was injured in a collision with the defendant, Leopold Jerger. Lestina was playing an offensive position for his recreational soccer team and Jerger was the goal keeper for the opposing team. Jerger, the defendant, apparently ran out of the goal area and collided with the plaintiff. The plaintiff alleged that the defendant "slide tackled" him in order to prevent him from scoring. The plaintiff seriously injured his left knee and leg in the collision.

While the Wisconsin Supreme Court acknowledged that relatively few sports cases have held that a plaintiff may recover on proof of negligence, it ruled in this case that negligence is an appropriate standard to govern cases involving injuries during recreational team contact sports.⁴⁸

For a time, New Jersey also adopted the negligence standard for sports injury cases in *Crawn v. Campo*.⁴⁹ In *Crawn*, the appellate court held that ordinary negligence, rather than reckless conduct, was the appropriate standard to be applied in a participant to participant sports injury case.

Plaintiff Michael Crawn, playing catcher in a pick-up softball game, was injured in a collision at home plate with defendant John Campo, an opposing base runner. The lower court ruled, on the basis of *Gauvin* and *Marchetti*, that intentional conduct or reckless disregard of the safety of others was required to give rise to a cause of action in a participant to participant sports related injury. This of course had been the trend. But in overruling the trial court the appellate court lined itself up with *Lestina*. The court persuasively

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id.

47. *Lestina v. West Bend Mut. Ins. Co.*, 501 N.W.2d 28, 33 (Wis. 1993).

48. *Id.* In a well reasoned opinion the court stated:

Depending as it does on all the surrounding circumstances, the negligence standard can subsume all the factors and considerations presented by recreational team contact sports and is sufficiently flexible to permit the 'vigorous competition' that the defendant urges. We see no need for the court to adopt a recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient.

Id.

49. 630 A.2d 368 (N.J. Super. Ct. App. Div. 1993).

reasoned that the only two settings in which New Jersey courts have recognized a negligence immunity is in special situations that involve the exercise of parental authority or the "fireman's rule."⁵⁰

New Jersey has however abandoned the simple negligence standard. Relying on *Nabozny*, the Supreme Court of New Jersey held that the duty of care required in establishing liability in recreational sports should be based on a standard of reckless or intentional conduct, rather than negligence.⁵¹

Connecticut joined the ranks of those jurisdictions allowing a negligence cause of action in 1989. In *Babych v. McRae*,⁵² the plaintiff, Wayne Babych, alleged that the defendant, Ken McRae, a fellow professional hockey player, struck the plaintiff across his right knee with a hockey stick during a game, causing the plaintiff to suffer personal injuries and financial losses. In holding that negligence is a legally sufficient cause of action when one professional sports participant is injured by another, the court rejected the New York decision in *Turcotte v. Fell*,⁵³ which held that negligence is not actionable when one professional sports participant injures another. *Babych* ruled that there was no analogous Connecticut case law barring a negligence cause of action in sports participant to participant cases.⁵⁴

As early as 1976, the Missouri Court of Appeals accepted negligence as a viable cause of action in sports related injuries.⁵⁵ In

50. *Id.* at 375. The "fireman's rule" allows a fireman or policeman to recover for injuries that result from hazards that are inherent or incidental to the performance of their duties only if intentional or wilful misconduct can be shown.

The appellate court concluded:

We thus find no sound reason to immunize sports participants from liability for their negligent conduct. To the contrary, New Jersey authorities persuade us that there is every reason to reject such an immunity. A person participating in sports activities can properly be required to act as a "reasonable [person] of ordinary prudence under the circumstances."

Id.

51. *Crawn v. Campo*, 136 N.J. 494, 508 (1994). In coming to this conclusion, the court held that:

a recklessness standard is the appropriate one to apply in the sports context [because it] is founded on more than a concern for a court's ability to discern adequately what constitutes reasonable conduct under the highly varied circumstances of informal sports activity. The heightened standard will more likely result in affixing liability for conduct that is clearly unreasonable and unacceptable from the perspective of those engaged in the sport yet leaving free from the supervision of the law the risk laden conduct that is inherent in sports and more often than not, assumed to be "part of the game."

Id.

52. 567 A.2d 1269 (Conn. Super. Ct. 1989).

53. 502 N.E.2d 964 (N.Y. 1986).

54. *Babych*, 567 A.2d at 1270.

55. *Niemczyk v. Burlison*, 537 S.W.2d 737 (Mo. Ct. App. 1976).

Niemczyk, the plaintiff and the defendant were participating in a softball game in Bell City, Missouri. The plaintiff was a member of a team from Bell City, and the defendant was a member of a team from Fisk, Missouri. The plaintiff, a base runner, was running from first base to second when the defendant ran across the infield and collided with the plaintiff in the base path. The court accepted negligence as a cause of action in this instance. It held that "whether one player's conduct, causing injury to another, constitutes actual negligence hinges upon the facts of the individual case."⁵⁶

In 1992, The Louisiana Court of Appeals also held that negligence was a viable cause of action in the sports injury case.⁵⁷ The plaintiff, Patrick Hendry, was engaged in a game of racquetball with Robert Panek and Stephen Schoelmann. Hendry was hit in the face with Panek's racket, when Panek swung the racket too wide after backhanding a ball. The court held that voluntary participants in sporting activities have a duty to play with sportsmanlike conduct, according to the rules of the game, and to refrain from acts which are unforeseeable and which evidence wanton or reckless disregard for the other participants.⁵⁸ Thus, the court apparently accepted everything from a negligence standard to a recklessness standard in the sports context.

In *Ginsberg v. Hontas*,⁵⁹ the plaintiff was playing second base in a recreational softball game. Defendant was sliding into second base, and a collision occurred between the plaintiff and the defendant, fracturing the plaintiff's right leg. The court held that the plaintiff failed to prove by a preponderance of the evidence that the defendant was negligent in his play during the game. The appellate court affirmed the lower court's conclusion that the plaintiff failed to establish that defendant had acted negligently. The court went on to state however, that "[t]he duty owed by the defendant in instant matter is a common duty, the duty to act reasonably under the circumstances."⁶⁰ One may reasonably conclude that since the court based its decision on the plaintiff's failure to meet his burden of proof, and not on a finding that the plaintiff's theory was based on a non-viable cause of action, negligence is in fact a viable cause of action in Louisiana. Unfortunately, the court obfuscated a clear understanding of the matter by mixing negligence language with that of recklessness in stating that "[i]n this softball game defen-

56. *Id.* at 741.

57. *Hendry v. U.S. Fidelity and Guar. Ins. Co.*, 594 So. 2d 584 (La. Ct. App. 1992).

58. *Id.* at 586.

59. 545 So. 2d 1154 (La. App. 4th Cir. 1989).

60. *Id.* at 1155.

dant owed the plaintiff the duty to act reasonably, that is to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another.⁶¹

In a 1986 decision, the Washington Court of Appeals allowed the negligence claim for sports injuries.⁶² *Kladnick* involved an injury caused on a skating rink. While it was not a "heat of competition" case, the court expressed its ruling in terms that encompass sports cases as a whole, saying that those who participate in sports or amusements are taken to assume known risks of being hurt, although they are not deemed to have consented to unsportsmanlike rule violations which are not part of the game.⁶³ Thus, the court here bases its ruling, not on the inappropriateness of a negligence cause of action, but rather on an assumption of risk defense.

There are in fact a number of older opinions from which it can be inferred that the court would allow a negligence cause of action. While these are not all "heat of competition" cases, they do involve the sports context and give some insight into the courts' reasoning on the application of negligence principles to the actions of sports participants. In these cases, the courts typically talk about the assumption of risk defense to the negligence cause of action rather than declaring that negligence fails to state a cause of action in the first place.

Florida so held in 1983, when it stated that express assumption of risk is a viable defense to a negligence action in the context of a contact sport.⁶⁴ The plaintiff, Kuehner, brought a negligence action against the defendant, Green. Kuehner had been injured as the result of a karate take-down maneuver executed by Green during a sparring exercise at Green's home. The court appears to adopt the view that negligence is a viable cause of action in a contact sport. The court found that the plaintiff had subjectively recognized the danger of the take-down maneuver called a "leg sweep."⁶⁵

Similarly, Minnesota, Michigan, Wisconsin, Louisiana and California have turned, in the sports injury case, to analysis of defenses to negligence, rather than of failure of negligence to state a cause of

61. *Id.*

62. *Ridge v. Kladnick*, 713 P.2d 1131 (Wash. Ct. App. 1986).

63. *Id.* at 1133.

64. *Kuehner v. Green*, 436 So. 2d 78 (Fla. 1983).

65. *Id.* at 79, 80. It based part of its decision on social policy by saying that "[i]f contact sports are to continue to serve a legitimate recreational function in our society, express assumption of risk must remain a viable defense to negligence action spawned from these athletic endeavors." *Id.*

action in the first place. In *Lutterman v. Studer*,⁶⁶ the plaintiff tried out for the 7th grade baseball team. On the first day of practice, the students were moved indoors because of rain. During a simulated batting drill, the bat slipped out of the defendant's hand and struck the plaintiff on the left side of his head. The court held that in the sports context, as well as other contexts, even where there is a finding of negligence, proximate cause usually presents a jury issue.⁶⁷ Thus, the court allowed a deliberation by the jury on the negligence cause of action.

In *Carey v. Toles*⁶⁸, the plaintiff, James Carey, age 15, and the defendant, Edward Toles, age 13, were engaged in an afternoon pick-up baseball game. Toles, a right handed batter, hit the ball into right field and started to run. He threw his bat which hit Carey, who was on the sidelines between home plate and first base. Carey's injuries required extensive surgery on his mouth and jawbone and the replacement of nine teeth. The court ruled that whether a minor baseball player was negligent in throwing a bat after hitting a ball and whether a minor plaintiff was contributorily negligent in standing on the sidelines are jury questions.⁶⁹ The appellate court remanded for a new trial based on an improper jury instruction regarding the assumption of risk as it relates to negligence. Note that the court did not rule that negligence in the sports context fails to state a cause of action.

In *Ceplina v. South Milwaukee Sch. Bd.*,⁷⁰ a minor plaintiff, Rosemary Ceplina, was injured when she was struck in the face with a baseball bat swung by the minor defendant, James Pauwels. Both were 6th grade students. The court held that as a general rule, the existence of negligence is a question of fact which is to be decided by the jury. The court expressed the belief that the jury should decide what the defendant's duty was and whether or not it was breached, as opposed to the court deciding this issue as a matter of law.⁷¹

In the two Louisiana cases,⁷² the Louisiana Court of Appeals held that even if there was negligence on the part of the defendant, the plaintiff had assumed the risk of injury resulting from negligence. Once again, the logical inference is that, since defenses to

66. 217 N.W.2d 756 (Minn. 1974).

67. *Id.* at 758.

68. 151 N.W.2d 396 (Mich. Ct. App. 1967).

69. *Id.* at 402.

70. 243 N.W.2d 183 (Wis. 1976).

71. *Id.* at 185.

72. *Benedetto v Travelers Ins. Co.*, 172 So. 2d 354 (La. Ct. App. 1965); *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So. 2d 831 (La. Ct. App. 1961).

the negligence action are analyzed by the court, negligence must be recognized as a viable cause of action.

In *Tavernier v. Maes*⁷³, the plaintiff and defendant were part of a family picnic at a public park. The plaintiff was playing second base and the defendant was running from first to second. The defendant slid into second base, colliding with the plaintiff, which resulted in the fracture of both the outer and inner bones of the plaintiff's left ankle. The court held that in the sports context, as well as others, one of the key issues in regard to the assumption of risk defense is 'what did the plaintiff know and when did he know it.'⁷⁴ The court allowed a negligence cause of action but gave a jury instruction of assumption of risk as well. In *Hoyt v.*

*Rosenberg*⁷⁵, the plaintiff, Marilyn Hoyt, 11 years old, and the defendant, Jack Rosenberg, 12 years old, were playing "kick the can," a form of the old game of hide and seek, with two other children. The rules are not crucial to understanding this game, but essentially one had to "kick the can" to be the winner. The defendant kicked the can with some force, striking the plaintiff in the face, and causing her to lose the use of one eye. The court held that in deciding whether there had been a failure of a minor to use ordinary care to avoid injury to other children, the test is not what an adult would have done or what the results indicate should have been done, but what an ordinary child in that situation would have done.⁷⁶ By its holding the court indicates that it would allow a negligence cause of action in this informal youth "contest."

As pointed out in the material on "recklessness," courts have at times gone out of their way to distinguish the cause of action in the contact as opposed to the non-contact sports injury case, by stating that "participants in bodily contact games such as basketball assume greater risks than do golfers and others involved in non-physical contact sports."⁷⁷

73. 51 Cal. Rptr. 575 (Ct. App. 1966).

74. *Id.* at 581,582.

75. 182 P.2d 234 (Cal. Ct. App. 1947).

76. *Id.* at 236.

77. Oswald, 406 N.E.2d at 160. It is beyond the scope of this article to address the multitude of golf cases in which action was brought for a variety of unique and innovative ways of inflicting serious injury (and not so serious general bonking) on fellow players, caddies, bystanders, and other innocent victims with the various paraphernalia of the game. In one case the court rejected the defendant's arguments that he owed no duty to the plaintiff, that the plaintiff was contributorily negligent, or that the plaintiff assumed the risk. While there was certainly legal precedence for the defendant's position on these issues, perhaps the appellate court's conclusion that a golf player has the duty to exercise ordinary care to prevent injury to others by a driven golf ball, was itself driven by the justices' conclusion that "the uncontradicted evidence is that the defendant was a wild and erratic player and knew that a golf ball

struck by him was liable to fly at most any angle." *Alexander v. Wrenn*, 164 S.E. 715, 717 (Va. 1932).

A survey of golf cases reveals a wide range of approaches to injuries caused by skilled and unskilled players: *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990)(being hit by a golf shot of a golfing companion is a foreseeable, customary part of the sport and does not state a cause of action for negligence because no duty is owed to protect the victim from that conduct); *Carrigan v. Roussell*, 426 A.2d 517 (N.J. Super. Ct. App. Div. 1981)(holding golfer on first tee did not have duty to give warning before taking a shot, but had duty to give warning when shot began to hook toward practice area); *Rindley v. Goldberg*, 297 So.2d 140 (Fla. Dist. Ct. App. 1974)(finding that golfer struck by a ball hit by fellow member of foursome sustained injury that was result of obvious and ordinary risks of the sport of golfing); *Mazzuchelli v. Nissenbaum*, 244 N.E.2d 729 (Mass. 1969)(stating experienced golfer who was struck in the eye by a golf ball hit by defendant assumed the risk of his injury); *Strand v. Conner*, 24 Cal.Rptr. 584 (Cal. Dist. Ct. App. 1962)(holding that player of the game of golf in which many hazards develop from player errors, which cannot be classified as negligent, assumes the risk of injury from such hazards); *Thomas v. Shaw*, 124 S.E.2d 396, (Ga. 1962)(stating that golf player assumes risks of dangers ordinarily incident to game but not negligent acts of fellow player); *Oakes v. Chapman*, 322 P.2d 241 (Cal. Dist. Ct. App. 1958)(finding that there was no duty to warn when the plaintiff was not in what a reasonable person would consider a position of danger when defendant hit the plaintiff with his golf ball); *Boynton v. Ryan*, 257 F.2d 70 (3rd Cir. 1958)(holding that where golf player invited a threesome to play through, there was no duty to warn before the defendant's ball hit the plaintiff); *Rose v. Morris*, 104 S.E.2d 485 (Ga. Ct. App. 1958)(stating golf player must give adequate notice to those who are in apparent danger of getting hit by a ball, but people who are on a golf course must assume risk of being injured by a hooked or sliced ball); *Turel v. Milberg*, 169 N.Y.S.2d 955 (N.Y. App. Term. 1957)(asserting that defendant golfer was not liable for injuries sustained by plaintiff when he was struck by defendant's golf ball, though defendant failed to shout "fore" before striking the golf ball, where plaintiff saw defendant about to swing at the golf ball); *Trauman v. City of New York*, 143 N.Y.S.2d 467 (N.Y. Trial Term 1955)(holding that golfer intending to strike a ball is not under duty to give traditional warning by yelling "fore" to persons in such position that danger to them is not reasonably anticipated); *Hampson v. Simon*, 104 N.E.2d 112 (Ill. App. Ct. 1952)(finding that no presumption of negligence arises from the mere fact that a player on a golf course is hit by a ball driven by another player); *Rogers v. Alice Chalmers Mfg. Co.*, 92 N.E.2d 677 (Ohio 1950)(determining that by participating in an athletic contest, including golf, a player assumes the ordinary risks of playing the game, and one of the ordinary risks in playing golf is being hit by a golf ball); *Houston v. Escott*, 85 F.Supp. 59 (D. Del. 1949)(stating that golf player assumes risk of injury resulting from his own participation in playing golf and cannot recover for injuries against another player when struck by a ball hit by that player when the plaintiff is standing in the line of play); *Walsh v. Machlin*, 23 A.2d 157 (Conn. 1941)(asserting that golfer owed duty to companion with whom he was playing to use reasonable care to avoid injuring him); *Stober v. Embry*, 47 S.W.2d (K.Y. Ct. App. 1932)(holding that golfer must give notice to those dangerously situated who are not aware of his intention to hit the ball); *Benjamin v. Nurenberg*, 157 A.10 (Pa. Super. Ct. 1931)(stating that golfer owes no duty to warn a player in another foursome before he attempts a shot, when the other player is not in the line of the golfer's play); *Gortener v. Bordes*, 131 So. 494 (La. Ct. App. 1930)(finding that loss of plaintiff's son's eye when struck with defendant's improvised golf club was not the result of the defendant's negligence under evidence presented); *Wood v. Postelthwaite*, 496 P.2d 988 (Wash. Ct. App. 1972)(stating that no duty on golfer to warn exists if other player is not in or near the intended line of flight or the other player is aware of the imminence of the shot); *Carroll v. Askew*, 106 S.E.2d 635 (Ga. Ct. App. 1969)(asserting that golf player does not assume risk of negligent acts of a fellow player); *Neumann v. Shlansky*, 294 N.Y.S.2d 628 (Co. Ct. 1968)(holding that a golfer owes a duty to use reasonable care to avoid injuring other players on the golf course); *Getz v. Freed*, 105 A.2d 102 (Pa. 1954)(determining that golfer is negligent where he drives a ball, without warning, and the plaintiff is not walking or standing within the orbit of the shot of the defendant). If you are still reading this footnote you are; a)

When negligent conduct proximately causes harm, a *prima facie* case is established. The main defenses to a negligence-based claim are contributory negligence and assumption of risk. Each of these defenses once operated as a complete bar to the negligence claim. Comparative negligence legislation now applicable in most states has changed this common law rule.⁷⁸ Under comparative negligence statutes, a contributorily negligent plaintiff is not necessarily precluded from recovery. A negligence-based claim in sports may be won or lost over the availability of an assumption of risk defense. As with consent in the intentional tort action, the assumption of risk defense will require the court to determine the nature of the risks that the willing participant assumes.

The best advice to a practitioner representing an injured sports participant is to plead the three causes of action in the alternative. This would be done in the same manner as one would plead breach of warranty, negligence, and strict liability on behalf of a consumer injured by a defective product.

V. CONCLUSION

A growing number of states appear to recognize negligence as a viable cause of action in the "heat of competition" context. In almost every area of our lives we are exposed to liability if we act in a negligent manner and cause harm to others. For the most part, our social compact says that unreasonable conduct which causes physical harm is actionable. This rule of liability is firmly grounded in social policy. The exposure to liability serves to deter unreasonably risky behavior and to compensate the injured.

In a few limited areas, actors are insulated from liability for ordinary negligence. These exemptions, too, are rooted in policy. For example, in the area of defamation law, a plaintiff who is a public person can ordinarily recover for injury to reputation only upon a clear and convincing showing of "knowledge of falsity or reckless disregard for truth or falsity."⁷⁹ This solicitude for speech is grounded in strong social policy; we are as a people deeply committed to free speech and a wide-open, robust discussion of issues of

an avid golfer, b) an avid student of sports law, c) generally abnormal, d) any combination of the above. Query whether any of these cases belong in the context of a discussion involving participant versus participant liability in sports. Golf, after all, is more of a game (like chess) than a sport (like football).

78. See *e.g.*, ARK. CODE ANN. § 27-1765; ME. REV. STAT. ANN. tit. 14, § 156; MISS. CODE ANN. § 11-7-15; OKLA. STAT. ANN. tit. 23, § 13; TEX. REV. CIV. STAT. ANN. art. 2212A; WASH. REV. CODE ANN. § 4.22005.

79. *N.Y. Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

public concern. In order to give speech the breathing room it needs to thrive, negligent speakers are insulated from liability.

Another area where liability is circumscribed concerns conduct which causes severe emotional distress, but no immediate physical harm. Here, too, for reasons of policy, the actor is insulated from liability for ordinary negligence. To succeed, the plaintiff must show intentional or reckless conduct of an "extreme and outrageous nature."⁸⁰ The negligent infliction of even severe emotional distress is generally not actionable because of strong and clearly articulated policy concerns. This immunity from liability for negligence is premised upon both the absence of physical harm and the desire to nurture an environment where people feel free. The theory is that holding an actor responsible for emotional distress caused by negligence would undermine deeply held liberty interests. People would be afraid to say and to do for fear of causing compensable emotional upset.⁸¹ There are other areas, too, where the negligent actor is exempt from liability.⁸² But for the most part, the prevailing view is that unreasonable actors are responsible for harm caused. This is in recognition of the fact that negligence is a sound basis for liability. Exemptions are relatively rare, and grounded firmly in social policy.

Does it make sense, then, to insulate a negligent sports participant from liability to a physically injured co-participant? Is sports deserving of such solicitude? Are there really convincing policy reasons to insulate a sports participant from liability for physical harm caused by negligence?

The courts that require an injured sports participant to prove recklessness (and thus protect the "merely" negligent actor) do so on the theory that sports, like speech, needs "breathing room." But the evidence is accumulating that, on every level of competition, participants need to be restrained and not emboldened. From kids' sports to professional sports, sportsmanship, fair play and reasonable restraint are lost values. Grotesque showmanship, unethical means to win, and reckless unconcern mar the landscape of sport.

80. RESTATEMENT (SECOND) OF TORTS § 46.

81. As Magruder put it:

[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the hide is a better protection than the law could ever be.

Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

82. For example, under the traditional common law rule a landowner owes no duty to a trespasser; or more accurately stated, he owes a duty to refrain from intentional harm, but not much more.

Sports participants don't need breathing room; they should rather have their feet held to the liability fire.

I must confess that what I have just said pains me. I am a sports enthusiast with few peers; I play sports, watch sports, coach sports and even study sports. But the simple truth is that sports must be placed back in perspective. (It is not as important as political speech). Insulating sports participants from liability for ordinary negligence sends all the wrong messages. Even in the heat of competition, participants can and should be expected to behave reasonably.