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The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Professional Athletes

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Cover Page Footnote

Professor Sheila Foster, Members of the Fordham Sports Law Forum

NOTE

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Michael F. Taxin *

INTRODUCTION

In the world of contact sports, injuries to participants are often considered part of the game. Serious injuries are so common in most major sports that players, coaches, and fans rarely appreciate the possibility of liability when injuries occur. There are instances, however, where injuries may not be considered part of the game, and a remedy under tort law may be available to the affected participant.

Tort law is applied to athletic competition under several legal theories including (1) the intentional torts of assault and battery, (2) negligence claims brought under the ordinary negligence standard, and (3) claims asserting reckless conduct, which standard is currently the most widely accepted.¹ The most often

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¹ See Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 195 (noting the applicable legal theories in torts and sports cases and stating that the modern trend requires recklessness or a specific intent to injure).

invoked defenses to avoid liability are consent and assumption of the risk.² Several public policy issues also play a role in deciding these cases, including the fostering of intense competition and maintaining the integrity of the game.³ Athletes today are under extreme pressure to be successful and many resort to taking nutritional supplements and performance enhancing drugs to compete at the highest possible level.⁴ As a result, today's athlete is typically stronger, more powerful, and certainly capable of inflicting serious injury on teammates and opponents alike.⁵ Due to this tremendous financial incentive on success in athletics, the use of performance enhancing drugs by athletes should also be considered in torts in sports cases.

This Note will begin by examining the legal principles and public policy considerations related to torts in sports cases. It will also analyze the economic incentives for professional athletes today and the physical development of athletes over the last few decades, which is due in large part to the use of supplements and performance-enhancing substances. The Note will examine the feasibility and potential success of alternative remedies in this area. Finally, this Note will discuss whether there should be a change of the standard applied, or alternatively, the factors analyzed by the courts in these cases.

I. THE LEGAL STANDARD

Initially, courts were willing to grant recovery in tort for sports injuries on a showing of mere negligence.⁶ While some courts still

² See Linda S. Calvert Hanson & Craig Dennis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 148 (discussing assumption of the risk and implied consent as viable affirmative defenses); see also Lazaroff, *supra* note 1, at 214–16 (noting problems with the assumption of the risk and consent defenses in the context of sports).

³ See Kevin A. Fritz, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT. L. J. 189, 222 (discussing the basic principle of the “integrity of the game” of professional sports).

⁴ James C. McKinley, Jr., *Guessing the Score: Open Secret*, N.Y. TIMES, Oct. 11, 2000, at A1.

⁵ Mark Madden, *Legalize Steroids; Level Playing Field*, PITTSBURGH POST-GAZETTE, Aug. 19, 2000, at B3 [hereinafter Madden, *Legalize Steroids*].

⁶ See Lazaroff, *supra* note 1; see also *infra* notes 9–33 and accompanying text.

follow that approach, the general trend has moved toward a standard of recklessness or a specific intent to injure.⁷ This trend is based largely on public policy concerns and the difficulty in applying an ordinary negligence standard to contact sports tort cases.⁸

A. The Traditional Standard: Negligence

The general basis of a negligence claim is an act or omission that falls below the level of care of a reasonable person under the circumstances.⁹ In the context of contact sports, however, the question of how a reasonable person should act may be more difficult to determine. During sporting events athletes are expected and encouraged to engage in physical contact with their opponent in an attempt to gain a competitive advantage.¹⁰

In *Niemczyk v. Burlison*, the Missouri Court of Appeals discussed this conflict, stating that while certain acts or omissions in everyday society may be negligent, the same acts or omissions during a sporting event may not constitute an actionable claim.¹¹ The court noted several factors to be examined in determining whether actionable negligence occurred, including (1) the sport involved, (2) the ages and physical attributes of the participants, (3) the skill level of the participants, (4) whether it was an amateur or professional competition, (5) reasonable risk of injury in the sport at issue, (6) whether any safety equipment was used, and (7) the level of the competition.¹²

⁷ See Lazaroff, *supra* note 1, at 195 (discussing the emerging trend of recklessness in sports and torts cases); see also *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding recklessness as the applicable standard of care in determining tort liability for an injury suffered during a sporting event).

⁸ See, e.g., *Nabozny*, 334 N.E.2d at 260–61.

⁹ See PROSSER, WADE, & SCHWARTZ, *CASES AND MATERIALS ON TORTS* 130 (John W. Wade et al. eds., 9th ed. 1994) [hereinafter PROSSER, WADE, & SCHWARTZ].

¹⁰ See Lazaroff, *supra* note 1, at 194 (discussing the fact that violent conduct is often a part of the game in contact sports and, therefore, necessary and often encouraged).

¹¹ 538 S.W. 2d 737, 741 (Mo. Ct. App. 1976). During a softball game the defendant ran across the infield and into the baseline and collided with the plaintiff while the plaintiff was advancing from first to second base. See *id.*

¹² *Id.* at 741–42 (articulating relevant factors in making a determination of liability for injuries occurring during athletic competition, and recognizing that other factors likely should be considered depending on the circumstances).

The *Niemczyk* court did not limit itself to the aforementioned factors, however, noting that other factors also may be significant in determining whether there was liability.¹³ In fact, according to *Niemczyk*, the factors a court looks to will depend on the specifics of the case.¹⁴ At least one other court has applied the *Niemczyk* factors in a negligence claim for injuries occurring during sporting events.¹⁵ In particular, the court in *Lestina v. West Bend Mutual Insurance Co.*, stated that negligence is a legitimate theory of recovery in all recreational contact sports cases.¹⁶ The *Lestina* court considered not only the amateur status of the athletes involved, but also the ages and level of skill of participants.¹⁷

Similarly, in *Gaspard v. Grain Dealers Mutual Insurance Co.*, an injury caused by a flying baseball bat in a game played during a school recess was open for a negligence claim.¹⁸ While the Louisiana Court of Appeal found no negligence by the defendant, it did not hold that negligence was an inappropriate standard.¹⁹ The court did, however, explicitly state that while the defendant could be found liable under a negligence theory, assumption of the risk is available in such a claim and likely would have barred recovery on those facts.²⁰ Yet, the *Gaspard* decision does not close the door to liability. The court did not address whether a person unaware of such a risk, such as an unskilled player or one unfamiliar with the rules of the game, could recover for negligence had it occurred.²¹ The court also failed to clarify the relevant factors to such a determination.²² Furthermore, the court did not determine whether such an investigation should be made on a case-

¹³ *Id.*

¹⁴ *Id.* at 741.

¹⁵ *See, e.g., Lestina v. West Bend Mut. Ins. Co.*, 501 N.W.2d 28 (Wis. 1993) (applying the mere negligence standard to a tort liability case resulting from an injury in a soccer game).

¹⁶ *Id.* at 29.

¹⁷ *Id.* at 33.

¹⁸ 131 So. 2d 831 (La. Ct. App. 1961).

¹⁹ *See id.* at 833–34.

²⁰ *See id.*

²¹ *Id.*

²² *See id.*

by-case basis, thus allowing for potentially unlimited litigation and liability in similar cases.²³

An incident similar to that in *Gaspard* occurred in *Richmond v. Employers' Fire Insurance Co.*, where during a collegiate baseball team's practice, a bat slipped out of a coach's hands and struck a player.²⁴ The court did not discuss the fact that these athletes were older and engaged in organized competition in holding that no negligence occurred, and stated that even if it had, assumption of the risk would have barred recovery.²⁵ The court concluded that this risk was foreseeable for baseball participants.²⁶ In addition, the *Richmond* court failed to create any objective standard for determining inherent risk in a particular sport, thus failing to clarify what is to be expected from participants in preventing injury.²⁷

According to *Niemczyk*, however, the player's skill level should have been considered in determining whether any negligence occurred, rather than considering whether the injured athlete could assume the risk.²⁸ Under this analysis, a collegiate participant should be held to a higher standard and should be expected to hold on to the bat or take other safety measures to prevent injury, as opposed to a younger, amateur participant during a school recess.²⁹

While most of the *Niemczyk* factors have not changed over time, the physical attributes of athletes have undergone a major transformation.³⁰ Athletes are bigger, faster, and stronger as a result of medical, scientific, and technological advancements, as well as advanced weight training combined with the use of

²³ *See id.*

²⁴ *See Richmond v. Employers' Fire Ins. Co.*, 298 So. 2d 118 (La. Ct. App. 1974).

²⁵ *See id.* at 122.

²⁶ *Id.*

²⁷ *See id.* at 118.

²⁸ *Niemczyk v. Burluson*, 538 S.W.2d 737, 741-42 (Mo. Ct. App. 1976) (identifying certain criteria to be used in determining whether actionable negligence occurred).

²⁹ *Id.*

³⁰ *See, e.g.*, John Oehser, *Burgeoning Athleticism May Mean More Injuries*, FLORIDA TIMES-UNION, Nov. 25, 1999, at D10 (explaining that as athletes continue to get bigger and stronger they may be more susceptible to injury).

performance enhancing substances.³¹ Notably, the average weight of an offensive lineman in the National Football League (“NFL”) in the 1970s was approximately 250 pounds.³² Today, it would be difficult to find a lineman under 300 pounds.³³ In this regard, it also may be appropriate to consider the use of performance enhancing substances in a tort liability analysis. Athletes today are trying to gain a competitive advantage by any means, and many are using legal and illegal supplements to accomplish that goal.³⁴

Despite the fact that the aforementioned cases adopted negligence as the appropriate standard, there is little clarification and even less agreement about (1) when and why negligence is an applicable theory for recovery, (2) what risks should be considered inherent to the sport, and (3) whether and to what extent assumption of the risk is applicable as a bar to recovery.³⁵ Even though courts view each case independently based on specific facts, there is little, if any, consistency relating to the meaning of, and the weight given to, the various factors articulated in *Niemczyk*.³⁶

³¹ See E. Randy Eichner, M.D., *Ergogenic Aids: What Athletes Are Using and Why*, 25 PHYSICIAN & SPORTSMEDICINE (1997) (discussing the prevalence and effects of several legal and illegal supplements known to be taken by athletes in an attempt to improve performance) available at <http://www.physsportsmed.com/issues/1997/04apr/eichner.htm> (last visited Feb. 5, 2004).

³² The offensive line of the 4-time Super Bowl Champion Pittsburgh Steelers of the 1970s averaged 250 pounds. See Madden, *Legalize Steroids*, *supra* note 5.

³³ In 2000, 30 of the 31 National Football League (“NFL”) teams had offensive lines that averaged at least 300 pounds. See Bill Wallace, *Weighing In, Bigger Is Better According to Current Trend for NFL Linemen*, PRO FOOTBALL WEEKLY (Aug. 13, 2001) (citing statistics from a report to the National Academy of Sports Medicine which stated that in 1991 there were 38 players who weighed over 300 pounds and in 2001 there were 280), available at http://archive.profootballweekly.com/content/archives2001/features_-2001/Wallace_081301.asp (last visited Jan. 22, 2004).

³⁴ See Eichner, *supra* note 31.

³⁵ See *supra* notes 15–28 and accompanying text.

³⁶ See, e.g., *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So.2d 831 (La. Ct. App. 1961).

B. From Negligence to Recklessness

Courts abandoned the negligence standard in favor of the more stringent standard of recklessness in cases beginning in the 1970s as a response to (1) the ad hoc basis of the decisions in the aforementioned negligence cases, (2) the open door invitation to tort litigation, and (3) the consideration of society's interest in promoting athletics and fostering athletic competition.³⁷

The leading case establishing the recklessness standard is *Nabozny v. Barnhill*.³⁸ Julian Claudio Nabozny, the goalkeeper for an amateur soccer team of high-school age players, legally grabbed the ball with his hands inside the penalty box and while in possession of the ball was kicked in the head by an opposing player causing permanent damage to his skull and brain.³⁹ Such contact is considered a violation of the Fédération Internationale de Football Association ("FIFA") rules of soccer because "any contact with a goalkeeper in possession in the penalty area is an infraction of the rules, even if such contact is unintentional."⁴⁰ The *Nabozny* court, articulating a higher standard of care than ordinary negligence, held that a "player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player."⁴¹

The court reasoned that the law should not unreasonably burden athletic competition.⁴² The court also noted, however, that because athletes were engaged in athletic competition it did not immunize them from their legal duty to refrain from violating a safety rule.⁴³ Notably, the *Nabozny* court did not limit its holding to the particular facts, or discuss the other factors cited in

³⁷ See, e.g., *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975).

³⁸ *Id.*

³⁹ *Id.* at 259–60.

⁴⁰ *Id.* at 260 (noting that the conduct in question violated a rule of the game of soccer). Several players and witnesses testified that the actions of the defendant were known to be in violation of the rules and that the contact could have been avoided. *Id.*

⁴¹ *Id.* at 261.

⁴² *Id.* at 260.

⁴³ *Id.* at 261.

Niemczyk.⁴⁴ Though most courts follow *Nabozny*, none have found a violation of a safety rule alone to be sufficient to impose liability.⁴⁵ After all, some safety rules are often violated, and in many cases, participants expect them to be violated.⁴⁶ It must be noted, though, that while all sports have some form of safety rules, the rules vary depending on the sport and the type of physical contact normally associated with the game.⁴⁷

Although *Nabozny* involved high-school-age athletes in an amateur contest, the recklessness standard has also been applied in professional sports.⁴⁸ In a notable case involving professional sports, *Hackbart v. Cincinnati Bengals, Inc.*, one player struck another in the back of the head with his forearm out of frustration after his team had thrown an interception and the play was moving the other way.⁴⁹ Though no penalty was called on the play, a review of the game film revealed the action, and the plaintiff was later diagnosed with a serious injury.⁵⁰

By applying the recklessness standard to professional football—arguably the most physical of the professional sports—the Supreme Judicial Court of Massachusetts in *Gauvin v. Clark* seemingly adopted the standard to adjudicate all professional

⁴⁴ *See id.*

⁴⁵ *See, e.g., Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979) (holding a football player liable for reckless conduct which violated a safety rule, but not based on the rule violation alone); *see also McKichan v. St. Louis Hockey Club*, 967 S.W. 2d 209 (Mo. Ct. App. 1998) (holding that conduct which is a “part of the game” of professional hockey is not actionable even if it violates rules of the game, unless it is unreasonable that such conduct could be anticipated).

⁴⁶ *See, e.g., Jaworski v. Kiernan*, 696 A.2d 332, 337 (Conn. 1997) (“We also anticipate that players in their enthusiasm will commit inadvertent rules violations from which injuries may result. The normal expectations of participants in contact team sports include the potential for injuries resulting from conduct that violates the rules of the sport.”).

⁴⁷ *See, e.g., Crawn v. Campo*, 643 A.2d 600, 605 (N.J. 1994) (noting that physical contact varies depending on what is “appropriate from sport to sport and from game to game.”).

⁴⁸ *See Hackbart*, 601 F.2d at 524 (reversing the decision of the district court and noting that recklessness was the appropriate standard to be applied).

⁴⁹ *Id.* at 519.

⁵⁰ *Id.*

sports.⁵¹ The *Hackbart* court stated that a violation of the rules of the game cannot be consented to, and if such conduct causes an injury, the injured player deserves at least the right to a trial on the basis of recklessness.⁵²

While most courts have since adopted the recklessness standard following *Nabozny*, some have not.⁵³ In Wisconsin, the state legislature addressed its courts' reluctance to apply the recklessness standard by passing a statute codifying the standard and making it applicable to tort liability in sports cases.⁵⁴

C. *Intentional Tort Liability*

Intentional torts are difficult to prove in contact sports cases because liability for intentional torts hinges on proving that the defendant intended to cause the injury.⁵⁵ Outside of sports, this may not be difficult because standards of behavior are clearly defined. In the world of professional sports, however, where violent conduct is expected, encouraged, and a vital part of the

⁵¹ See, e.g., *Gauvin v. Clark*, 537 N.E.2d 94, 97 (Mass. 1989) (“The majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety.”). Furthermore, the court articulated that setting a standard of liability “in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games.” *Id.*

⁵² See *Hackbart*, 601 F.2d at 520–21.

⁵³ See *Lestina*, 501 N.W.2d 28, 33 (Wis. 1993) (finding “no need for the court to adopt a recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient”).

⁵⁴ See WIS. STAT. § 895.525 (2002). The statute states in pertinent part:

Liability of Contact Sports Participants. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury. (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in tort actions only if the participant who caused the injury acted recklessly or with the intent to cause injury.

Id.

⁵⁵ See PROSSER, WADE, & SCHWARTZ, *supra* note 9, at 17–29.

game, it is difficult to show an intent to injure on the part of a player who was merely doing what he is paid to do.⁵⁶ Furthermore, the physical nature of sports creates the difficult question of what constitutes consent.⁵⁷

A recent intentional tort case involves two Oakland Raider teammates, William Romanowski and Marcus Williams.⁵⁸ During a fight in training camp Romanowski ripped off Williams' helmet and punched him in the face, breaking his left orbital bone.⁵⁹ The injury forced Williams to go on injured reserve, ended his season, and possibly ended his career.⁶⁰ The complaint Williams filed alleges the intentional torts of battery and intentional infliction of emotional distress, as well as a claim for mere negligence.⁶¹ The case is pending, but if it goes to trial, it is likely that Romanowski's lawyers will raise consent and assumption of the risk as full or partial defenses. One can only wonder whether the court will consider Romanowski's recent positive drug test as well.⁶²

II. DEFENSES

As previously mentioned, both assumption of the risk and consent may be considered viable defenses to tort liability in contact sports cases.⁶³ These defenses should not act as an automatic bar to recovery, however.⁶⁴ Such immunity potentially could result in increased violence between participants and leave injured athletes without any possibility of compensation for their injuries.⁶⁵ Currently, all athletes agree to follow an established

⁵⁶ See Calvert Hanson & Dernis, *supra* note 2, at 35.

⁵⁷ *Id.*

⁵⁸ See Associated Press, *Beat-Up Raiders Scramble to Fill In Key Positions* (Oct. 17, 2003), available at <http://www.reddingemployment.com/sports/pro/past/20031017sppro-042.shtml> (last visited Feb. 19, 2004). The case is filed in Alameda County Court as *Marcus Williams v. William Romanowski*, 03-122024. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *infra* note 112 and accompanying text.

⁶³ See Lazaroff, *supra* note 1; see also Calvert Hanson & Dernis, *supra* note 2.

⁶⁴ *Id.*

⁶⁵ See Calvert Hanson & Dernis, *supra* note 2.

code of conduct for playing the game when they sign contracts to play in a professional league, and penalties such as fines and suspensions may be imposed for violations of the code of conduct.⁶⁶ The threat of potential tort liability, however, may be an important incentive for athletes to follow the rules of their sport, and without such incentive, the economic deterrent of a small fine may not be sufficient.⁶⁷

One way to deter the potential violence in contact sports is through league regulation, including fines or suspensions without pay,⁶⁸ but several problems are evident with this type of regulation. First, leagues would be forced to designate precise types of conduct warranting a suspension.⁶⁹ This requires an objective standard, which even the courts, to this point, have been unable to adopt.⁷⁰ Second, the leagues would be forced to apply the rules uniformly to all of the players.⁷¹ In instances where a suspension would be warranted, the suspensions would apply evenly to all players, including those who attract fans and generate revenue for the league.⁷² These type of suspensions might have a chilling effect on competition and lessen both the entertainment value and the fans' level of interest.⁷³

Furthermore, there will always exist the problematic issues of consent and assumption of the risk, which arise in every sport.⁷⁴ For example, a hockey player may not consent to being hit in the head with a stick even though it is worthy of a penalty. Similarly,

⁶⁶ See, e.g., NAT'L FOOTBALL LEAGUE PLAYERS' ASS'N, COLLECTIVE BARGAINING AGREEMENT BETWEEN NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N 2002–2008, art. XI § 1(b) [hereinafter NFL PLAYERS' ASS'N] (stating that fines or suspensions may be “imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players”), available at <http://www.nflpa.org/media/main.asp> (last modified Jan. 8, 2002).

⁶⁷ See Bradley C. Nielsen, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681, 695 (1989).

⁶⁸ See Fritz, *supra* note 3, at 220–23 (discussing generally problems with league regulation).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See also Lazaroff, *supra* note 1, at 214–16.

one must consider whether a football player has assumed the risk of getting hit on the head after a play is over.

A. Assumption of the Risk

The assumption of the risk defense requires that the injured party be aware that harm may occur and voluntarily assume the risk of another's conduct.⁷⁵ Generally, assumption of the risk means any obvious and foreseeable risk.⁷⁶ It is difficult, however, to ascertain whether there are any unforeseeable risks in a professional sport where physical contact is simply a part of the game.

In hockey, being hit with an opponent's stick while handling the puck is considered foreseeable, but it may not be foreseeable to be hit in the head from behind while not playing the puck. In football, a quarterback expects to get hit during the course of the game. It is not clear, however, whether the quarterback has agreed to voluntarily assume the risk of being hit illegally in the head after a play is over or even during a play, regardless of whether that hit constitutes a penalty. These concerns arise in every contact sport, and each deserves its own independent analysis depending on the sport and the particular facts.

B. Consent

The consent defense is similar to the assumption of the risk defense. The consent defense applies where the athlete knew the risk of injury and consented to the contact by participating in the sport.⁷⁷ While it is true that athletes consent to certain physical contact, that should not be seen as consenting to all physical contact that is not within the parameters of the particular game.⁷⁸

The National Hockey League ("NHL") suspended Marty McSorley, a veteran hockey player for the Boston Bruins, for an

⁷⁵ See W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS § 68, at 485 (5th ed. 1984).

⁷⁶ Joseph Kelner & Robert S. Kelner, *Sports Injuries – Assumption of Risk*, 197 N.Y.L.J. 1 (Feb. 11, 1987).

⁷⁷ See Calvert Hanson & Dernis, *supra* note 2, at 148.

⁷⁸ *Id.*; see also Kelner & Kelner, *supra* note 76.

entire year after he injured an opposing player by slashing him in the head with his stick.⁷⁹ The incident was highly publicized and considered egregious because of the circumstances surrounding the slash.⁸⁰ McSorley, who is known around the league as an “enforcer”—a player whose main purpose in hockey is to be physical and get into fights—hit Donald Brashear, another enforcer, from behind with only a few seconds left in the game.⁸¹ The puck was nowhere near Brashear, and the outcome of the contest already was decided.⁸² Brashear did not sue McSorley civilly but if he had, the question remains whether he would have prevailed or would have been determined to have consented to the contact.⁸³

Along with the questions presented by the McSorley situation, there are other problems with these defenses in tort liability cases in sports. For example, even though players in contact sports are aware that violations of safety rules occur in every game, this may not mean that the players consent to such violations. Also, different risks may be assumed or consented to in different sports. It may be difficult to decide the level of consent or assumption of risk objectively. In addition, the courts may not be the best mechanism for making such a decision. Below, this Note will (1) address why these issues are more difficult today than at the time of the *Nabozny* and *Hackbart* decisions, (2) offer suggestions for courts to consider in future cases, and (3) offer alternative means of adjudication.

⁷⁹ J.C.H. Jones & Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions*, 12 SETON HALL J. SPORT L. 165, 180, 193 & n.173 (2002).

⁸⁰ *Id.* at 180; see also Kostya Kennedy, *Up Against It in an Exclusive Interview Marty McSorley Discusses His On-Ice Assault of Donald Brashear and the Resulting Suspension, the Longest in NHL History*, SPORTS ILLUSTRATED, Nov. 20, 2000, at 58.

⁸¹ See Jones & Stewart, *supra* note 79 (noting that there were only three seconds left in the game, the result was not in doubt, and there had been previous altercations during the game between Donald Brashear and Marty McSorley as well as Brashear and several of McSorley’s teammates).

⁸² See *id.*

⁸³ *Id.* at 190.

III. THE CHANGING EVOLUTION OF SPORTS

While the *Nabozny* decision changed the standard of tort liability for sport participants from ordinary negligence to recklessness, this was almost thirty years ago and the standard may now be outdated.⁸⁴ Sports are a much greater part of our society today than at the time of the *Nabozny* decision.⁸⁵ Today, there are tremendous financial incentives on athletes for individual success, and greater potential revenues the leagues.⁸⁶ Professional leagues and teams charge more money at the gate than ever before, yet teams still maintain large attendance numbers and many easily sell out most or all of their games.⁸⁷

Franchises are much more valuable today because of the increased value of television rights, advertising fees, and sponsorship fees.⁸⁸ Additionally, the earning potential of players and coaches has increased, not only in salary, but also in endorsement opportunities.⁸⁹ Recently, there also has been

⁸⁴ See *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding recklessness as the applicable standard of care in determining tort liability for an injury suffered during a sporting event).

⁸⁵ President George W. Bush, State of the Union Address (Jan. 20, 2004) [hereinafter State of the Union Address], available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (last visited Feb. 13, 2004).

⁸⁶ See Chris Isidore, *Wins, Not Whining, Attract Fans*, CNNmoney, May 10, 2002, at http://money.cnn.com/2002/05/10/commentary/column_sportsbiz/nba/ (last visited Feb. 13, 2004).

⁸⁷ See MANDY RAFOOL, PLAYING THE STADIUM GAME: FINANCING PROFESSIONAL SPORTS FACILITIES IN THE '90S (Nat'l Conference of State Legislatures 1997) (noting attendance figures of the four major professional sports totaled over 100 million people each year from 1993–1995) (on file with the *Fordham Intellectual Property, Media and Entertainment Law Journal*).

⁸⁸ See Press Release, Nat'l Cable & Telecommunications Ass'n, Viewing Reflects Value, NCTA Says in White Paper on Cable Pricing (May 6, 2003), available at <http://www.ncta.com/press/press.cfm?PRid=363&showArticles=ok> (last visited Feb. 13, 2004).

⁸⁹ In 1984, the average salaries in the four major sports leagues were as follows: National Basketball Association (“NBA”) \$246,000; Major League Baseball (“MLB”) \$326,000; NFL \$162,000; and National Hockey League (“NHL”) \$130,000. See Dr. Jack C. Watson II, *Sport & the Economy*, Spring 2004 (slide show materials prepared for Sport in American Society lecture at West Virginia University School of Physical Education), available at <http://www.wvu.edu/~physed/sportpsych/Watson> (last visited Feb. 20, 2004). In 2001, the average salaries were: NBA \$3.2 million; MLB \$2.3 million; NFL \$1.2 million; and NHL \$1.4 million. See *id.*

expansion in existing leagues and the development of several new professional leagues, including two major women's sports leagues.⁹⁰

Most importantly, the support of the fans has remained constant, which is integral to the success of any sports league.⁹¹ After all, the fans are the people who pay the ticket prices, buy the merchandise, and watch the games on television, all of which enables owners to pay athletes higher salaries.⁹² The early owners and commissioners of Major League Baseball ("MLB") knew that to keep the fans interested, they must maintain "the integrity of the game."⁹³ When this idea of integrity was first introduced, it was in response to a gambling scandal that had damaged the public perception of the competition at stake.⁹⁴ While gambling may still be a major issue in sports, the issue that most affects the integrity of sports and competition today is the use of performance enhancing drugs.⁹⁵

The tremendous emphasis on winning and the pressure on players to perform well have led to an increase in weight lifting, body conditioning, and the use of legal—and sometimes illegal—

⁹⁰ See Women's Nat'l Basketball Ass'n [WNBA], at <http://www.wnba.com> (last visited Feb. 20, 2004); see also Women's United Soccer Ass'n [WUSA], at <http://www.wusa.com>. The WUSA went out of business in 2003 (last visited Feb. 20, 2004). Grant Wahl, *Weathering the Storm; Her Players Shaken by the Collapse of Their Pro League, April Heinrichs Guided the U.S. to an Opening Win by Drawing on Her Own Difficult Past*, SPORTS ILLUSTRATED, Sept. 29, 2003, at 66.

⁹¹ See Isidore, *supra* note 86.

⁹² See Watson, *supra* note 89.

⁹³ In 1919, eight players from the Chicago White Sox allegedly "threw" the World Series as a result of being paid off by gamblers. See PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* ch. 1 (2d ed. 1998). In response to this "Black Sox" scandal, Major League Baseball decided to replace the existing National Commission, consisting of three men in charge of league discipline, with a single commissioner with broad power. See *id.* According to club owners and fans the change was necessary in order to maintain the integrity of the game. See *id.*

⁹⁴ See *id.*

⁹⁵ See Eichner, *supra* note 31 (discussing various performance enhancing drugs currently being taken by athletes); see also George Fan, Comment, *Anabolic Steroid and Human Growth Hormone Abuse: Creating an Effective and Equitable Ergogenic Drug Policy*, 1994 U. CHI. LEGAL F. 439, 441–56 (discussing the prevalence of athletes taking anabolic steroids and human growth hormone); State of the Union Address, *supra* note 85.

performance enhancing drugs.⁹⁶ The problem has grown so quickly that President George W. Bush addressed it in the 2004 State of the Union Address:

Athletics play such an important role in our society, but unfortunately, some in professional sports are not setting much of an example. The use of performance enhancing drugs like steroids in baseball, football and other sports is dangerous and it sends the wrong message: that there are shortcuts to accomplishment and that performance is more important than character.⁹⁷

A. *The Use of Performance Enhancing Substances*

There are several different types of steroids and supplements that athletes take to increase their size and improve performance.⁹⁸ The following subsections will address a number of them in detail.

1. Anabolic Steroids

The most commonly known form are anabolic steroids.⁹⁹ Steroids are designed to emulate the effects of the male sex hormone testosterone and can be taken either orally or injected into the body.¹⁰⁰ The effect of anabolic steroids is to promote metabolism and tissue repair, and when combined with weight training, steroids can help increase lean body mass, strength, aggressiveness, and serve to reduce recovery time for muscles.¹⁰¹

The National Collegiate Athletic Association (“NCAA”) and the NFL have banned steroids, and both organizations test their athletes.¹⁰² In contrast, MLB does not randomly test athletes.¹⁰³

⁹⁶ See Eichner, *supra* note 31.

⁹⁷ State of the Union Address, *supra* note 85.

⁹⁸ See Fan, *supra* note 95; see also Eichner, *supra* note 31.

⁹⁹ See Eichner, *supra* note 31.

¹⁰⁰ See Fan, *supra* note 95, at 441–42.

¹⁰¹ *Id.* at 443.

¹⁰² See McKinley, *supra* note 4.

¹⁰³ See *id.* At the time of the writing of this Note MLB was in the process of instituting a new mandatory and random drug testing policy because over five percent of players tested positive last year. See Jonathan Leshanski, *MLB's Drug Problem*, At Home Plate, at <http://www.athomeplate.com/drug.shtml> (June, 23, 2003) (discussing MLB's policy and the five percent requirement that allows the league to institute mandatory and random drug testing); see also Mark Madden, *Baseball's Steroid Policy Lacks Any Substance*,

Recently, a coach and a former baseball player have stated that they believe that thirty percent to forty percent of players have used performance enhancing steroids at some point.¹⁰⁴ Furthermore, the statements of Ken Caminiti and Jose Canseco, two former all-stars who admitted to taking steroids, combined with recent record-breaking home run seasons, truly has raised public awareness of steroid use in MLB.¹⁰⁵

2. Tetrahydrogestrinone

Baseball is also facing a potential scandal regarding a new type of previously undetectable steroid known as Tetrahydrogestrinone (“THG”).¹⁰⁶ Barry Bonds and Jason Giambi, two baseball players, and several other athletes were recently subpoenaed to testify before a grand jury about this drug.¹⁰⁷ The subpoenas were issued following a raid by federal agents of the Bay Area Laboratory Co-Operative (“Balco”), which is suspected of producing the drug.¹⁰⁸ Balco tests athletes’ blood for specific elements and recommends supplements to help the athlete improve their performance.¹⁰⁹ Bonds, who denies taking anything illegal, stated that he visits Balco a few times a year to get advice on what supplements to take.¹¹⁰ Baseball is not the only sport with issues involving THG, however. Four NFL players for the Oakland Raiders, including William Romanowski,¹¹¹ reportedly also tested positive for the substance when the NFL re-tested former drug-test samples in response to an investigation into THG by the U.S. Anti-Doping Agency.¹¹²

PITTSBURGH POST-GAZETTE, Nov. 22, 2003, at B2 (explaining the rules of the new policy to be instituted next year).

¹⁰⁴ *See id.*

¹⁰⁵ *See* Michael Sokolove, *In Pursuit of Doped Excellence*, N.Y. TIMES, Jan. 18, 2004, § 6 (Magazine), at 48.

¹⁰⁶ *See* Dick Patrick, *Bonds, Jones, Giambi Called Before Grand Jury*, USA TODAY, Oct. 20, 2003, at C14.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See* Sokolove, *supra* note 105.

¹¹⁰ *See id.*

¹¹¹ *See supra* note Part II.C.

¹¹² *See* SI.com, *Four Raiders Face Suspension Over THG*, at <http://sportsillustrated.cnn.com/2003/football/nfl/11/16/raiders.thg/> (Nov. 16, 2003).

3. Other Common Performance Enhancers

Another commonly known type of natural supplement is the Human Growth Hormone (“HGH”).¹¹³ The hormone is naturally secreted by the body and provides growth to almost every organ and tissue in the human body.¹¹⁴ No known drug test effectively detects HGH, thus, it has taken over as the “drug of choice” among athletes according to recent studies.¹¹⁵

Recently, other supplements have been discussed in the news as athletes search for ways to gain a competitive edge.¹¹⁶ In 1998, Mark McGwire revealed that he was taking the hormone Androstenedione (“Andro”) during the milestone baseball season when he broke Roger Maris’ home run record, which was thought to be unbreakable.¹¹⁷ Andro is a hormone that is converted into testosterone by the liver and is considered an anabolic steroid by many scientists.¹¹⁸

MLB and the NFL both have dealt with tragedies resulting from an increased use of Ephedra, and other substances containing Ephedra.¹¹⁹ Ephedra, a plant product that contains Ephedrine Alkaloid, can speed up an athlete’s metabolism, effectuating weight loss and giving the athlete more energy.¹²⁰ The NFL and

¹¹³ See Fan, *supra* note 95, at 452–56 (discussing the history, prevalence, and effects of taking the human growth hormone).

¹¹⁴ *Id.* at 452.

¹¹⁵ *Id.* at 452–54.

¹¹⁶ See McKinley, *supra* note 103, at A1 (discussing the use of drugs and steroids within MLB to enhance performance).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ The deaths of former Baltimore Orioles pitcher Steve Bechler and Minnesota Vikings offensive lineman Korey Stringer have both been linked to the use of Ephedra. See Dr. Richard Lustberg, *Thoughts on the Death of Steve Bechler and the Impact of Ephedra*, Psychology of Sports, at <http://www.psychologyofsports.com/couch/-couch022503.htm> (Feb. 25, 2003); see also Associated Press, *Vikings Raise Ephedra as ‘Causal Link’ to Stringer’s Fatal Heatstroke* (Feb. 25, 2003), available at http://www.usatoday.com/sports/football/nfl/vikings/2003-02-25-stringer-ephedra_x.htm (last visited Feb. 20, 2004).

¹²⁰ See generally Saunders & Walker, P.A., Ephedra Alkaloid Dietary Supplement Information, *General Info*, at <http://www.ephedra-information.com/info.cfm> (last visited Feb. 20, 2004).

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NCAA ban these substances, but MLB, the NHL, and the NBA do not.¹²¹

Additionally, there are many other supplements athletes take to enhance their performance, such as Creatine, which increases the athletes' energy level and allows for more productive workouts by altering the chemical make-up of their body.¹²²

In the NFL, several players are suspended every year for using performance enhancing drugs banned by the league as well as substances that are outright illegal.¹²³ These suspensions, however, do not appear to have had any success deterring others from using the same or similar drugs.¹²⁴ It is unlikely that anything can successfully be done to stop the use of these drugs; even if successful, manufacturers will just create new supplements that will be more difficult to detect, and athletes will start using again.¹²⁵

B. The Uneven Playing Field and Tort Liability

All of the aforementioned supplements, whether legal or illegal, have had a tremendous impact on sports. Athletes today are bigger, stronger, faster, and more aggressive.¹²⁶ The changing

¹²¹ Eddie Pells, *Ephedra Eyed After Pitcher's Death* (Feb. 20, 2003), available at 2003 WL 13366594. On December 30, 2003, the Food and Drug Administration announced an outright ban on ephedra citing an "unreasonable risk of illness or injury." CNN.com, *Government Announces Ban on Ephedra*, at <http://www.cnn.com/2003/HEALTH/12/30/ephedra> (Dec. 31, 2003). This was the first time in history that the U.S. government banned the sale of an over-the-counter nutritional supplement. *Id.*

¹²² See Eichner, *supra* note 31.

¹²³ See, e.g., Slam! Sports, *Smith, Cloud, Newman Return From Four-Game Drug Suspensions*, at http://www.ottawasun.com/Slam030929/nfl_sus-ap.html (Sept. 29, 2003) (discussing the return of the players who were suspended in early 2003 for taking various drugs).

¹²⁴ *Id.* There were several players suspended this year for using these, among other, drugs. See Jim Jenkins, *Shadowy Substances: Many Legal Stimulants Are Banned by the NFL, and Some Players Are Getting Caught in the Confusion*, Metabolaw.net, at <http://www.metabolaw.net/news/ShadowySubstances.html> (discussing several players suspended in 2002) (Nov. 24, 2002); see also 2003 Fantasy Football Player Injury Update Page, Coachbox.com, at <http://www.coachbox.com/manage/player-updates.htm> (noting suspensions of two other players for violating the league's substance abuse policy at the beginning of the 2003 season) (last visited Feb. 26, 2004).

¹²⁵ See Sokolove, *supra* note 105, at 54.

¹²⁶ *Id.*

physical make-up of athletes has resulted in an uneven playing field whereby players taking drugs have a competitive advantage.¹²⁷ It may be unfair to have players competing against one another when only some use unauthorized supplements to increase their performance. One consideration is whether to include these legal, yet non-natural, physical advantages when determining tort liability for injury inflicted during athletic competition. Furthermore, one may consider whether athletes should be held accountable for injuries caused as a result of their strength acquired by taking illegal or otherwise banned performance enhancers.

Sports, society, and the legal system should adjust to these changes and adopt rules and standards of behavior that can be appreciated by the modern-day athlete. A recklessness standard may not be sufficient anymore. In addition, the courts may not have sufficiently detailed knowledge of these sports to develop an appropriate standard to determine when a player should be liable. It may be better to leave these types of decisions to the league or another form of adjudication such as arbitration.

IV. ALTERNATIVE REGULATION

There are several potential methods of alternative regulation in this area including arbitration, a uniform law, or league self-regulation.¹²⁸ Sports leagues are generally self-regulating and often rely on arbitrators to settle disputes between the league and the player's union, or between a team and an individual player.¹²⁹

A. Arbitration

An alternative method of dispute resolution is arbitration, whereby the parties consent to have their issue resolved by a

¹²⁷ Madden, *Legalize Steroids*, *supra* note 32.

¹²⁸ See Jeffery M. Schalley, *Eliminate Violence From Sports Through Arbitration, Not the Civil Courts*, 8 *SPORTS L.J.* 181 (2001) (discussing how sports teams operate as businesses and, thus, desire to regulate problems internally).

¹²⁹ *Id.* at 195.

neutral third party.¹³⁰ Arbitration is sometimes considered a better alternative to relying on the courts because it usually involves an arbitrator with specific knowledge of the subject matter at issue.¹³¹ This reasoning has prompted some suggestion that arbitration become the means of adjudicating sports injury cases.¹³²

As stated previously, professional sports leagues often include arbitration clauses in their contracts, and such clauses have been upheld.¹³³ Courts consistently emphasize the importance in society of allowing unions and employers to bargain for, and agree to, alternative types of dispute resolution through collective bargaining.¹³⁴ Thus, an arbitration clause agreed to in order to determine tort liability among players likely would be enforced.

Tort cases between professional athletes are seldom litigated. Typical reasons for using arbitration are the low costs, and the quickness of adjudication, which also alleviates the burden on the courts and helps to limit litigation.¹³⁵ There are, however, several problems with using arbitration to adjudicate such disputes.

One reason why these incidents rarely proceed to litigation may be that players do not want to sue other players against whom they compete for fear of being ostracized from the group.¹³⁶ Also, all players are represented by the same union and may be pressured by the union to avoid disputes among players that, in the big

¹³⁰ *Id.* at 196 (citing STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 6-10, at 233 (1st ed. 1985)).

¹³¹ Schalley, *supra* note 128, at 196 (citing Goldberg, *supra* note 130, at 234).

¹³² *See, e.g.*, Schalley, *supra* note 128, at 196 (suggesting that arbitration is a better way to determine liability for player versus player tort claims).

¹³³ *See Boston Celtics Ltd. P'ship v. Shaw*, 908 F.2d 1041 (1st Cir. 1990) (holding that arbitration was a satisfactory method of resolving a dispute between a union and employer where both parties had bargained for an arbitration clause through collective bargaining).

¹³⁴ *Id.*

¹³⁵ *See Schalley, supra* note 128, at 234 (citing GOLDBERG, *supra* note 130, at 234).

¹³⁶ *See, e.g.*, ESPN.com, *Williams Still Feeling Effects From Punch to Face*, at <http://sports.espn.go.com/espn/print?id=1612471&type=story> (Sept. 10, 2003) (on file with the Fordham Sports Law Forum). Several players that crossed the picket line during the MLB strike of 1994 are still not allowed to be union members and, thus, miss out on some union benefits including licensing money. Tim Kurkjian, *The Replacements*, ESPNMAG.com, at <http://espn.go.com/magazine/kurkjian-20020829.html> (Aug. 29, 2002).

picture, the process of collective bargaining, are on the same team.¹³⁷ Finally, a player who sues or makes a claim against another player in tort would then be opening the door to being sued himself or herself. Although there may be many reasons for the lack of litigation in this area, it is likely that a mandatory arbitration clause would actually increase the amount of claims and the time spent in adjudicating those claims. Therefore, some of the principal reasons supporting arbitration as an alternative means of adjudication are flawed and, thus, it is doubtful that the sports leagues will want to promote arbitration as a method of determining tort liability.

B. Creating a Uniform Law

An alternative approach may be to create a defined uniform law. Professional athletes participate in sports throughout the United States, yet many states have differing views on what conduct should give rise to liability.¹³⁹ The difference in views may cause an uncertainty as to what conduct might cause liability and what conduct is just a part of the game. This uncertainty affects whether an athlete actually consents to or assumes a specific risk, which may result in a chilling effect on athletic competition.

Congress may have the ability to create a uniform law to deal with these cases pursuant to the interstate commerce clause.¹⁴⁰ Sports fall under the umbrella of interstate commerce because of

¹³⁷ The players association in each of the major sports represents the entire group of players, the applicable bargaining unit, in collective bargaining negotiations with the league. *See generally* Glenn M. Wong, ESSENTIALS OF SPORTS LAW 502–06 (3rd ed. 2002) (describing the collective bargaining process).

¹³⁹ *See* *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding mere negligence insufficient for liability, and requiring recklessness or a specific intent to injure). *But see* *Lestina v. West Bend Mut. Ins.*, 501 N.W.2d 28 (Wis. 1993) (holding that mere negligence is sufficient to give rise to liability).

¹⁴⁰ *See* *Flood v. Kuhn*, 407 U.S. 258, 282–83, 291 (1972) (recognizing the interstate nature of professional sports leagues).

the competition stretching across state lines.¹⁴¹ Whether Congress deems such a law necessary is unknown, but no such law has been adopted yet. Moreover, even if Congress did enact such a law, it likely would not be able to create an objective standard that would differentiate among various sports, and be flexible enough to account for the constantly changing evolution of sports, athletes, and performance enhancing substances.

C. *League Self-Regulation*

The best way to create uniformity in each sport may be to allow the sports leagues themselves to create the applicable standard of tort liability. Generally, sports leagues are self-regulating because the league oversees all the actions of both the member teams and the players.¹⁴² Each league creates its own safety rules and meets every year to discuss the safety rules and make any necessary changes. Leagues also typically impose fines and suspensions for deserving violations of league rules.¹⁴³ The athletes and the leagues mutually agree to these rules in the collective bargaining agreement negotiated between the league and the player's union.¹⁴⁴ This is not to suggest that the league should determine tort liability. It is meant to suggest that each sports league is best equipped to understand the rules of its game and the type of physical contact involved. A sport-specific rule addressing tort liability may be able to help the courts in deciding these cases.

Therefore, self-regulation by sports leagues is the most appropriate way to strike a balance between maintaining the integrity of the game and fostering competition, while deterring excessive violence and allowing for compensation of those injured as a result of this violence. Each sports league can incorporate into its rules its own standard for tort liability in their particular sport.

¹⁴¹ *See id.*

¹⁴² *See* Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 202 (1984) (noting the frequently recited need for self-regulation in the business of sports).

¹⁴³ *See, e.g.*, *NFL PLAYERS' ASS'N*, *supra* note 66 and accompanying text.

¹⁴⁴ *See* Stephen F. Ross, *Monopoly Sports Leagues*, 73 *MINN. L. REV.* 643, 711–12 (1989) (noting the incentives for leagues and player unions to negotiate mutually beneficial agreements through collective bargaining).

The standard would need to be negotiated and agreed to through collective bargaining. Every player would understand and agree to the types of conduct for which he or she may be individually liable in tort.

Relying on the various league rules for each sport is a starting point to discuss potential liability. In hockey, a player who hits another with a stick violating the league rule, or a player who injures another in a fight, could be liable because his or her conduct is outside the rules of the game.¹⁴⁵ Similarly, a baseball player who throws his or her bat or the ball at another player, and a football player who strikes an opponent illegally, could be liable.¹⁴⁶

The type of conduct described above is prevalent in nearly every game, however, even though it violates the rules of each league. The courts, as adjudicators of such conduct, still would have to hear evidence about the specific facts and circumstances, and make a judgment as to whether or not a player should be liable in tort for such conduct. This may not be an ideal situation for judges and juries who are unfamiliar with the game. However, juries deal with issues and situations with which they are unfamiliar all the time.¹⁴⁷

It is unclear which, if any, of the aforementioned methods would be successful for sports tort cases, but several things are certain. League rules must be considered a critical part of any analysis. The cases will always be fact specific due in part to the varying nature of the different sports. The ultimate goal must be to balance the violence of sports with the public policy of compensating those wrongfully injured, while maintaining the integrity of the game. Because sports activity is so different from everyday behavior in society, entrusting the standards of conduct

¹⁴⁵ See, e.g., Jones & Stewart, *supra* note 79, at 180, 193 & n.173.

¹⁴⁶ See, e.g., Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524 (10th Cir. 1979).

¹⁴⁷ See George K. Chamberlin, J.D., Complexity of Civil Action As Affecting Seventh Amendment Right to Trial by Jury, 54 A.L.R. Fed. 733 (1981) (listing various cases dealing with the issue of complexity of litigation and the right to a trial by jury). The article divides the cases by circuit and then discusses those where jury trials were required and were not required. Finally, it explores the view that there is no complexity exception to the right to a jury trial.

to the leagues or representatives who are familiar with the sport might be the best way to achieve this balance.

Violence in sports must be controlled, and players suffering injuries resulting from such violence should be compensated. The best way to determine how, why, and what factors should be considered in determining who deserves compensation is still in question, but there is little doubt that change is in order.

V. CHANGING THE COURTS' ANALYSIS

The aforementioned options of arbitration, uniform laws, and league self-regulation are not without their respective pitfalls. There are feasibility issues as well as the difficulty of getting groups with differing opinions to reach a mutual agreement on how to address tort liability in sports. It is certainly possible that the best method for adjudicating tort liability between athletes is the system currently in place. The changing evolution of sports, athletes, and the use of performance enhancing drugs, however, is not taken into consideration under our current system.

One potential solution to address these changes in sports is to change the legal standard. Although this may be unlikely because of most courts' willingness to follow *Nabozny*,¹⁴⁸ the fact that a few courts do not adopt recklessness as the appropriate standard and the changing evolution of sports may be sufficient evidence that a change is in order. The question is whether any change would achieve the desired result. Reversion back to a mere negligence standard could create an abundance of litigation and might have a chilling effect on competition. Alternatively, moving towards an intentional standard will make it almost impossible for athlete plaintiffs to recover for their injuries. Therefore, recklessness appears to be the most appropriate standard, and

¹⁴⁸ See, e.g., *Hackbart*, 601 F.2d 516; *Santiago v. Clark*, 444 F. Supp. 1077 (N.D.W. Va. 1978) (barring recovery to a horse jockey without a showing of specific intent to injure); *Ross v. Clouser*, 637 S.W.2d 11 (Mo. 1982) (holding that recklessness is the applicable standard for a cause of action for personal injuries suffered during an athletic contest); *Kabella v. Bouschelle*, 672 P.2d 290 (N.M. Ct. App. 1983) (affirming summary judgment for defendant because no allegation of intentional or reckless conduct was made).

perhaps it is the method of applying the standard, or as previously discussed, the method of adjudication that should be changed.

One approach is to modify the factors courts look to in determining whether an athlete acted recklessly.¹⁴⁹ The factors articulated in *Niemczyk* initiate the analysis, but the court did not limit its view to those factors alone.¹⁵⁰ Other than the age and skill level of the participants, which are necessary factors for any consent and assumption of the risk analysis, torts in sports cases are viewed independently of each other based on the circumstances. For example, some factors not mentioned in *Niemczyk* that may be important include, but should not be limited to, the time of the game when the injury occurred, the extent of the injury, and perhaps, most importantly, the conduct causing the injury and its legality or prevalence in the normal course of the sport at issue.

The use of performance enhancing drugs by athletes should also be considered as a factor in these cases. If a player uses a supplement that is either banned by the specific sport in which he or she plays, or is outright illegal, that should be used against him or her in an action to recover damages. It is an unfair competitive advantage to have an athlete that uses these substances injuring one whose ability is all natural and legal. This uneven playing field should be considered because when an athlete agrees to play in a particular sport he or she should not be ruled to consent to, or assume the risk of, physical contact with a player who has violated either the law or the league rules to gain a physical advantage.

It is abundantly clear that the use of these performance enhancing drugs are prevalent in most, if not all, professional sports leagues today;¹⁵¹ and it is unlikely that athletes will stop using them.¹⁵² Allowing their usage, however, can cause long-term damage to the athlete and the sport. Consider the effect of allowing athletes to take these substances so long as they are not outright illegal. First, the substance may still have negative side

¹⁴⁹ The factors were initially articulated in *Niemczyk v. Burlison*, 538 S.W.2d 737, 741–42 (Mo. Ct. App. 1976). See *supra* notes 11–28 and accompanying text.

¹⁵⁰ *Niemczyk*, 538 S.W.2d at 741–42.

¹⁵¹ See Fan, *supra* note 95.

¹⁵² See Sokolove, *supra* note 105.

effects. Creatine and Andro, for example, are currently legal and allowed by some or all sports leagues respectively, but they may cause athletes problems in the long-term.¹⁵³ To date, potential side effects are unknown because usage only recently has become prevalent.

Second, even if one product is outlawed, new products and supplements continue to be created and it can take years before enough knowledge is developed to ban their sale. In the case of Ephedra and Baltimore Orioles pitcher Steve Bechler, whose death was linked to Ephedra, it was too late.¹⁵⁴ Additionally, allowing legal substances that improve performance would not balance the uneven playing field. Even though athletes are allowed to take some substances, that does not mean that all athletes would choose to take some form of supplement. Surely, there are some professional athletes that still would be wary of potential side effects and other athletes who choose to avoid taking them altogether. Thus, allowing these supplements does not even the playing field, and it also further jeopardizes the integrity of the game.¹⁵⁵

Performance enhancing drug use is likely to continue to be a problem, and may lead to greater injuries in sports.¹⁵⁶ As previously discussed, there are several ways in which these two issues are intertwined.¹⁵⁷ Perhaps courts should impose a rebuttable presumption of liability on athletes who test or have tested positive for banned substances. This would shift the burden from the plaintiff to the defendant in these cases to prove that he or she did not violate the duty of care owed to a fellow player. A

¹⁵³ See Bodybuildingforyou.com, *Andro Side Effects*, at <http://www.-bodybuildingforyou.com/pro-hormones/andro-side-effects.htm> (last visited Jan. 22, 2004) (noting some known side effects as well as the fact that because of limited use and studies there may be long-term side effects that are unknown); see also Bodybuildingforyou.com, *Creatine Side Effects*, at <http://www.bodybuildingforyou.com/-creatine/creatine-side-effects.htm> (last visited Jan. 22, 2004) (explaining that there may be long-term side effects from taking creatine, though none are known currently).

¹⁵⁴ See Lustberg, *supra* note 119.

¹⁵⁵ See Sokolove, *supra* note 105, at 30.

¹⁵⁶ See Oehser, *supra* note 30.

¹⁵⁷ See discussion *supra* Part III.B.

presumption such as this may also be viewed as a deterrent to using performance enhancing drugs.

CONCLUSION

Sports have become a major part of our society today and athletes are often considered role models to children. Winning and success have become so important that athletes will do anything to gain a competitive edge, including using illegal or league-banned performance enhancing substances.

As a result, the modern athlete on average is much bigger and stronger than athletes at the time of the *Nabozny* and *Hackbart* decisions, which applied recklessness as the standard in player versus player tort litigation. The increased strength of these athletes, combined with the economic incentives to succeed and the encouragement of physical violence in contact sports, has and will continue to create issues of tort liability in sports cases.

The *Nabozny* court recognized that a change needed to be made in 1975, and the *Hackbart* court followed suit.¹⁵⁸ Today, it may be time to recognize the need for another change. This Note has suggested several alternatives to ensure that the use of performance enhancing drugs is considered in cases involving injury to athletic participants. Each alternative has merit and each has its pitfalls, but one thing that is certain is that the use of performance enhancing drugs should be considered in the analysis.

Short of a complete ban on performance enhancing drugs, which appears unlikely, an effort should be made to reduce the incentives to use such drugs—both from the standpoint of public policy, and in an effort to reduce the risk of serious injury or death.

Sports leagues often regulate themselves through collective bargaining. There is no reason to believe that the union and league could not bargain for a standard of conduct that is a part of the game and a defined set of conduct for which a player could be found liable in tort. Furthermore, if the league and union decide that the courts are not the best method to adjudicate their

¹⁵⁸ See discussion *supra* Part I.B.

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bargained-for standard of care, they can also agree to arbitrate these tort claims among themselves.

Until one of these alternatives is adopted, players will continue to be injured by opposing players who gain a physical advantage by using illegal or league-banned substances. The courts, legislatures, and the sports leagues, should take the initiative to adopt such a change in order to protect the players and the integrity of the games. Not doing so would simply be continuing to ignore this major issue in professional sports today.