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Penalty Box or Jury Box?
Deciding Where Professional Sports Tough Guys Should Go

McKichan v. St. Louis Hockey Club¹

I. INTRODUCTION

To those unfamiliar with the customs of professional hockey, observing a referee stand by while players drop their gloves and duke it out can be a disconcerting experience. Even more disconcerting is watching last week’s highlights illustrate in slow-motion detail the bone-crushing force with which one player slams another into the boards. The professional hockey fan, however, knows that acts like these are the byproducts of a fast and furious game that recognizes physical intimidation as a legitimate strategy.² In McKichan v. St. Louis Hockey Club,³ the Missouri Court of Appeals for the Eastern District of Missouri ruled that severe body checks administered moments after a play are “part of the game of professional hockey,”⁴ and therefore are not actionable as a matter of law. Although McKichan addresses the narrow issue of the liability of professional hockey players, the court’s opinion is consistent with a majority of recent cases that have denied recovery to injured sports participants, whatever their level of skill, and it illustrates the more general problems courts face when trying to gauge whether a sports participant has crossed the line dividing enthusiastic competitors from the malfeasant.

II. FACTS AND HOLDING

On December 15, 1990, the Milwaukee Admirals played the Peoria Rivermen in Peoria, Illinois.⁵ Both teams were members of the International Hockey League (IHL), a professional hockey “minor league,”⁶ and had ties to National Hockey League (NHL) teams.⁷ The Rivermen, the eventual league

¹. 967 S.W.2d 209 (Mo. Ct. App. 1998)
². See generally JOHN DAVIDSON, HOCKEY FOR DUMMIES (1997); Austin Murphy, Fighting For A Living: St. Louis Blues enforcer Tony Twist, whose pugilistic talents appear to run in the family, doesn’t pull any punches on the job, SPORTS ILLUSTRATED, Mar. 16, 1998, at 42, available in 1998 WL 8979450.
³. McKichan, 967 S.W.2d at 209.
⁴. Id. at 213.
⁵. Id. at 210.
⁷. The Vancouver Cannucks used the Milwaukee Admirals as a farm team, and the St. Louis Blues were affiliated with the Peoria Rivermen. Brief for Appellant at 3-4, McKichan v. St. Louis Hockey Club, 967 S.W.2d 209 (Mo. Ct. App. 1998) (Nos. 72261, 72267).
champions, dominated the game. The incident giving rise to the lawsuit took place at 15:57 in the third period when the score was 10-4, Peoria. In a failed attempt to execute a "dump-in" play, the Rivermen knocked the puck over the goal and out of the rink. A linesman blew his whistle, indicating play had stopped, and Stephen McKichan (hereinafter McKichan), the goaltender for the Admirals, turned from his position at the side of the goal and skated toward the "boards," the wall surrounding the rink. A videotape of the incident revealed that Rivermen player Tony Twist (hereinafter Twist), who had been involved in an incident with McKichan in the second period, skated full speed in McKichan's direction from the near blue line (approximately 60 feet from the boards behind the goal). A referee blew a second whistle, this time directed at Twist. Twist, however, continued toward the goaltender and deliberately

11. Brief for Appellant at 5. A "dump-in" play involves gaining control of the puck and shooting it into the opponent's end of the ice. Id. Other players then skate into the area near the opposing team's goal and attempt to regain possession of the puck and score a goal. Id.
13. Id. at 211.
14. Tony "Twister" Twist, even though playing for the Rivermen during the December 15, 1990 game, was under contract with the St. Louis Blues. While playing for the Blues, Twist developed a reputation as an enforcer on the ice. See generally Dave Luecking, Ya Wanna Go? Foes Say No to Twist, ST. LOUIS POST-DISPATCH, Nov. 2, 1997, at 10H, available in 1997 WL 3375506; and Dave Luecking, An Ironic Twist Blues Tough Guy a Softie Off Ice, ST. LOUIS POST-DISPATCH, Nov. 16, 1996, at 06, available in 1996 WL 2803904; Murphy, supra note 2, at 42. During his career, which spanned 11 professional seasons and 445 games, Twist had 10 goals, 28 points, and earned 1,121 penalty minutes. See Dave Luecking, Twist is Seriously Hurt in Motorcycle Crash: Knee, Pelvis Injuries Could End Career of Blues Enforcer, ST. LOUIS POST-DISPATCH, Aug. 11, 1999, at D1, available in 1999 WL 3036024.
15. In the second period, McKichan was penalized for punching Twist in the face with his blocker glove while Twist was involved in a scuffle with another Milwaukee player. McKichan, 967 S.W.2d at 210.
16. McKichan, 967 S.W.2d at 211.
19. At trial, Twist testified that he meant to make bodily contact with McKichan. Brief for Appellant at 6. The trial court did not permit Twist to testify that his third-period check was an act of retaliation for the punch delivered by McKichan in the second period. Id. at 10-11. If allowed, Twist's brief suggests he would have testified (as he did in his deposition) that in the course of executing the dump-in play, he saw an opportunity
checked him in the back and side with his body and outstretched hockey stick. The blow knocked McKichan into the boards and rendered him unconscious for approximately thirteen minutes. Twist, who violated five separate rules of hockey with his conduct, received a “match penalty”—the most severe penalty in hockey—and was suspended by the IHL for every game Peoria played while McKichan was injured and all subsequent games between Milwaukee and Peoria.

McKichan filed suit in the Circuit Court of the City of St. Louis, seeking damages against Twist and his owner, the St. Louis Hockey Club, (hereinafter the Blues). After Twist filed a counterclaim against McKichan, the players dismissed their respective claims against one another, and McKichan proceeded solely against the Blues. Following a two-week trial, a jury awarded McKichan $175,000 in compensatory damages.

On appeal, the Blues claimed the trial court erred in denying its motion for judgment notwithstanding the verdict because the contact at issue, a check between opposing players, was “a risk inherent in professional hockey and one assumed by professional hockey players.” McKichan argued that the issue was whether Twist’s conduct was deliberate, wilful, or reckless, and that the reviewing court need not determine whether Twist’s conduct exceeded the risk of physical contact inherent in the sport.

The Missouri Court of Appeals for the Eastern District of Missouri held that the severe body check at issue was “‘part of the game’ of professional hockey,” and it therefore was not actionable as a matter of law.

III. LEGAL BACKGROUND

Bruises, sprains, and broken bones frequently accompany the pursuit of competitive thrills at every level of play. Not surprisingly, these injuries have
spawned considerable litigation in recent years, primarily from amateur or recreational sporting events. In general, courts have recognized three theories of recovery (intentional tort, negligence, and recklessness) and two principle defenses (consent and assumption of risk) in actions by one sports participant against another.31 As noted by Professor Lazaroff, however, most tort law is predicated on nonviolent human interaction whereas many sports, especially sports like football or hockey, require participants to engage in activities that often lead to injury even when the game is played in good faith and according to the rules.32 The challenge for the courts, therefore, has been to articulate a meaningful way to determine the scope of liability in the sports setting.

A. Recovery for Intentional Torts and Problems of Consent

Actions for battery or assault have produced few reported cases. Under normal principles, a defendant is liable for battery if he acts intending to cause harmful or offensive contact with another person (or imminent apprehension of such contact) and harmful or offensive contact results.33 He is liable for assault if, with the same intent, he puts the plaintiff in imminent apprehension of a battery.34 The plaintiff need not prove the defendant intended the results of his conduct. Instead, he must show that the defendant's act was (1) volitional, and that (2) the defendant intended to invade dignitary interests of the plaintiff or another person.35

31. Because the defenses of consent and assumption of risk are closely related to (and sometimes the counterpart of) the theories of recovery, this Note describes the defense doctrines in terms of their relationship to the theories of recovery. For general information regarding sports participant liability, see Stanley L. Grazis, Annotation, Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant, 55 A.L.R.5th 529 (1998); Daniel Lazaroff, Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 194 (1990); Ray Yassar, In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants be Required to Be Reasonable?, 5 SETON HALL J. SPORT L. 253, 255-57 (1995).

32. Lazaroff, supra note 31, at 194. Professor Lazaroff notes that "it is inconceivable that professional boxing or full contact karate matches could be conducted without some injury to one or both participants. Causing bodily harm is the very essence of the match. Even in so-called 'noncontact' sports such as basketball or baseball, contact with other players or their equipment is common and sometimes produces serious injury." Id.


34. RESTATEMENT (SECOND) OF TORTS § 21 (1965).

35. The dignitary interest protected by battery are an individual's right to be free from harmful and offensive contact. The tort of assault is designed to protect an individual's interest in freedom from apprehension of such contact. See Fowler v. Harper et al., The Law of Torts § 3.2, at 3:4-5 (3d ed. 1996); W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS §§ 9 & 10 (5th ed. 1984).
Intentional tort actions fail if a defendant’s contact was accidental or consented to by the injured party. Accidental interest-invasions, often the result of competition at close quarters, are not assaults or batteries, even if they result in severe injuries, because the defendant did not intend the invasion. Intentional interest-invasions, if consented to by the injured party, are not tortious under the ancient principle of volenti non fit injuria (no wrong is done to one who is willing to be injured). Consent may be actual or apparent; that is, inferred from the plaintiff’s own participation in the game.

A frequently quoted passage in the Restatement (Second) of Torts states that competitors who take part in a game demonstrate “a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages.” The Restatement further provides that a player’s apparent consent

36. HARPER ET AL., supra note 35, § 3.3, at 3:15-16.
37. See generally HARPER ET AL., supra note 35, § 3.10, at 3:38-50. KEETON ET AL., supra note 35, § 18, at 112; Yassar, supra note 31, at 255 & n.8. Professor Yassar suggests other privileges, such as self-defense, may also play a role. Id. at 256 and n.14. For an opinion that seems to rely on principles of self-defense, see Hanson v. Kynast, 526 N.E.2d 327, 334 (Ohio Ct. App. 1987) (Milligan, J. concurring) (defendant lacrosse player not liable for opposing player’s paralyzing injuries when he reasonably defended himself from opposing player’s attack from behind by flipping opposing player over his back).
38. See, e.g., Thomas v. Barlow, 138 A. 208, 209 (N.J. 1927) (setting aside verdict for alleged intentional blow to the jaw in basketball game when the evidence showed it was accidental).
39. See KEETON ET AL., supra note 35, § 18, at 112 (stating the “ancient maxim” of volenti non fit injuria); see also 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.
40. Actual consent is willingness in fact for the conduct to occur. See RESTATEMENT (SECOND) OF TORTS § 892 (1965). Not surprisingly, sports cases ordinarily do not discuss actual consent. Even though participants choose to play a game, it does not follow that they are willing to be tackled or tagged. In fact, the object of the game is to avoid such contacts.
42. RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (1965). See the cumulative list of reported cases for an extensive list of citations.
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43. RESTATEMENT (SECOND) OF TORTS § 50 cmt. b (1965). Other commentators argue that participants do not actually consent to unfair play or to violence exceeding that permitted by the letter and spirit of the rules. See J.H. Beale, Jr., Consent in the Criminal Law, 8 HARV. L. REV. 317, 323 (1895); Francis H. Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 COLUM. L. REV. 819, 822-23 n.9 (1924).

44. One exception may be found in Overall v. Kadella, 361 N.W.2d 352 (Mich. Ct App. 1984), which affirmed a jury verdict for an amateur hockey player who was injured when another player struck him in violation of a league ban on fighting. The court, however, also seemed to conclude that the plaintiff was no longer playing the game because he was injured while sitting on the bench after the game clock expired. Id. at 354-55.


46. See Averill v. Luttrell, 311 S.W.2d 812, 813-14 (Tenn. Ct. App. 1957) (discussing an unappealed jury verdict awarding damages for injuries sustained from an assault and battery committed by one professional baseball player against another. The incident arose while the plaintiff Luttrell was at bat. After being hit by a pitch, Luttrell, in disgust, threw his bat in the general direction of the pitcher’s mound. Averill, the catcher and the defendant, stood up and punched Luttrell in the back of the head. Luttrell was knocked unconscious and sustained a fractured jaw upon falling face first to the ground.).

47. See Griggas v. Clasuson, 128 N.E.2d 363, 366 (Ill. App. Ct. 1955) (sustaining a verdict for the plaintiff on assault and battery that took place in a basketball game after the defendant pushed the plaintiff from behind and then punched him repeatedly in the face).
consent should be treated by the law as though he had.\(^4\) Expressed another way, it means the defendant's conduct, which in other circumstances would be tortious, should be treated by the law as though it were not. The reported (and absence of reported) intentional tort cases hint that most courts actually believe the Restatement rule goes too far in imposing liability.

**B. Recovery for Recklessness or Negligence and Assumption of Risk**

Most sports-related claims sound in negligence or recklessness, not in intentional tort.\(^4\)\(^9\) Under general principles, a defendant may be liable under a negligence theory for acts that pose an unreasonable risk of harm to the plaintiff and cause the plaintiff's injuries. He may be liable for reckless misconduct for acts that create a substantially greater risk of harm to the plaintiff that would negligence, and, again, that cause the plaintiff's injuries.\(^5\) Many early decisions discussed sport-participant liability in terms of negligence,\(^5\)\(^1\) or, as discussed more fully below, in terms of whether the plaintiff had assumed the risk of

\(^{48}\) See HARPER ET AL., supra note 35, at n.10.

\(^{49}\) This has not always been true. The earliest cases seemed to recognize intentional tort as the only basis for recovery. Recovery for negligence arising out of athletic contests seemed nearly "out of the question," according to at least one early observer. See Note, 26 Mich. L. Rev. 322 (1928). Negligence actions became more widely recognized during the 1950s and 1960s. See generally J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 8.02 (1979). The modern trend has been to exempt contact sports from negligence liability, and instead require liability to be predicated on recklessness. See infra notes 70-119 and accompanying text.

\(^{50}\) According to the Restatement (Second) of Torts, reckless misconduct differs from negligence in several respects:

Reckless misconduct ... differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965).

In recent decisions, however, many courts have demonstrated a reluctance to recognize actions for simple negligence. Instead, they require proof that the defendant engaged in intentional or reckless misconduct in order for the plaintiff to state a cause of action.

This trend toward a recklessness standard is traceable to *Nabozny v. Barnhill*, a 1975 Illinois decision. In *Nabozny*, the plaintiff sought damages for negligence after he sustained injuries during an amateur soccer match in which he was the goaltender. The defendant, ignoring a well known soccer rule prohibiting contact with the goaltender when the goaltender is in possession of the ball in the penalty area, charged the net and kicked the plaintiff in the head after the plaintiff had possession of the ball. The court held that “a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful, or reckless disregard for the safety of the other player.” However, it framed its decision narrowly. It stressed that the plaintiff’s allegation of negligence was cognizable because, under the circumstances, the defendant’s negligent disregard for a known safety rule was equivalent to reckless disregard for the plaintiff’s safety.

In subsequent decisions, Illinois courts refined and distinguished the “contact sports exception to liability premised on negligence” by consistently narrowing the application of *Nabozny*. They interpreted *Nabozny* to establish a limited duty of care for contact sports participants—the duty to refrain from wilful and wanton or intentional misconduct that causes injuries. No other

52. See infra notes 102-23 and accompanying text.

53. See infra notes 67-87 and accompanying text.


56. Id. at 260.

57. Id.

58. Id. at 261.

59. Id. Specifically, the court pointed out that (1) the teams were trained by knowledgeable coaches, (2) the game was governed by a recognized set of rules, and (3) the specific rule in question was designed to protect players from serious injury. Id.

60. For a discussion of the development of the exception, see Pfister v. Shusta, 657 N.E.2d 1013, 1014 (Ill. 1995).

61. According to Illinois courts, wilful and wanton conduct is “a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for ... the safety ... of others.” Pfister, 657 N.E.2d at 1014-15 (citations omitted). This conduct ranges from “acts considered negligent [to] behavior found to be intentionally tortious” and may
reported decision recognized a cause of action predicated on a safety-rule violation, as did Nabozny, nor did any of the decisions turn on the parties' likely or actual expectations about a particular game. For example, an injured softball player could not recover when pushed or knocked down by another player even though he did not anticipate such competitive play during a friendly game, which was part of a family picnic and social day sponsored by his employer. Another Illinois court deemed it legally insignificant that the plaintiff, a child, did not or could not appreciate the dangers associated with the game of "bombardment." In Pfister v. Shusta, the Illinois Supreme Court reaffirmed these decisions and overruled a rogue appellate court decision that had recognized a negligence cause of action arising out of an impromptu game of "kick the can." Pfister held that participants who voluntarily engage in contact sports cannot recover for injuries resulting from the negligence of other players. As a result, Pfister established that the courts’ role in sports injury cases is to determine if the injured party was involved in a contact sport, and, if so, to determine whether a fact question exists as to whether the injury was caused by the wilful and wanton or intentional misconduct of the defendant. According to the opinion, this commonsense approach strikes an appropriate balance between society’s dual interests in limiting liability for injuries resulting from the physical contact inherent in contact sports and in allowing recovery for injuries resulting from reckless misconduct by other participants. Later decisions indicated that in non-contact sports, such as golf or skiing, negligence remains the appropriate standard.

64. 657 N.E.2d 1013 (Ill. 1995).
66. In Pfister, four college students engaged in a spontaneous can-kicking game in the lobby of their dormitory. In an attempt to gain control of the can, the plaintiff pushed the defendant. Pfister v. Shusta, 657 N.E.2d 1013, 1014-15 (Ill. 1995). The defendant responded by pushing back, causing the plaintiff to fall. Id. at 1015. While attempting to break his fall, the plaintiff put his hand and forearm through the glass door of a fire extinguisher case mounted on the wall. Id. The trial court issued summary judgment on the plaintiff’s negligence claim. Id. at 420. The appellate court reversed. Id. Claiming that the wilful and wanton concept did “not add clarity or aid analysis,” it attempted to articulate a fact-intensive standard purportedly based on Restatement (Second) of Torts concepts of apparent consent and assumption of the risk. Pfister, 627 N.E.2d at 1262-63.
67. Id.
68. See supra note 61.
70. Id. at 1018.
71. See Zurla v. Hydel, 681 N.E.2d 148 (III. Ct. App. 1997) (negligence is appropriate standard for golf because it is a sport that emphasizes control and finesse);
Missouri also adopted a recklessness standard for contact sports and a negligence standard for noncontact sports. Interestingly, Missouri's test for actionability under a recklessness standard was enunciated in *Niemczyk v. Burleson*, a 1976 decision that recognized claims for negligence. In *Niemczyk*, the Missouri Court of Appeals listed eight factors for a court to consider in determining whether a plaintiff stated a cause of action for recklessness. They were: (1) the specific game involved, (2) the ages and physical attributes of the participants, (3) the level of skill of the participants, (4) the participants' knowledge of its rules and customs, (5) whether they are amateurs or professionals, (6) the types of risks which inhere to the game and those outside the realm of reasonable anticipation, (7) the presence or absence of protective equipment, and (8) the degree of zest with which the game was being played.

When the Missouri Supreme Court overruled *Niemczyk* in 1982 in *Ross v. Clouser*, it nonetheless approved the use of the *Niemczyk* factors and did not explain how the decision changed Missouri law.

Missouri and Illinois are the only jurisdictions that have explicitly recognized different standards of care for contact and noncontact sports. Eleven
states—California, Connecticut, Kentucky, Louisiana, Massachusetts, Nebraska, New Jersey, New Mexico, New York, Ohio, and Texas—have recognized recklessness as the sole standard governing all sport-
participant cases. Arizona,88 Nevada,89 and Wisconsin90 have adhered to the negligence standard.91

Only one reported decision considered whether professional players can incur liability for on-field actions when no intentional tort is alleged. In Hackbart v. Cincinnati Bengals, Inc., a federal court applying Colorado law recognized a recklessness theory in an action by professional football players.92 The suit stemmed from an incident that occurred after the Denver Broncos intercepted a Cincinnati Bengals’s pass.93 The plaintiff, who had just attempted a block, watched the play following the interception with one knee on the ground.94 Acting out of anger and frustration, a Bengals player struck the plaintiff in the back of the head with a blow of sufficient force to cause both players to fall to the ground.95

During a bench trial, the judge made a finding that professional football players are prone to “flare ups” and fighting.96 Because Hackbart was an experienced player who recognized that he might be injured when other players flared up but chose to play the game anyway, the court held that he assumed the risk of the other player’s action and could not recover.97 The trial court then considered the “larger question of whether playing field action in the business of professional football should become a subject of the courts” in an extended discussion of social policy.98 Finding no judicially discernable code of conduct for professional football players, it concluded civil courts are ill-equipped to second-guess what occurs on the NFL “battlefield.”99

The Tenth Circuit Court of Appeals took issue with the district court’s determination that tort principles are inapplicable to professional football.100 Concerned that adopting the district court’s nonintervention policy would mean victims of unlawful blows would have retaliation as their sole remedy, the court ruled that recklessness was the appropriate standard by which to judge the claim and remanded the case to the district court.101

91. These decisions stress that negligence, when properly understood, is the better rule. See, e.g., Lestina, 501 N.W.2d at 32.
93. Hackbart, 601 F.2d at 519.
94. Id.
95. Id.
98. Id. at 357-58.
99. Id. at 358.
As alluded to above, the focus of many early (and some recent) opinions is whether the plaintiff "assumed the risk" of injury and not whether the defendant breached the duty of care owed by one player to another. These discussions are often confusing because contemporary scholarship recognizes that the generic term assumption of risk refers to at least two different concepts.\footnote{See generally HARPER ET AL., supra note 35, ch. XXI.}

The Harper, James, and Gray treatise on torts distinguishes between primary and secondary assumption of risk.\footnote{See HARPER ET AL., supra note 35, § 21.0. This view has earned judicial support in a number of jurisdictions. For a list of cases, see HARPER ET AL., supra note 35, § 21.0, at n.4.} In its primary sense, the plaintiff's assumption of risk is an analogue to the defendant's lack of duty.\footnote{HARPER ET AL., supra note 35, § 21.0.} Just as "tails" is another way of expressing "not heads," "plaintiff assumed the risk" is another way of expressing "defendant was not negligent" or, more precisely, that the defendant was under no obligation to protect the plaintiff from that risk. Assumption of risk in the primary sense is a policy-driven concept that flows from the legal relationship of the parties, not their subjective expectations.\footnote{HARPER ET AL., supra note 35, § 21.0.} The duty of care that attends this relationship is a question of law reserved to the court.\footnote{HARPER ET AL., supra note 35, § 21.0.}

In its secondary sense, assumption of risk is a subjective standard.\footnote{HARPER ET AL., supra note 35, § 21.0.} If the plaintiff knows, understands, and appreciates a risk and deliberately encounters it, he assumes that risk in the secondary sense of the term. If he unreasonably exposes himself to the risk, he is also comparatively or contributorily negligent.\footnote{HARPER ET AL., supra note 35, § 21.1.} The key issues are the plaintiff's actual appreciation of, and willingness to encounter, the particular risk. These are factual determinations usually reserved to the jury.\footnote{HARPER ET AL., supra note 35, § 21.0.}

In many of the early cases relying on "assumption of risk," it is often unclear whether the plaintiff was barred from recovery because the defendant was not negligent or because the plaintiff knowingly and voluntarily encountered the risk. \textit{Murphy v. Steeplechase Amusement Co.},\footnote{166 N.E. 173 (N.Y. 1929).} one of the first decisions recognizing the concept of assumption of risk (albeit in a non-sports context), is illustrative. In \textit{Murphy}, the plaintiff, who was injured when he fell on an
amusement park attraction called "The Flopper," alleged that the ride was improperly equipped to protect persons who were unaware of its dangers. In his opinion denying recovery, Judge Cardozo indicated that the plaintiff assumed the risk:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . Visitors were tumbling about the belt to the merriment of onlookers when [the plaintiff] made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.\footnote{Id. at 173-74. The "Flopper" was a moving belt that ran on an inclined plane. It was surrounded by padded walls. The belt stopped and started suddenly, causing standing passengers to "flop" to the floor. Id.}

The plaintiff willingly took a chance when he stepped on the ride. That he suffered an unexpected injury was irrelevant because he appreciated the risk that he might fall.\footnote{Id. at 174 (citations omitted).} However, the opinion also detected "no adequate basis" for finding that "The Flopper" was negligently operated. Thus, it is unclear whether the plaintiff also would have been barred from recovery had he been unaware of the risk of falling. Early sports-injury cases involving baseball,\footnote{See Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831 (La. Ct. App. 1961) (the plaintiff assumed the risk of injury because he knew of the danger of flying bats in the game of "workup," but the defendant was not negligent because he wiped his sweaty hands before picking up the bat).} basketball,\footnote{See Kerby v. Elk Grove Union High Sch. Dist., 36 P.2d 431 (Cal. Dist. Ct. App. 1934) (the plaintiff knew the risk of being hit by thrown ball, but the defendant was not negligent in throwing it). See also Albers v. Independent Sch. Dist., 487 P.2d 936 (Idaho 1971) (colliding with other players).} football,\footnote{See Vendrell v. School Dist., 376 P.2d 406 (Or. 1962) (football player knew the risk of injuries from tackling by other players, but other players did not tackle negligently).} and ice skating\footnote{See Moe v. Steenburg, 147 N.W.2d 587 (Minn. 1966) (the plaintiff knew of the risk of collisions with other skaters, but the defendant was not negligent when he skated backwards for approximately twenty feet without looking behind him).} provide similar examples of this ambiguity.

Subsequent decisions made clear that the plaintiff's subjective knowledge of the risk often was not the critical issue. Instead, voluntary participants in lawful sports were held to assume, as a matter of law, all ordinary and obvious risks of that sport.\footnote{See Weistart & Lowell, supra note 49, § 8.02, at 936 & n.24 (citing an extensive list of cases that apply this principle to sports such as alpine skiing, balance

\footnote{111. Id. at 173-74. The "Flopper" was a moving belt that ran on an inclined plane. It was surrounded by padded walls. The belt stopped and started suddenly, causing standing passengers to "flop" to the floor. Id.}
\footnote{112. Id. at 174 (citations omitted).}
\footnote{113. Id. at 174-75.}
\footnote{114. See Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831 (La. Ct. App. 1961) (the plaintiff assumed the risk of injury because he knew of the danger of flying bats in the game of "workup," but the defendant was not negligent because he wiped his sweaty hands before picking up the bat).}
\footnote{115. See Kerby v. Elk Grove Union High Sch. Dist., 36 P.2d 431 (Cal. Dist. Ct. App. 1934) (the plaintiff knew the risk of being hit by thrown ball, but the defendant was not negligent in throwing it). See also Albers v. Independent Sch. Dist., 487 P.2d 936 (Idaho 1971) (colliding with other players).}
\footnote{116. See Vendrell v. School Dist., 376 P.2d 406 (Or. 1962) (football player knew the risk of injuries from tackling by other players, but other players did not tackle negligently).}
\footnote{117. See Moe v. Steenburg, 147 N.W.2d 587 (Minn. 1966) (the plaintiff knew of the risk of collisions with other skaters, but the defendant was not negligent when he skated backwards for approximately twenty feet without looking behind him).}
\footnote{118. See Weistart & Lowell, supra note 49, § 8.02, at 936 & n.24 (citing an extensive list of cases that apply this principle to sports such as alpine skiing, balance


The vitality of the affirmative defense of assumption of risk has received little judicial ink because most of the decisions simply discuss the limited duty of care owed by one participant to another, or whether recklessness or negligence should be the appropriate standard. In jurisdictions that have retained the defense despite the adoption of comparative fault, a plaintiff's assumption of risk remains a total bar. Missouri, for example, recognizes assumption of risk as a defense to reckless misconduct if there is sufficient evidence that a plaintiff knew and appreciated a particular risk (such as risks of collisions between opposing players at home plate). In this case, a plaintiff cannot recover for injuries caused by a particular risk if she nonetheless proceeds in the face of that risk (such as by playing in catcher position).

In jurisdictions where secondary assumption of risk is subsumed by comparative fault, a defendant cannot interpose an affirmative defense of assumption of risk to bar recovery by a plaintiff who deliberately, albeit reasonably, encounters the risk of his reckless misconduct. Instead, the jury

beam, baseball, basketball, blanket toss, boat and water skiing, bobsled, chinning bar, fishing, football, golf, gym horse, gym mat, monkey bar, mutual combat, parallel bars, pool, racing, rodeo, rope jumping, skydiving, springboard, still rings, surfing, table tennis, toboggan, trampoline, and tumbling).

There is a split of authority among both academics and courts regarding the general viability of the defense. The academic lines were sharply drawn during the advisory discussions surrounding the Restatement (Second) of Torts. On the one side were those who favored retaining the defense. On the other, those who advocated analyzing the issue solely in terms of contributory or comparative negligence. As told by Justice Greenhill in Halepeska v. Callihan Interests, Inc., the advisors were sharply divided on this issue:

A group mainly of distinguished deans and professors, favored striking the entire chapter of Assumption of Risk [from the Restatement]. They would use contributory negligence. The group includes Deans Page, Keeton and Wade, and Professors James, Malone, Morris, Seavey and Thurman. Mr. Eldredge prepared a "dissent" for this group. The group is referred to in the notes to the draft as "The Confederacy." Others including Prosser, Professor Robert Keeton, and Judges Fee, Flood, Traynor and Goodrich supported the existence of the defense of assumed risk. The distinguished scholars refer to the debate, among themselves, as "The Battle of the Wilderness."

Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 378 n.3 (Tex. 1963). Those who favored retaining the defense won the battle for the Restatement. Section 496C, entitled "Implied Assumption of Risk," states:

[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct . . . and who nevertheless voluntarily chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

Restatement (Second) of Torts § 496C (1965).

See supra note 119.

See e.g., Knight v. Jewett, 834 P.2d 696 (Cal. 1992).
may allocate fault and damages to a plaintiff only to the extent her participation in the activity is deemed unreasonable. However, in California, a state that has abrogated assumption of risk and adopted comparative fault, case law suggests that a jury should consider the fact that a plaintiff reasonably has chosen to play a particular sport in allocating fault. In contrast, Florida seems to be the only jurisdiction that has specifically retained the affirmative defense in sports litigation despite its abrogation in other contexts.

IV. THE INSTANT DECISION

In *McKichan v. St. Louis Hockey Club*, a court applying Illinois contact sports law was for the first time presented with a case involving professional athletes. The opinion is brief, ostensibly due to the dearth of case law in the context of professional sports.

The court first examined amateur contact sports law. Missouri, according to the court, had "essentially adopted" the Illinois standard, and thus the court looked to both Illinois and Missouri law, and *Pfister*, *Nabozny*, and *Ross* in particular. Finding no Missouri or Illinois cases applying contact sports law to professional sports, the court turned to *Averill* and *Hackbart*.

Noting that voluntary participants in sports assume all obvious risks incident to the game, the court undertook a practical analysis of concepts of duty, consent, and assumption of the risk by applying the factors discussed in *Ross* to the case at hand. The court recognized the rough and often violent nature of professional hockey, where tripping, slashing, and fighting among players is

122. *Id.*

123. *See* Kuehner v. Green, 436 So. 2d 78, 79-80 (Fla. 1983) (noting that despite the abolition of implied assumption of risk, assumption of risk must remain a viable defense to negligence actions stemming from athletic endeavors if sports are to continue to serve a legitimate recreational function).


125. *Id.* at 212.

126. *Id.* at 211.


commonplace. The court further found that rule infractions were frequent and intentional. As to the players, the court found that they were highly skilled, sometimes highly paid athletes who were well aware of the inherent violence of the sport. The court also took notice of internal league mechanisms for penalizing rule violators and compensating injured players.

In conclusion, the court found the specific conduct at issue to be, for better or worse, "part of the game" of professional hockey and not outside the realm of reasonable anticipation of the players. The court therefore held that the conduct was not actionable as a matter of law.

V. COMMENT

By holding that conduct that is part of the game of professional hockey is not actionable even when it violates several rules and results in injury, McKichan v. St. Louis Hockey Club goes a long way in insulating professional hockey players from civil liability. The decision raises several interesting questions about the appropriate duty of care owed by one professional athlete to another, and the role the court should play in determining when a player should be subject to civil suit.

In McKichan, the court seemed to struggle with the question of whether the "recklessness" standard adopted by Illinois courts in contact sports cases should apply to professional cases. It left the question unanswered, however, when it opted to use the factors adopted in Missouri cases as its analytical framework. The court’s reluctance to determine whether Twist’s act was "reckless" is understandable. As aptly noted by Professor Lazaroff, using a recklessness standard to determine when sports conduct should be actionable "brings to mind the proverbial attempt to fit a square peg in to a round hole." This is particularly true in professional hockey, where players anticipate and typically encounter contact that is "reckless" by laymen standards. Not only body checking but also vigorously attempting to gain control of the puck at close quarters arguably involves great risks of danger. Exposing players to jury review in every instance that might be considered reckless would lead to anomalous results.

The McKichan analysis avoids these problems. Only if a player does something that a court considers "outside the realm of reasonable anticipation" of the other players could he be subject to suit. Thus, players will not have to

133. Id.
134. Id. at 213.
135. Id.
136. Id.
138. Id.
139. Lazaroff, supra note 31, at 213.
worry about defending their on-field conduct to a jury if they comport their behavior to what experience tells them is acceptable. According to the decision, this seems to include most instances of fighting, slashing, and body checking because these acts are commonplace.

On the other hand, the court's decision protects rough-playing defendants like Twist at the expense of plaintiffs like McKichan who might believe that conduct outside of the written rules is not an acceptable form of play. Certainly not all players share the same willingness to submit to all contacts that are "part of the game" of professional hockey. For example, some players whose games are based on skill and finesse rarely engage in conduct that sends them to the penalty box, while others frequently engage in violent play. The objective analysis adopted by McKichan seems unwilling to recognize that players' differing expectations should have a bearing on whether the conduct will be considered actionable. Instead, it indicates that courts should adopt an essentially laissez-faire approach and recognize a cause of action only when no player could reasonably anticipate the act.

As a matter of policy, the court's position is sound. Persons who voluntarily choose to engage in sporting events should be held to accept as a matter of law the normal range of risks inherent in the sport. Not only is this approach consistent with the principle of volenti non fit injuria, but, as a practical matter, it also is the only approach that does not have the potential to fundamentally alter the nature of competitive play. Any attempt at drawing fine lines of actionability in professional sports cases might lead to detrimental judicial oversight simply because judges and jurors are not well-equipped to analyze close cases. The court's analysis wisely leaves most decisions about on-field conduct to league officials and limits relief to league remedies. Unlike judges or jurors, officials are familiar with the customs and rules of their sport and are therefore better able to determine when an aggressive act exceeds the norm. 140 Furthermore, leagues have in place their own mechanisms to discipline unruly players, which may be more effective than civil penalties. Professional league commissioners have broad disciplinary powers, including the power to resolve disputes between players, impose fines, and suspend players from


In hockey, this is particularly true. Although the uninitiated may not believe it, even hockey "tough guys" abide by an unwritten code of conduct, with which the referees are familiar and jurors and judges generally are not. When a player crosses the line of "no sucker punching, no taking advantage of an injured foe, no jumping a guy when he's gassed at the end of a shift and no pairing off against a nonheavyweight unless he's a jerk who really has it coming." Murphy, supra note 2. The referees and the leagues are better able to assess the situation and impose the proper penalties.
games.141 “[D]ecisions of the league can be swift, certain, and severe,”142 unlike litigation, which often takes years to reach trial.143

Those with misgivings about the routine violence of professional sports like hockey may criticize the efficacy of analysis in McKichan. It has been argued that customary violent conduct should not, as a matter of law, be considered unreasonable when violence has been encouraged to promote patronage.144 This potential criticism is misplaced for three reasons. First, it ignores the strong bargaining power of professional players. Through their collective bargaining agreements, professional athletes influence internal league disciplinary standards and procedures, which in turn deter violent players in the league.145 Other bargained-for protections, such as career-ending disability policies and standardized contract clauses, obviate the need for the legal system to compensate injured players. Second, professional players are professional. They have well-defined expectations about the games they play and the customs involved. Unlike amateurs, they know with a high degree of certainty what to expect on a given night from a particular player and can take measures to protect themselves accordingly. Third, imposing civil sanctions in close cases might subject players to liability even when their conduct complies with the sport’s customs. Customs would give way as players circumscribed their conduct to keep within judicially imposed standards. Thus, recognizing liability in close cases might be tantamount to regulating professional sports through the judiciary.

Judicial policy-making in this area seems particularly inappropriate. To a certain degree, popular professional sports reflect what society wants. As business enterprises, professional leagues are sensitive to how the public feels about them. When fans are turned off, leagues try to reform their image to bring them back. The courts need not “regulate” sports when they are responsive to public sentiment. And if a particular sport affronts society, the legislature is the appropriate forum to either regulate or ban what is objectionable.146

Although McKichan decided a case involving professional athletes, other courts would do well to take notice of its reasoning in actions involving amateur players. What one can draw from the often confusing (and sometimes artificial) discussions of assumption of risk, consent, and limited duty is that courts are

141. See NHL Constitution and Bylaws, Article VI; NHL Collective Bargaining Agreement, Art. 18; NFL Constitution and Bylaws Article VIII; NFL Collective Bargaining Agreement, Art. XI. Players may be (and often are) fined and suspended.

142. Hanson & Demis, supra note 140, at 151.

143. One also may question the deterrent effect of civil damages on hockey players like Twist whose pocket depth is directly proportional to their ability to "enforce" on the ice.

144. See, e.g., HARPER ET AL., supra note 35, 240 n.17.

145. See NHL Collective Bargaining Agreement, Art. 23; NFL Collective Bargaining Agreement, Arts. XII, XLIX, LI, & LIV.

146. Professional boxing is an example of a sport regulated by legislation.
willing to intervene when a participant does something totally unexpected under the circumstances. Opinions that make reference to the factors used by Missouri courts make clear that analysis in sports injury cases does not strictly follow traditional tort principles, but instead considers the foreseeability of the defendant’s action under the circumstances of a particular game and level of play. By adopting Missouri’s multi-factor test, courts would be more forthright in their reasoning and acknowledge that, except in extreme cases of misconduct by players, sports should be played primarily on the field and not in the courtroom.

VI. CONCLUSION

In McKichan v. St. Louis Hockey Club, the Missouri Court of Appeals for the Eastern District of Missouri ruled that conduct that is “part of the game” of professional hockey is not actionable as a matter of law. The decision protects professional leagues from unnecessary and potentially detrimental judicial oversight, and it allows players to gauge their potential for liability by comparing their game conduct to that of their peers. In addition, the McKichan court’s explicitly contextual analysis, which avoids confusing (and sometimes artificial) discussions of assumption of risk, consent, and limited duty, is a solid model that should be followed by future courts when they consider entertaining civil actions by one sports participant against another.

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