Unnecessary Roughness: When On-field Conduct Leads to Civil Liability in Professional Sports

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I. Introduction

The first half is winding down and the Denver Broncos already have a commanding 21-3 lead over the Cincinnati Bengals, when a pass intended for Bengals running back Charles "Booby" Clark is intercepted by the Broncos free safety. Hoping to help his teammate have a successful runback of the interception, Broncos defensive back Dale Hackbart attempted to throw a block on Booby Clark. Following this effort, Hackbart knelt on the ground and turned to watch the play continue down the field. Angered and frustrated at his team's losing cause, Clark stepped forward, and with his right forearm struck Hackbart in the back of the head and neck. The blow left Hackbart with a severe neck fracture, and he eventually sued Clark and the Bengals in civil court.[1] Whether on-field conduct, such as of the nature displayed here, should lead to civil liability is a topic for heavy debate.

With inherent violence at the forefront of many professional sports, the line between acceptable and unacceptable on-field conduct is anything but distinct. As a result, courts have consistently had to decide what type of conduct falls within the "scope of the game," and whether specific violent acts occurring outside this distinction are the basis for liability. It has been traditional for courts to exercise great restraint in sports-related cases, relying on the belief that "the law should not place unreasonable burdens on the free and vigorous participation in sports."[2] Despite this understanding, when it comes to athletic competition, courts have determined that some "of the restraints of civilization must accompany every athlete onto the playing field."[3] The court in *Hackbart v. Cincinnati Bengals,*[4] established a test revolving around a standard of "recklessness" that requires assessing certain elements based on specific facts of the particular case. However, this test may come up short when analyzing all types of conduct falling within the gray areas of professional sports. Because of the potential for violent acts outside the scope of the game, the regulation must not only be consistent, but also be something that can effectively deter such conduct detrimental to the sport, as well as to a player's career. Concurrently, it is vital that

[1] *See* JENNIFER L. MINIGH, SPORTS MEDICINE 26 (2007); Nick C. Nichols, *Courts and Sports A Current Update*, http://www.abrahamwatkins.com/CM/Articles/Courts-And-Sports.asp.
[2] Turcott v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986) (quoting Nabonzy v. Barnhill, 334 N.E.2d 258, 260).
[3] *Id.*
[4] 601 F.2d 516 (10th Cir. 1979).

the vigorous participation by athletes during a professional sports contest is not hindered by too broad of a standard imposing conduct liability.

This paper contends that although it is significant that athletes competing in inherently dangerous sports be protected from unnecessary injury, a stricter and more workable standard must be adopted in determining what on-field conduct leads to civil liability, so as to maintain the integrity of pure athletic competition. Part I of this paper will discuss the common standards currently used in determining what is outside the scope of the game and therefore, what can lead to liability. Part II will examine how the commissioner and league rules in the four major sports attempt to regulate unnecessarily violent activity during the course of a sporting event. Part III will analyze various court decisions concerning conduct within a sports setting and trace the history of liability in the civil context. Part IV will discuss the defense of assumption of risk in sports injury cases, and Part V will offer an idea of how to go forward in terms of ultimately creating a workable and more effective standard. This paper concludes by attempting to draw the line between courts and sports, illustrating why it is important to keep these two areas as independent and distinct as possible.

II. The "Scope of the Game" and the "Recklessness" Standards

It seems fair to say that when a player is injured by another player due to conduct within the scope and nature of the sport in which the player participates, then no liability should carry into a legal context. However, if a player is injured by another player's conduct that would be deemed well outside the scope of the sport, the potential for liability is appropriate. But exactly what conduct falls in the "scope of the game" standard? Consider a few instances in baseball:

A base runner trying to beat a tag slides into a catcher at home plate and breaks the catcher's leg. Compare that with a base runner who slides in with his spikes raised, piercing the neck of a crouched catcher. What about where a hitter charges the mound, bat-in-hand, and swings and hits the pitcher? Or even when a pitcher intentionally throws at a hitter—*who is still in the on-deck circle*? When asking which of these situations fall outside the scope of baseball—and can potentially give rise to liability—there is often ambiguity and rarely a clear-cut answer.

A proper analysis under the "scope of the game" standard requires one to look to the inherent nature of a particular sport. Certain sports, such as football and hockey, are comprised of excessive contact and hitting during a game, and these sports are naturally and inherently violent and physical. Throughout the course of these contests, players' conduct, though perhaps extremely violent at times, is given greater leeway when analyzing whether such conduct is outside or within the scope of the game. Other sports, such as baseball or basketball, are not as inherently violent or contact-based, and thus, certain harmful conduct is more likely to be considered outside the scope of the game.

The specific league rules outlined in every major sport also help to determine whether conduct is outside or within the scope of the game. Rules frequently sanction certain conduct, often leading to fines or suspension when violated, which can be a good indication of what conduct is inherent to the sport or well outside its limits. Certainly, some scenarios are clearly outside the nature of a sport; however, a far greater amount fall into the "gray area" in which determination becomes much more difficult.

Courts have also viewed the application of a standard of "recklessness" as the means for assessing a player's conduct within a sport. Recklessness is defined in American law as "[c]onduct whereby the actor does not desire harmful consequence but . . . foresees the possibility and consciously takes the risk," or alternatively as "a state of mind in which a person does not care about the consequences

of his or her actions."[5] This differs from a standard of "intentional wrongdoing" in that, to be reckless, the *act* must be intended by the actor, but the actor does not intend to cause the harm which results from it, whereas intentional wrongdoing requires the actor to have intended to cause the *harm* that results from the act. Thus, utilizing the broader standard of recklessness in determining liability in a sports context, a court looks for, and must find, "the intent to do the act, but without the intent to cause the particular harm."[6]

American courts have followed this two-step approach, originally adopted in *Hackbart*, assessing first whether the conduct falls outside the scope of the game, and then determining whether a player acted in reckless disregard of the rights of others in the particular act that led to injury. However, before an action ever makes it to legal determination, the conduct in question will likely be regulated through league rules and policies, policed by the Commissioner and League Presidents. Courts, in determining whether player conduct is within the scope of the game, often look to the specific league's rules on player conduct. As a result, it is ultimately the authority of the league and commissioner to establish what types of conduct are appropriate within the game, and thus, drawing the line for the kind of conduct that falls outside its scope.

III. Commissioner and League Regulation

Each of the four major sports industries in the United States, the National Football League ("NFL"), National Hockey League ("NHL"), National Basketball Association ("NBA"), and Major League Baseball ("MLB") are controlled by a commissioner who is responsible for, among other things, regulating players' on-field and off-field conduct. Primarily, this is done through the specific league's personal conduct policy. For instance, the NFL's personal conduct policy requires players to refrain from "conduct detrimental to the integrity of and public confidence in the National Football League."[7] The policy goes on to explain when discipline by the league and commissioner may be imposed upon a player, specifically including "[c]onduct that imposes inherent danger to the safety and well being of another person," as well as "[v]iolent or threatening behavior among employees, whether in or outside the workplace."[8]

However, this ambiguous language hardly offers a clear and distinct line in terms of deciding what specific types of conduct are prohibited. Furthermore, a strong argument is that sports, particularly football, are inherently dangerous in themselves. And if that is indeed plausible, then it would follow that conduct occurring during the course of sport participation would fall under this prohibited category—inherently dangerous to the safety of another person or violent behavior in the workplace. This is likely not what the league envisioned when drafting its policy, and perhaps not even considered when assessing game conduct. Such ambiguity leaves much open to interpretation and ultimately is at the discretion of the league commissioner.

League rules also serve as a form of regulation during professional sport contests. It is these specific rules that often distinguish what falls within the "scope of the game." Frequently, a commissioner of a professional sport will have to examine a player's conduct and determine whether such conduct violates a specific rule of the league. If so, the player may be severely fined, or even suspended for a certain number of games at the discretion of the commissioner. The rules provide a standard for which the game is to be played, and it is these rules which serve to govern players' actions within a game,

[5] BLACK'S LAW DICTIONARY 1298–99 (8th ed. 2004).
[6] *See Hackbart*, 601 F.2d at 525.
[7] NATIONAL FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 1 (2008).
[8] *Id.* at 1–2.

ultimately serving the purpose of deterring violent or harmful conduct detrimental to another player's safety.[9]

For instance, in 2000, the NHL delivered a season-long suspension to Boston Bruins' defenseman Marty McSorley for striking another player on the side of the head with his hockey stick.[10] Such conduct was in violation of National Hockey League, Rule 52, titled "Deliberate Injury of Opponents."[11] Vancouver Canucks forward Donald Brasher was the recipient of McSorley's conduct and suffered a season-ending concussion when he violently banged his head on the ice after being struck unconscious by McSorley's stick.[12] Brasher eventually recovered from his injury and continued his career that following season.[13] While hockey is an inherently violent sport, McSorley's conduct seemed to go beyond anything that normally occurs in a hockey game; however, Brasher chose not to file a civil action against McSorely, likely because he was able to resume his career.[14] Unlike Brasher, the NHL did not take McSorely's conduct lightly. The season-long suspension was the longest ever issued by the NHL for an on-ice incident, and the league hoped their action would deter any future conduct of this sort and protect players' safety going forward.[15]

Recently, NBA Commissioner David Stern took action in foresight of potential injury and possible liability that the league may incur as a result of a player being injured. In February 2010, the NBA banned the chewing on straws by a player while playing in a game.[16] Although odd, this action was taken in response to the Dallas Mavericks acquiring guard Caron Butler, a player who liked to chew on straws while he played.[17] This interesting rule drew much attention from fans, players, and critics; however, NBA Vice President of Basketball Communications Tim Frank stood behind the action, stating that "[i]t's a safety issue, period."[18] The NBA was serious about the rule and Mavericks owner Mark

[9] *See, e.g.*, Off. Rules of Major League Baseball, Rule 8.02(d) (forbidding a pitcher from intentionally throwing at a batter). If such a violation occurs, an umpire may eject the pitcher from the game, or warn the pitcher and manager of both teams that another pitch thrown intentionally at a batter will result in immediate ejection of that pitcher. *Id.* The Comment to Rule 8.02(d) discusses the policy behind this prohibition: "To pitch at a batter's head is unsportsmanlike and highly dangerous. It should be—and is—condemned by everybody. Umpires should act without hesitation in enforcement of this rule." *Id.* The Commissioner League or Presidents have the authority to take any additional action against a pitcher violating this rule, including suspending or fining the player. *See id.*; Rule 9.05.

[10] Mark Conrad, *NHL Suspends McSorley for Season After Stick Incident: Slash at temple of opposing player results in longest punishment in league history*, SPORTS LAW NEWS (2000), http://www.sportslawnews.com/archive/Articles%202000/McSorley.htm.

[11] "A match penalty shall be imposed on a player who deliberately injures an opponent in any manner." National Hockey League Rule 52(a). "In addition to the match penalty, the player shall be automatically suspended from further competition until the Commissioner has ruled on the issue. *Id.* at (b).

[12] *Id.*

[13] Jeffrey A. Citron & Mark Ableman, *Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. REV. 193, 193 (2003).

[14] *Id.*

[15] Mark Conrad, *NHL Suspends McSorley for Season After Stick Incident: Slash at temple of opposing player results in longest punishment in league history*, SPORTS LAW NEWS (2000), http://www.sportslawnews.com/archive/Articles%202000/McSorley.htm. McSorely was also forced to forfeit $72,000, his pro rata salary for the remainder of the season. *Id.* This incident occurred in Vancouver, and it is important to note that although Brasher did not file a civil action, the Province of British Columbia actually charged McSorely with the crime of assault. *See Regina v. McSorley*, 2000 BCPC 116, [2000] B.C.J. No. 1993 (Prov. Ct.) (QL). However, this paper only explores liability in a civil context and will not go into the relevant criminal charges.

[16] *See* Jeff Caplan, *NBA Bans Butler from Chewing Straws*, ESPNDALLAS.COM, Feb. 26, 2010, http://sports.espn.go.com/dallas/nba/news/story?id=4945104.

[17] *Id.*

[18] *Id.*

Cuban confirmed this position, acknowledging that Butler's straw chewing was now "against the rules."[19] Subject to ridicule and debate, rules such as this one illustrate how league policies are in place for the safety of players, as well as to decrease the potential of the league incurring any liability because of a player being injured.

Although various rules and regulations are in place in the major sports leagues to police players' conduct and deter harmful conduct outside the nature of the game, occasionally a player's conduct is so far outside the rules and causes extreme injuries that courts have been forced to take action and establish a standard for civil liability in a sports context.

IV. Regulation Through Court Decisions and Specific Cases

When a serious injury occurs due to conduct of a player well outside the scope of the rules and nature of the game, it seems "just" that the injured player have the ability to seek relief in a legal setting. For example, perhaps a basketball player suffers a career-ending knee injury because the guard on the opposing team intentionally kicks his legs out from under him while on a fast break. It would seem appropriate and fair that the injured player be able to recover damages for lost wages, medical bills, or other expenses incurred as a result of this intentional act.[20] A series of cases over the last thirty-plus years have forced courts to determine a standard for civil liability in a professional sports context. While professional sports and legal action are in large part separate from each other, "these underlying cases provide the basic legal foundation and requirements which are necessary in litigation involving recreational injuries in order to establish the legal principles for liability and recovery in sports injury cases."[21] A thorough analysis of significant sports injury court cases will reveal the evolution of standards of liability in this unique context.

A. *Hackbart v. Cincinnati Bengals* [22]

In the leading case on professional sports liability, *Hackbart v. Cincinnati Bengals*, the court was faced with the issue of whether one player's injury that was caused by another player during the course of a professional football game can give rise to liability in tort where the injury was the result of an intentional striking of a blow.[23] Denver Broncos defensive back Dale Hackbart was injured when Bengals running back Charles "Booby" Clark struck Hackbart in the back of the head and neck after a play had ended during a regular season game.[24]

The trial court ruled in favor of Clark and the Bengals, stating that "professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is

[19] *Id.*

[20] A specific example would be the 2003 case of Marcus Williams v. Bill Romanowski. The two Oakland Raiders football players, during an inter-squad scrimmage, got into a confrontation. A lawsuit arose after Romanowski ripped of Williams' helmet and punched him in the face, crushing his left eye socket. Williams was forced to retire from football because of the injury, and sought $3.4 million in damages from Romanowski. Williams argued to a court that Romanowski "had crossed the line and broken the rules," but although a jury returned a verdict in favor of Williams, they only found liability in the amount of $340,000. Ultimately, however, the case settled for $415,000. *See* Nick C. Nichols, *Courts and Sports A Current Update*, http://www.abrahamwatkins.com/CM/Articles/Courts-And-Sports.asp.

[21] *Id.*

[22] 601 F.2d 516 (10th Cir. 1979).

[23] *See generally id.*

[24] For additional facts, *see supra* Introduction.

so great that it renders injuries *not actionable in court*."[25] The court further held that even *intentional* batteries during a professional football contest are "beyond the scope of the judicial process."[26] As a result, even though Clark testified at trial that the blow to Hackbart was not accidental but rather intentionally administered, the court held that as a matter of law the available remedies within the context of professional football are the "imposition of penalties and expulsion from the game,"[27] sanctions controlled by the commissioner and league officials.[28] Ultimately, the view of the court was that it would be unreasonable to hold that one player has a duty of care for the safety of others during the course of professional football, which is so violent and physical in nature.

The trial court relied on policy to conclude that because the case was one deriving from a professional sports contest, there should be separate governing bodies.[29] "Intentional injuries incurred in football games should be outside the framework of the law. . . . [and] courts are ill-suited to decide" whether conduct within a professional sport should be "subject to the restraints of the law."[30] Finally, the court did address that although there could be a deterrent effect on violent activity by the potential threat of legal liability through civil actions, such expansion of the body of governing law in professional sports must be accomplished through legislation and administrative regulation, rather than through court decision.[31] The trial court's deferment to the league and commissioner, however, was not embraced by the Court of Appeals.

The United States Court of Appeals for the Tenth Circuit, reversing the decision of the lower court, took a different approach and analyzed the type of conduct prohibited by the rules of the game.[32] The court determined that intentionally striking a player in the back of the head is outside the scope of the playing rules, as well as the general customs of professional football.[33] The court discussed how recklessness would be applicable to the given situation and was the appropriate standard to be followed, concluding that the injury to Hackbart was the result of conduct by Clark which was in "reckless disregard of Hackbart's safety."[34] As a result, the Bengals appeared to be liable through the concept of *respondeat superior*,[35] given the reckless conduct of Clark outside of the scope of the rules of professional football. However, Hackbart and the Bengals settled the action for $200,000 before the remanded case went to trial.[36]

B. Tomjanovich v. California Sports, Inc.[37]

Around the same time as the *Hackbart* decision came to light, the court in *Tomjanovich v. California Sports, Inc.* was faced with a similar sports-related issue and potential liability resulting from a player's conduct during an NBA basketball game. During a regular season game between the Houston Rockets and the Los Angeles Lakers, Rockets center Kevin Kunnert accidently elbowed Lakers forward

[25] *Hackbart*, 601 F.2d at 518–19 (emphasis added).
[26] *Id.* at 519.
[27] *Id.*
[28] *See supra* Part II.
[29] *See Hackbart*, 601 F.2d at 520.
[30] *Id.*
[31] *See id.*
[32] *See id.* at 521.
[33] *Id.*
[34] *Id.* at 525.
[35] Respondeat superior is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).
[36] FREDERICK J. DAY, CLUBHOUSE LAWYER: LAW IN THE WORLD OF SPORTS 88 (2004).
[37] 1979 U.S. Dist. LEXIS 9282 (S.D. Tex 1979).

Kermit Washington.[38] Washington, angered by this action, attempted to punch Kunnert.[39] Both teams joined in the ruckus, and while Rockets star-forward Rudy Tomjanovich attempted to break up the fight, Washington landed a punch squarely into Tomjanovich's face. The blow left Tomjanovich with fractures of the nose, skull, and jaw, as well as facial lacerations, a concussion, and leakage of spinal fluid from the brain cavity.[40]

Tomjanovich sued the Los Angeles Lakers, alleging both vicarious liability and negligent supervision, as the employer of Kermit Washington.[41] The court determined that evidence supported a cause of action against the team based on Washington's conduct, and Tomjanovich was entitled to relief.[42] A jury awarded damages to the plaintiff in the amount of $3.3 million to cover expenses related to medical aid, hospital services, and wage loss.[43] The Lakers appealed this award, and later settled out of court with Tomjanovich for an undisclosed amount.[44] Like *Hackbart*, this case illustrates another instance where a player was able to recover legal damages as a result of an injury caused by the conduct of another player during the course of a professional game.

C. *Avila v. Citrus Community College District* [45]

A final case analysis regarding conduct liability in sport involves a batter getting hit in the head with a pitch during a baseball game. In *Avila v. Citrus Community College District*, an intercollegiate baseball game was played between two community college teams.[46] A home team batter was hit by a pitch, and in the next half-inning, in retaliation the home team pitcher intentionally threw a pitch at the visiting batter.[47] This intentional "beanball" thrown in retaliation, hit the plaintiff in the head, cracking his batting helmet and causing dizziness and other unspecified serious personal injuries.[48] The court was faced with the issue of whether the host community college district owed any duty to visiting players that may support liability, and whether the host school breached a duty of care to the injured batter because of the conduct of the home team's pitcher.[49]

Although this paper primarily focuses on professional level sports, *Avila*, indicates that there is no difference in analysis between collegiate competition and Major League Baseball under the facts of the case. The court in *Avila* even stated, there is "no reason to distinguish between collegiate and professional baseball"[50] in applying the appropriate standards, and "[t]here is nothing legally significant . . . about the level of play in this case."[51] As a result, an in-depth look at this case and an examination of the court's analysis relates appropriately to one that could arise at the professional level.

[38] *See* FREDERICK J. DAY, CLUBHOUSE LAWYER: LAW IN THE WORLD OF SPORTS 88 (2004).
[39] *Id.*
[40] *Id.* at 89.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Avila v. Citrus Community College District, 131 P.3d 383 (Cal. 2006).
[46] *Id.* at 385.
[47] *Id.* at 385–86.
[48] *Id.* at 386.
[49] *Id.* at 385.
[50] *Id.* at 394.
[51] *Id.* (quoting West v. Sundown Little League of Stockton, Inc., 116 Cal. Rptr. 2d 849(Cal. Ct. App. 2002)) (internal quotation marks omitted).

The court, citing previous cases on point in this area, determined that there is an established principle that "co-participants have a duty not to act recklessly, outside the bounds of the sport."[52] An athlete participating in a sport does not assume the risk of another player's conduct "totally outside the range of ordinary activity involved in the sport."[53] However, in this case, the court found that even if the home pitcher *intentionally* threw the pitch to hit the batter, such conduct was still within the range of ordinary activity within the sport.[54] A pitch intentionally thrown at a batter is accepted by custom in baseball, as pitchers throw at a batter to disrupt timing, back him away from the plate, retaliate after a teammate has been hit, or to punish a batter for hitting a home run.[55] Accordingly, the court held that the action was barred by the doctrine of "assumption of risk"[56] and that being hit by a pitch, even *intentionally*, is an inherent risk of baseball.[57] Thus, the host college owed no duty to the injured plaintiff to prevent the pitcher from even intentionally hitting the batter, and no liability or basis for recovery existed. This outcome ultimately demonstrates how conduct within the scope of the game does not give rise to an action for recovery in a civil context.

V. The "Assumption of Risk" Defense

In tort actions, and frequently at issue in claims arising out of participation in sport and recreation activity, the doctrine of "assumption of risk" offers a complete defense for defendants faced with potential liability. In other words, if a plaintiff assumes the risk of injury associated with a particular act, he or she cannot maintain an action against a party that causes the injury.[58] The traditional absolute defense required proof by the defendant "that the plaintiff voluntarily accepted a specific known and appreciated risk."[59] If these criteria were met, a defendant could not be held liable for injuries arising from the known risk inherent with a sport.

For example, a professional baseball player is aware of the dangers of being hit by a pitch, and pitches often thrown at speeds of up to one hundred miles per hour are apparent and well known. In choosing to participate in a baseball contest, a player knows, understands, and appreciates the risk that being hit by a pitch can result in serious injury or, even in rare occasions, death. As a result, a player who happens to be hit by a pitch and injured has no cause of action against the opposing pitcher or team.

Recently, a high court in the state of New York limited primary assumption of risk solely to athletic participation. Declining to apply the doctrine in non-athletic suits, the court "recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and [the court has] employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against the prohibitive liability to which they would otherwise give rise."[60]

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[52] *Id.* at 392 (citing Knight v. Jewett, 11 Cal. Rptr. 2d 2 (Cal. Ct. App. 1992)).
[53] *Id.* at 394 (quoting Knight, 11 Cal. Rptr. 2d 2).
[54] *Id.*
[55] *Id.* at 393. For a more in depth analysis of this example, *see infra* Part V.
[56] *See infra* Part IV for further discussion of the "assumption of risk" doctrine.
[57] *See Avila*, 131 P.3d at 393–94.
[58] *See* BLACK'S LAW DICTIONARY 134 (8th ed. 2004) ("[O]ne who takes on the risk of loss, injury, or damage cannot maintain an action against a party that causes the loss, injury, or damage . . .).
[59] *Avila*, 131 P.3d at 391 ("The doctrine depended on the actual subjective knowledge of the given plaintiff and, where the elements were met, was an absolute defense to liability for injuries arising from the known risk.") (internal citations omitted).
[60] Trupia v. Lake George Cent. Sch. Dist., 2010 NY Slip Op 02833 (N.Y. 2010), *available at* http://www.leagle.com/unsecure/page.htm?shortname=innyco20100406287.

However, when a player's conduct is outside the scope of the game in a professional sports competition, the concept of assumption of risk becomes vague.[61] Often, the ambiguity lies in whether or not the injured party consented to the defendant's conduct as a result of assuming the risk to participate in the activity. It has been viewed by courts that players do not consent to acts which are reckless or intentional, and a variety of factors are considered in determining whether a professional athlete should be held to having consented to conduct of a co-participant which caused the injury.[62] These factors include:

> the ultimate purpose of the game and the method or methods of winning it; the relationship of defendant's conduct to the game's ultimate purpose, especially his conduct with respect to the rules and customs whose purpose is to enhance the safety of the participants; and the equipment . . . involved in the playing of the game.[63]

Accordingly, the most difficult issue when it comes to consent and the doctrine of assumption of risk is whether the specific conduct of which caused the injury to the plaintiff is within the scope, rules, and customs of the game, and whether the injured player was aware of the risk of that conduct by participating in the sport, thus, consenting to it. When it comes to professional sports, athletes are likely to be aware of the dangers of the activity "and presumably more willing to accept them in exchange for a salary."[64] Courts will likely find informed consent in a professional athlete participating in his or her sport, given the athlete's knowledge and experience in the activity.[65] But as discussed, liability arises where conduct is so outrageous and not inherent to the sport that a player could not have assumed the risk of injury. It is this struggle that has been up to court determination for decades.

VI. A Modified Approach to Player Conduct and Liability

There will always be instances, although likely (and hopefully) rare, in which a player's conduct within a professional sports contest is so extreme and unnecessary that it causes serious, and even career-ending, injury to another player. In these situations, it is vital that the injured player be able to recover damages in a civil context for, among other things, wages lost by the premature conclusion of his or her career. The current standard used to assess the liability of professional sports conduct fails to sufficiently assess the issues, leaving room for clarification and improvement. However, the standard currently utilized by the court system is not completely flawed, as it manages to address the significance of liability in conduct not inherent within the sport itself. Accordingly, a modified approach to the current analysis would ultimately give rise to the best result in assessing liability as a result of a player's on-field conduct.

The standard of recklessness currently relied on by the courts when determining liability is inappropriate when analyzing a player's conduct during a professional sports contest. There is too much potential for hindering pure athletic competition when applying this standard. Recall the definition of recklessness: "an actor does not intend injury but can *foresee the possibility of injury*" as a result of his conduct.[66] There is no place for this standard in professional sports because frankly, the professional athlete competing in sport cannot be required to endorse this mindset.

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[61] *See Avila*, 131 P.3d at 391 ("When the injury is to a sporting participant, the considerations of policy and the question of duty necessarily becomes intertwined with the question of assumption of risk.").
[62] *See* Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986).
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *See* Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524–25 (10th Cir. 1979); *supra* Part I.

For instance, in baseball, a pitcher throwing a fastball up-and-in to a power hitter, with the purpose of backing the hitter off the plate and setting up the subsequent pitch—a curveball low-and-away—may lose control of the pitch, or just release a bit too early in his delivery, causing the ball to hit the batter in the head at a speed of up to one hundred miles per hour. This could result in the batter being seriously injured. In this scenario, the pitcher could certainly *foresee the possibility of injuring* the batter with a pitch high-and-tight, but he does not intend the pitch to hit the batter and cause the resulting injury. Under the current standard of recklessness, putting aside the doctrine of assumption of risk for the sake of this example, the pitcher could be found liable for the injuries suffered as a result of the pitch. Applying this standard would have a detrimental effect on the game of baseball and the way the game is played, dramatically deterring a pitcher from pitching inside at the fear of hitting and injuring the batter and suffering liability as a result. Such a consequence would grant an extreme advantage to the batter and it is not the function of "tort law to chill any pitcher from throwing inside, i.e., close to the batter's body—a permissible and essential part of the sport—for fear of a suit over an errant pitch."[67]

Instead, courts should employ the standard of "intentional wrongdoing" rather than "recklessness" as a stricter standard for finding liability in sports conduct cases. Given the baseball example above, a proponent may still argue that even being *intentionally* hit in a baseball game is within the nature of the game, and thus should not lead to liability.[68] Throughout the history of baseball, many great pitchers have been notorious for hitting batters, relying on the "actual or threatened willingness to throw at batters to aid their pitching."[69] "For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. It is not the function of tort law to police such conduct."[70] However, under the standard of intent, the intentional throwing at a batter would not directly lead to civil liability. Rather, the standard would require that the defendant prove that the actor intended to *cause injury of the degree*, and was not just able to foresee it. Therefore, if the pitcher intended to hit the batter in the head to cause the batter to be knocked out of the game, and the pitcher's conduct does so, then there would be a basis for liability under this approach.

The above example is not the perfect display of this analysis, as getting hit with a pitch is an inherent risk of baseball and likely covered under the assumption of risk doctrine.[71] The matter of intentionally hitting another batter would likely never make it to the assessment under the intent standard because retaliating or strategizing by pitching inside is also within the scope of baseball. Additionally, this paper further contends that such conduct should never reach the court system whatsoever. As discussed previously, intentionally throwing at a batter is prohibited by the Rules of Major League Baseball, and as a result, the commissioner has the authority to regulate such activity and can impose suspensions or fines for this type of conduct.[72] It is solely the role of the umpire to punish a pitcher who hits a batter by ejecting him from the game or the league to suspend the pitcher for violating the rules. In fact, such punishment through league regulation is frequently done, and accordingly, this particular conduct should never reach court determination because it is not the function of the legal system to regulate this type of conduct.

[67] Avila v. Citrus Community College Dist., 131 P.3d 383, 394 (Cal. 2006).
[68] *See id.* at 393–94.
[69] *Id.* ("Some of the most respected baseball managers and pitchers have openly discussed the fundamental place throwing at batters has in their sport. . . . St. Louis Cardinals manager Tony La Russa detail[ed] the strategic importance of ordering selective intentional throwing at opposing batters, principally to retaliate for one's own players being hit. . . . [I]ntentionally throwing at batters can also be an integral part of pitching tactics, a tool to help get batters out by upsetting their frame of mind.").
[70] *Id.* at 394.
[71] *See supra* Parts I & IV.
[72] *See supra* Part III.

However, the approach as outlined is easily understood through this example, and a similar analysis could be applied to other on-field conduct in varying professional sports situations. Assessing the cases noted within this paper under the standard of intent, as opposed to recklessness, yields an interesting analysis as well. Perhaps the courts would have still decided the merits of these cases the same way; however, from a legal analysis standpoint, there is a major difference between the standards of intent and recklessness, which is significant to the competition and nature of professional sports.

In the latter two cases discussed in this paper, *Tomjonavich* and *Avila*, analyzing the defendant athlete's conduct under the standard of intent rather than recklessness would have yielded the same outcomes. In *Tomjonavich*, the defendant purposely punched the plaintiff, intending to cause injury. Although it could be argued that the defendant perhaps did not intend to cause injury quite to the degree that *Tomjonavich* suffered, the punch to the face resulted in the type of injury the defendant intended, and thus, liability would exist under this standard as well. Likewise, the outcome in *Avila* would have also been consistent whether applying the recklessness standard or the modified approach of intent. Similar to the baseball example discussed above, even if the pitcher intended to *injure* the batter by throwing at him, such conduct is within the scope of baseball, failing the first prong of the approach.

Finally, recalling the facts of *Hackbart*, the court applied the recklessness standard and determined that defendant "Booby" Clark acted in reckless disregard for Hackbart's safety. Thus, the Bengals were likely liable for damages. If the standard of intent were applied instead of recklessness, the result would likely be the same, but not necessarily. Under the modified approach, it would be necessary to ask what degree of injury Clark intended, if any at all. "Clark admittedly acted impulsively and in the heat of anger, and even though it could be said from the admitted facts that he intended the act, it could also be said that he did not intend to conflict serious injury which resulted from the blow which he struck."[73] However, it is likely that in taking out frustration he did intend to hurt Hackbart, and therefore, the intentional standard would likely yield the same outcome in imposing civil liability. The argument to the contrary is that he did not intend the injury at all, and therefore, would not be liable under this higher standard. This approach at least draws a further analysis as to what the player intended from his conduct while still vigorously participating in the nature of the sport.

Conclusion: Drawing the Line Between Courts and Sports

Negotiated into most major professional sports' Collective Bargaining Agreements, *arbitration* is the sole means for resolving disputes between players and leagues. The goal of this type of resolution is to keep professional sports and the court system as distinct and separate as possible. Drawing a line between the two is vital for the ongoing success of the major sports leagues in this country, and the view that courts do not possess the appropriate capacity for deciding sports-related disputes should continue to be the basis for this distinction.

However, at times it is both necessary and significant for a court to decide a dispute arising from a professional sports context, providing a means for the recovery of damages in certain unique cases. In these instances, in order to protect both athletes, as well as the integrity of the league and the sport itself, clear, consistent, and appropriate standards must be applied. Sports injury and conduct actions specifically require an effective determination, and in these cases, an analysis of assumption of risk is vital to determine potential recovery. Additionally, the cases discussed in this paper demonstrate how courts tend to approach sports injury actions, but as illustrated through specific analysis, this approach is somewhat misguided.

[73] Hackbart v. Cincinnati Bengals, 601 F.2d 516, 524 (10th Cir. 1979).

Ultimately, a modified approach would allow for a more effective determination of the unique situations occurring within professional sports. It is important to keep in mind that athletes put a lot on the line when competing in the professional sports arena and their livelihood should be protected as much as possible. However, it is even more important that the pure nature of athletics is not hindered so as to limit the potential of athletic competition. While the modified approach outlined in this paper does offer slightly less protection to injured athletes—making it more difficult to recover in civil suits given the stricter standard of intent—the standard is more realistic and better suited for the professional sports setting.

League rules are an important guideline in assessing appropriate conduct in sports. But even when a player's conduct violates a league rule and subjects "the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule."[74] Thus, the standard must be greater to ensure that the approach and mentality among athletes remains pure. By adopting this modified approach, the integrity of professional sports and pure athletic competition can be maintained, while still providing protection for athletes' health and safety during a contest.

Finally, undertaking this modified approach and applying a stricter standard for liability would not hinder the goal of deterring violent conduct—a concern of many proponents of the broad standard of recklessness. More injuries will not be the result of a stricter standard and players will not be encouraged to act reckless. Instead, and as illustrated, the majority of actions and results will remain consistent despite the altered standard; however, the consequence will not be less deterrence from violent conduct, but rather greater preservation of athletic competition, an effect significant to the tradition and unique nature of professional sports.

[74] *Avila*, 131 P.3d at 394 (quoting Knight v. Jewett, 11 Cal. Rptr. 2d 2 (Cal. Ct. App. 1992)) (internal quotation marks omitted).