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TORTS IN SPORTS—DETERRING VIOLENCE IN PROFESSIONAL ATHLETICS

*"It was a perfectly timed hit, and I used my hook on his head. . . . I heard Riley scream on impact and felt his body go limp. . . . [His] eyes rolled back in his head and he wasn't breathing. I had another knockout . . . ."**

INTRODUCTION

In recent years, the level of violence in professional team sports has increased dramatically.[1] Many commentators have suggested that professional sport administrators are incapable of dealing with the problem[2] and have called for judicial intervention in the field of professional sports.[3] The judiciary has recently responded to these requests by sanctioning the first civil actions brought by athletes to recover for personal injuries suffered during professional athletic contests.[4] In *Hackbart v Cincinnati Bengals, Inc.*,[5] the

* J. Tatum & W. Kushner, They Call Me Assassin 18 (1979) (statement of Jack Tatum, free safety with the Oakland Raiders of the National Football League (NFL)).

1. *See* note 25 *infra*.

2. *See* Flakne & Caplan, *Sports Violence and the Prosecution*, Trial, Jan., 1977, at 33-34; Comment, *Violence in Professional Sports*, 1975 Wis. L Rev. 771, 786-87 [hereinafter cited as *Violence in Sports*].

3. *See* Flakne & Caplan, *supra* note 2, at 35; *Violence in Sports*, *supra* note 2, at 789-90; 10 Conn. L. Rev. 365, 375-76 (1978); 12 Ga. L. Rev. 380, 391-92 (1978).

4. Two earlier suits involving professional baseball players resulted in out-of-court settlements. *See* Jacobson, *The Law vs. Sports Violence*, Newsday, Nov. 27, 1979, at 95, col. 1 (account of baseball player Billy Martin settling lawsuit brought by pitcher Jim Brewer for Martin's assault of Brewer after being hit with a pitch); N.Y. Times, Feb. 6, 1970, at 45, col. 7 (baseball players Juan Marichal and John Roseboro settling suit brought by Roseboro after being hit over the head by Marichal with a bat during a game). In addition, there has been one suit involving minor league baseball players. *See* Averill v. Luttrell, 44 Tenn. App. 56, 311 S.W.2d 812 (1957) (suit by a player against an opposing player and his team for injuries suffered in an altercation during a game); notes 152-54 *infra* and accompanying text.

5. 601 F.2d 516 (10th Cir.), *cert. denied*, 100 S. Ct. 275 (1979). The *Hackbart* case arose out of an incident that occurred in a game between two NFL teams, the Denver Broncos and the Cincinnati Bengals, on September 16, 1973. The plaintiff, Dale Hackbart, was on the field as a defensive safety for the Denver team and Charles Clark, one of the codefendants in the suit, was playing fullback for the Bengals. Midway through the game, the Cincinnati team attempted a pass which was intercepted by one of the Denver defensive players. The plaintiff fell to the ground attempting to block Clark. "Acting out of anger and frustration, but without a specific intent to injure," Clark responded by illegally striking the plaintiff in the back of the head with his right forearm. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 353 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir.), *cert. denied*, 100 S. Ct. 275 (1979). No penalty was called, but the blow resulted in a career-ending neck injury to the plaintiff. *Id.* at 353-54. Hackbart brought an action against Clark and the Cincinnati Bengals in the United States District Court for Colorado alleging that the blow was not acceptable conduct within the rules and customs of professional football but rather should be characterized as reckless misconduct as that concept is defined by § 500 of the Restatement (Second) of Torts. *Id* at 355; *see* Restatement (Second) of Torts § 500 (1965). The plaintiff did not allege that Clark's conduct was intentional because the one year statute of limitations on assault and battery had run prior to filing of the suit. 601 F.2d at 520. The trial court dismissed the case on the ground that the plaintiff, as a professional football player, had assumed the risk of such injury. 435 F. Supp. at 356. The court also dismissed the plaintiff's allegations that Clark was guilty of outrageous conduct and interference

Tenth Circuit reversed a district court decision which had held that a professional football player assumes the risk of injury caused by the intentional reckless conduct of an opposing player.[6] Recognizing that principles of negligence are "inherent in the game of football,"[7] the Tenth Circuit suggested that intentional or reckless conduct that results in injury is actionable.[8] In *Tomjanovich v. California Sports, Inc.*,[9] a Texas jury returned a $3.25 million verdict[10] for a plaintiff athlete based on the doctrine of respondeat superior and the theory that the defendant basketball team was negligent in training, supervising and retaining the player who inflicted the injury.[11] Together, the *Hackbart* and *Tomjanovich* cases suggest that the civil forum may become instrumental in deterring violence in professional sports.

The *Hackbart* case demonstrates that professional sports are not immune from legal intervention in the form of civil suits. *Tomjanovich*, meanwhile, puts professional sports franchises on notice that they may be held vicariously liable and, under some circumstances, directly liable for the violent acts of their players. The key inquiry, however, remains whether civil actions will have any impact on the problem of violence in professional sports. This Note will attempt to answer this question by examining the civil forum and its potential for both deterrence and compensation in light of the historic effect of league-administered sanctions and criminal prosecutions.[12]

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with contract, *id.* at 356-57, and held that, due to the violent nature of the game of football, the judiciary was "not well suited" to determine which civil restraints should be applied. *Id* at 358. The Tenth Circuit, however, rejected the trial court's reasoning that the general roughness of professional football makes effective judicial intervention impossible. 601 F.2d at 520-21.

6. 435 F. Supp. at 356.

7. 601 F.2d at 520.

8. *Id.* at 524-25. *See also* Note, *Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete*, 12 Ind L. Rev 687, 709 (1979) [hereinafter cited as *Theories of Recovery*].

9. No. H-78-243 (S.D. Tex. Aug. 17, 1979). The events leading to the *Tomjanovich* case occurred in a basketball game between two National Basketball Association (NBA) teams. Midway through the game, a fight broke out between the two teams The plaintiff player was struck in the face by Kermit Washington, a player for the defendant Los Angeles Lakers. As a result, Tomjanovich suffered nose, jaw and skull fractures, facial lacerations, a brain concussion, loss of blood, and leakage of spinal fluid from the brain cavity. Plaintiffs' Original Petition at 6 Tomjanovich brought suit against the Lakers, basing his claim on the doctrine of respondeat superior. Focusing on Washington's reputation as a violent player, he further alleged that the Lakers were negligent in hiring and employing Washington and in failing to discourage vicious conduct on the part of its players. *Id.* at 5. The Lakers answered that the blow was inflicted in self-defense and that fighting is an integral part of professional basketball. *See* Bodine, *Rudy T Alters Rules of Game*, Nat'l L.J., Sept. 3, 1979, at 3, col. 1. The jury returned a verdict in favor of the plaintiff for $3.25 million, including $1.5 million in punitive damages. *Id* at 13, col 3

10. The plaintiff subsequently remitted $125,000 of the $200,000 awarded for future medical expenses. Letter from Nick C. Nichols, Counsel for plaintiff (Jan.30, 1980) (on file with the *Fordham Law Review*); *see* note 9 *supra*.

11. *See* note 9 *supra*.

12. This Note focuses on the role of existing forums in deterring violence in professional sports. Although state and federal regulatory agencies have been suggested as possible means of dealing with the problem, *see* Hallowell & Meshbesher, *Sports Violence and the Criminal Law*, Trial, Jan., 1977, at 27, 32, such proposals are beyond the scope of this Note.

I. INTERNAL CONTROL

Within most professional athletic organizations, control of violence is the ultimate responsibility of the league commissioner. Pursuant to the league's constitution and bylaws, the commissioner is given broad discretion over disciplinary matters.[13] Disciplinary action is generally preceded by a league-conducted investigation or hearing concerning the circumstances surrounding the violent activity.[14] Based on the results of this inquiry, the commissioner may fine or suspend the players involved,[15] and, in the appropriate case, may even take disciplinary action against a coach or team administrator for failing to control his players.[16]

Effective internal controls are potentially the most powerful deterrent against violence in professional sports. Deterrence is largely a function of the severity and certainty of punishment,[17] although the latter element is of

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13. *See, e.g.*, Major League Agreement art. I, §§ 2-4, *reprinted in* Baseball Blue Book 501-02 (1979) [hereinafter cited as Blue Book]; Constitution and By-Laws for The National Football League art. VIII, § 8.13, at 29-33 (1976) [hereinafter cited as NFL Const.]. The NBA and the National Hockey League (NHL) do not make their constitutions and bylaws available to the public. However, copies of these documents from both the NBA and NHL appear in a 1957 congressional inquiry into professional team sports. *See Organized Professional Team Sports: Hearings on H.R. 5307, H.R. 5319, H.R. 5383, H.R. 6876, H.R. 6877, H.R. 8023, & H.R. 8124 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong., 1st Sess. 2937, 3011 (1957) [hereinafter cited as *1957 Hearings*]. Both organizations also vest broad disciplinary power in a single executive. *See* National Basketball Association Const. cl. 43 [hereinafter cited as NBA Const.], *reprinted in 1957 Hearings, supra*, at 2943; National Hockey League By-Laws §§ 17-18 [hereinafter cited as NHL Bylaws], *reprinted in 1957 Hearings, supra*, at 3066-69.

14. *See, e.g.*, Major League Agreement art. I, § 2(a), *reprinted in* Blue Book, *supra* note 13, at 501; NFL Const. art. VIII, § 8.13(A), at 29; NHL Bylaws § 17(3), *reprinted in 1957 Hearings, supra* note 13, at 3066.

15. *See, e.g.*, Major League Agreement art. I, § 3, *reprinted in* Blue Book, *supra* note 13, at 501-02; NFL Const. art. VIII, § 8.13(A), at 29; NHL Bylaws § 17(3), *reprinted in 1957 Hearings, supra* note 13, at 3066.

16. For example, following an extremely violent altercation during the 1976 World Hockey Association playoffs, the coaches of both teams were suspended for losing control of their players. *See* Reed, *Week of Disgrace on the Ice*, Sports Illustrated, Apr. 26, 1976, at 22. A commissioner's authority to impose such sanctions stems from his power to punish any officer, employee or player of a club for conduct which he deems "not to be in the best interests" of the game. Major League Agreement art. I, § 3, *reprinted in* Blue Book, *supra* note 13, at 501; *accord*, NFL Const. art. VIII, § 8.13(A), at 29. NHL Bylaws § 17(3), *reprinted in 1957 Hearings, supra* note 13, at 3066; NBA Const. cl. 43, *reprinted in 1957 Hearings, supra* note 13, at 2943. Baseball further empowers the commissioner to fine a league or a team for any conduct considered detrimental to the game. *See* Major League Agreement art. I, § 3, *reprinted in* Blue Book, *supra* note 13, at 501-02. Similarly, the commissioner of the NBA may fine a member club "guilty of conduct prejudicial or detrimental to the . . . Association." NBA Const. cl. 43, *reprinted in 1957 Hearings, supra* note 13, at 2943. The NFL commissioner is expressly authorized only to fine a member organization for "violation[s] affecting the competitive aspects of the game." NFL Const. art. VIII, § 8.13(A)(4), at 29. However, he may refer any disciplinary matter to the league's executive committee along with any disciplinary recommendations that he deems appropriate NFL Const. art. VIII, § 8.13(B), at 30. The executive committee may implement all or any part of the commissioner's suggestions as it sees fit. *Id.*

17. Panel on Research on Deterrent and Incapacitative Effects, National Research Council,

greater consequence.[18] League-administered sanctions are, in theory, capable of being both certain and severe. Because disciplinary decisions are made by a single individual with a working knowledge of the rules and customs of the game, sanctions may be imposed uniformly and predictably.[19] Moreover, one option open to a commissioner is to suspend players guilty of unnecessarily violent conduct.[20] Such sanctions affect a team's competitive ability and could, therefore, be quite severe.[21]

Unfortunately, internally imposed sanctions have been relatively unsuccessful in quelling sports violence.[22] This failure may be due to the fact that league sanctions against violence have, in practice, been neither certain nor severe. Disciplinary rules which leave little doubt that specific conduct will be punished have enjoyed some success.[23] Automatic penalties for misconduct, however, are the exception rather than the rule.[24] Sanctions left to the commissioners' discretion have not been as successful as mandatory penal-

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Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 19 (A. Blumstein, J. Cohen, & D. Nagin eds. 1978).

18. *See, e.g.*, Andenaes, *The General Preventive Effects of Punishment*, 114 U Pa L Rev 949, 964-65 (1966); Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions Some Implications for Criminal Justice Policy*, 51 J Urb L 145, 160-61 (1973).

19. *See* J. Weistart & C. Lowell, The Law of Sports § 5.09, at 658 n 933 (1979). The commissioner's expertise would be especially valuable in deciding the close cases which may arise in the area of sports violence. In hockey, for example, the difference between a perfectly legal "check" and illegal contact may depend upon the exact positioning of the player's stick or the location of the puck. *See* National Hockey League, Official Rule Book §§ 6(45), (48), at 52, 53 (The Sporting News pub. 1979). Subtle distinctions may be difficult for someone with a lesser knowledge of the game to perceive. *See* notes 67-71 *infra* and accompanying text.

20. *See* J. Tatum & W. Kushner, They Call Me Assassin 241 (1979); *Violence in Sports*, *supra* note 2, at 786.

21. *See* J. Tatum & W. Kushner, *supra* note 20, at 241; *Violence in Sports*, *supra* note 2, at 786.

22. *See* Flakne & Caplan, *supra* note 2, at 33, Létourneau & Manganas, *Violence in Sports Evidentiary Problems in Criminal Prosecutions*, 16 Osgoode Hall L.J. 577, 598 (1978), *Theories of Recovery*, *supra* note 8, at 710; *Violence in Sports*, *supra* note 2, at 786, 12 Ga L Rev 380, 390 (1978). *But see* Hechter, *The Criminal Law and Violence in Sports*, 19 Crim L Q 425, 439 (1977) (according to Alan Page, an NFL player, "[t]he league [NFL] has done an effective job to enforce the rules to the extent that they pretty well eliminate fighting in games").

23. An NBA rule imposing an automatic fine on any player or coach charged with a technical foul led to a 25% decrease in the number of such fouls. *See* N Y Times, Oct. 7, 1975, at 31, col 1. An NFL rule imposing an automatic fine on any player leaving the bench when a fight is in progress on the playing field has apparently enjoyed similar success. *See Arbitration in Professional Athletics*, in Arbitration of Interest Disputes—Proceedings of the Twenty-Sixth Annual Meeting of the National Academy of Arbitrators 108, 135-36 (B Dennis & G Somers eds 1973) (presentation of Theodore W. Kheel, Labor Counsel to the NFL Management Council). The litigation engendered by this rule when challenged by the NFL Player's Association illustrates the potential impact of such unions on league rulemaking procedures. *See* NFL Players Ass'n v NLRB, 503 F.2d 12 (8th Cir. 1974). The NHL has implemented several rules which impose automatic fines or penalties for their violation. *See* National Hockey League, Official Rule Book § 4 (The Sporting News pub. 1979). The effect of these rules, however, does not appear to have been documented.

24. Most sanctions are left to the discretion of the league commissioners. *See* notes 13-16 *supra* and accompanying text.

ties.[25] Moreover, violent conduct is often not dealt with severely by the commissioners.[26] Generally, suspensions are short[27] and fines are nominal.[28] In contrast, involvement with gambling is dealt with far more severely. Suspensions for gambling activity have ranged from one-half season to permanent ineligibility.[29] It may be argued that the effect of betting and

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25. In hockey, for example, the individual record for most penalty minutes amassed in a single season increased from 153 minutes in the 1967-68 season to 472 minutes in the 1974-75 season. *See* Kennedy, *Wanted: An End to Mayhem,* Sports Illustrated, Nov. 17, 1975, at 20. Although league officials admit to calling only a fraction of the violations which occur during a game, the 1974-75 NHL season was marred by 22,329 minutes in penalties, a 25% increase over the previous year. *See* Surface, *Turn Off the Mayhem!,* Reader's Digest, Mar. 1976, at 32. A study of serious injuries in professional football revealed that the number of injuries requiring a player to miss two or more games increased 25% from 1973 to 1974, the last year of the study *See* Yeager, *The Savage State of Sports,* Physician & Sportsmed., May, 1977, at 96. The failure of league-imposed sanctions to have any significant effect on violence is further evidenced by the rash of incidents that have plagued both hockey and basketball early in the 1979-80 seasons. In hockey, several members of the Boston Bruins were fined and suspended following a post-game brawl with fans at New York's Madison Square Garden. *See* N.Y. Times, Jan. 31, 1980, § A, at 17, col. 5 (one player fined $500 and suspended for eight games; two players fined $500 and suspended for six games; remaining players fined between $200 and $500). As a result of this incident, a lawsuit was filed by several fans against the players involved, both the New York Rangers and the Boston Bruins, the NHL, Madison Square Garden, and the City of New York. *See* N.Y. Times, Jan. 27, 1980, § 5 (Sports), at 1, col. 6, at 8, col. 6. Less than two weeks later, Ed Hospodar of the New York Rangers was fined $500 and suspended for three games for violently shoving an official in an attempt to get at an opposing player. His suspension immediately followed an automatic one game suspension he had served for accumulating his second and third game misconduct penalties of the season. *See* N.Y. Times, Jan. 12, 1980, at 17, col. 1. Similarly, Behn Wilson of the Philadelphia Flyers was recently fined and suspended for three games after incurring his third and fourth game misconduct penalties of the season for his participation in an altercation during a game. N.Y. Times, Feb. 14, 1980, § B, at 22, col 5. In the early stages of the 1979-80 basketball season, NBA Commissioner Lawrence O'Brien suspended George McGinnis of the Denver Nuggets for ten days without pay for intentionally running into an official following a disputed call. N.Y. Times, Dec. 21, 1979, § A, at 29, col. 1 *See also* N.Y. Times, Dec. 27, 1979, § B, at 9, col. 5 (suspension cut to six days). The commissioner also fined Gene Shue, the coach of the San Diego Clippers, $3500 and suspended him for one week for assaulting a referee, N.Y. Times, Jan. 10, 1980, § D, at 17, col. 1, and fined players Dave Cowens and Wayne Rollins $2500 and $1500, respectively, for fighting during a game. *See* Boston Globe, Jan. 17, 1980, at 59, col. 1.

26. *See* note 25 *supra.*

27. *See* J. Weistart & C. Lowell, *supra* note 19, § 5.09, at 657-58 & n.932. *But see* N.Y Times, Dec. 21, 1979, § A, at 29, col. 1 (Kermit Washington suspended for 60 days for punching Rudy Tomjanovich).

28. The maximum fine which may be imposed against a major league baseball player or an NHL player is $500. *See* Major League Agreement art. I, § 3(c), *reprinted in* Blue Book, *supra* note 13, at 502; NHL Bylaws § 17(3), *reprinted in 1957 Hearings, supra* note 13, at 3066. *But see* N.Y. Times, Dec. 21, 1979, § A, at 29, col. 1 (Kermit Washington fined $10,000 for punching Rudy Tomjanovich). The deterrent effect of larger fines is questionable in light of the salary levels in professional athletics. *See* notes 103-04 *infra* and accompanying text. *See also* J. Tatum & W Kushner, *supra* note 20, at 240-41; Kennedy, *supra* note 25, at 21. This is especially true if a player is reimbursed or the fine is paid by his team. *See* J. Tatum & W. Kushner, *supra* note 20, at 240-41; Kennedy, *supra* note 25, at 21. Such activity is, however, generally prohibited. *See, e.g.,* NFL Const. art. IX, § 9.1(C)(5), at 34.

29. Baseball player Dennis McLain was suspended for half of a season for his gambling

bribery on the outcome of a particular athletic contest can be more detrimental to sports than any amount of violence. It is difficult to imagine, however, that a deliberate and violent attack upon an opposing player is any less detrimental to the game than a player's mere association with known gamblers[30] or a player's betting on games in which he is not a participant.[31]

Many commentators believe that league officials are afraid to impose sanctions which would curb violence because to do so may hurt the members of the league financially.[32] Professional athletics has generally become a profitable business enterprise.[33] It is important to a sports franchise, therefore, that attendance levels and spectator interest remain high; if a team's star player is suspended for a long period of time, both fan attendance and interest may wane. Furthermore, it has been noted that violence actually spurs spectator interest.[34] Consequently, a reduction in violence may lead to a reduction in ticket sales and television ratings.

For whatever reason, "the token fine or penalty [imposed as a league

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associations and activities. *See* N.Y. Times, Apr. 2, 1970, at 48, col. 1. Football players Paul Hornung and Alex Karras were suspended for eleven months, a period covering an entire season, for betting on games. *See* N.Y. Times, Mar. 17, 1964, at 41, col. 1. Football players Merle Hapes and Frank Filchock were suspended indefinitely for failing to report that they were bribed before the 1946 championship game. *See* N.Y. Times, July 14, 1950, at 27, col. 3. The famed Black Sox scandal in baseball resulted in eight players being banned from the game for life for accepting bribes before the 1919 World Series. *See generally* E. Asinof, Eight Men Out (1963). Another baseball player was banned for life five years later for attempting to bribe an opposing player before an important game. *See* N.Y. Times, Apr. 2, 1970, at 48, col. 3. The lifetime suspension of an NBA player for betting on games in which he participated was upheld in Molinas v. Podoloff, 133 N.Y.S.2d 743 (Sup. Ct. 1954); *see* Molinas v. NBA, 190 F. Supp. 241 (S.D.N.Y. 1961) (NBA and member clubs did not violate antitrust laws by refusing to reinstate Molinas) The rationale behind such strict disciplinary measures has been that the intermingling of gambling and sport seriously impairs the concept of athletic competition and the reputation of all sports. *See* Molinas v. Podoloff, 133 N.Y.S.2d at 746.

30. Dennis McLain's mere association with known gambling figures formed the basis of his 1970 suspension although there was no evidence that McLain bet on baseball games. *See* N.Y. Times, Apr. 2, 1970, at 48, col. 1. Similarly, NFL Commissioner Pete Rozelle once threatened to suspend Joe Namath, a player with the NFL's New York Jets, if he did not sell his interest in a night club because "certain things were taking place" there. Newsday, Jan. 13, 1980, Sports, at 10, col. 1, at 11, col. 3. Apparently, the club was frequented by "undesireable customers." *See* N.Y. Times, July 19, 1969, at 1, col. 5.

31. Although football players Alex Karras and Paul Hornung were both suspended for an entire season, there was no evidence that either bet on games in which he was a participant. *See also* N.Y. Times, June 11, 1971, at 25, col. 1 (baseball player Clete Boyer fined $1000 for betting on football games); note 30 *supra*.

32. *See* Hechter, *supra* note 22, at 432; *Violence in Sports*, *supra* note 2, at 785

33. For example, each NFL team receives $5 million annually as a result of a $600 million, four-year contract between the league and major television networks This figure is slightly less than that which each team generates annually in gate receipts. *See* N.Y. Times, Dec. 30, 1979, § 5 (Sports), at 7, cols. 5, 6.

34. Speaking on violence in professional hockey, Dr. Walter Menninger, a former member of Pres. Johnson's National Commission on the Causes and Prevention of Violence, noted that "[m]any of the 'silent majority' who feel so frustrated, angry and helpless today can readily identify with the beleagured, assaulted hero of the 'war on ice'. They experience a vicarious satisfaction from the open aggression and mayhem on the ice." Time, Mar. 10, 1975, at 62.

sanction] has been ineffectual in eliminating violence in sports."[35] Thus, the need for an external deterrent force, such as legal intervention, is apparent.

II. THE CRIMINAL LAW AND VIOLENCE IN PROFESSIONAL SPORTS

Legal intervention is not completely new as a reaction to professional sports violence. Prior to the civil actions in *Hackbart* and *Tomjanovich,* criminal prosecutions were initiated against several National Hockey League (NHL) players for violent attacks on opposing players and spectators.[36] Those who favor the criminal law as a means of curbing violence in professional sports argue that "the only effective remedy [against sports violence] lies with the state, where the capability of meting out effective deterrent sanctions exists."[37] This position, however, disregards the importance normally placed on certainty of punishment as a factor in achieving deterrence.[38] Prosecutors have been relatively unsuccessful in their efforts to convict professional athletes for criminal assault.[39]

The first criminal prosecutions of professional athletes arose in Canada out of a stick swinging incident between two NHL players during a 1969 exhibition game. Although accounts of the incident differ,[40] it appears to have begun when Ted Green struck Wayne Maki in the face with a gloved hand.[41] Maki apparently retaliated by striking Green in the abdomen with his hockey stick.[42] A stick fight ensued during which Green was seriously injured. Both players were criminally charged for their roles in the altercation, and both were acquitted in separate prosecutions.[43] The trial judge in *Regina v. Maki*[44] found that Green initiated the stick fight[45] and that Maki simply retaliated in self defense;[46] the trial judge in *Regina v. Green,*[47] however, found that it was Maki rather than Green who initiated the incident[48] and that Green re-

35. *See* Flakne & Caplan, *supra* note 2, at 33.

36. *See* notes 40-53 *infra* and accompanying text.

37. Flakne & Caplan, *supra* note 2, at 34; *cf.* Regina v Maki, 14 D.L.R.3d 164, 167 (Ont. Prov. Ct. 1970) (participation in athletics should not render an individual immune from criminal prosecution); *Violence in Sports, supra* note 2, at 786 (growing incidence of violence suggests inadequacy of internal control and need for some form of increased deterrence); Note, *Consent in Criminal Law: Violence in Sports,* 75 Mich. L. Rev. 148, 148 (1976) [hereinafter cited as *Consent in Criminal Law*] (same).

38. *See* notes 17-18 *supra* and accompanying text.

39. *See* notes 40-53 *infra* and accompanying text.

40. *Compare* Regina v. Green, 16 D.L.R.3d 137, 139, 140-41 (Ont. Prov. Ct. 1970) *with* Regina v. Maki, 14 D.L.R.3d 164, 164-65 (Ont. Prov. Ct. 1970).

41. Regina v. Green, 16 D.L.R.3d 137, 138 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164, 164 (Ont. Prov. Ct. 1970).

42. Regina v. Green, 16 D.L.R.3d 137, 138-39 (Ont Prov. Ct. 1970). *But see* Regina v. Maki, 14 D.L.R.3d 164, 164 (Ont. Prov. Ct. 1970).

43. *See* Regina v. Green, 16 D.L.R.3d 137, 143 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164, 167 (Ont. Prov. Ct. 1970).

44. 14 D.L.R.3d 164 (Ont. Prov. Ct. 1970).

45. *Id.* at 165.

46. *Id.* at 165-66. For a discussion of the concept of self-defense as it applies in athletic competition, see Hechter, *supra* note 22, at 450-52.

47. 16 D.L.R.3d 137 (Ont. Prov. Ct. 1970).

48. *Id.* at 141-42.

sponded merely to protect himself and to warn Maki "not to do what he had done again."[49] The judge in *Green* also found that Maki had impliedly consented to being struck by Green because such conduct was commonplace in professional hockey.[50]

In the only criminal prosecution against a professional athlete in the United States, hockey player Dave Forbes was charged with criminal assault for beating an opposing player during a game in 1975.[51] The prosecution, however, resulted in a hung jury and the charges were subsequently dismissed.[52] One year later, NHL player Dan Maloney was acquitted by a Canadian jury of assault charges arising out of a similar incident.[53] Thus, while criminal prosecutions, or the threat of such action, might encourage rule changes designed to punish violence[54] and serve as somewhat of a deterrent, the effect of the criminal law on the problem has been negligible.[55]

There are several reasons underlying the failure of the criminal law to deal effectively with sports violence. State prosecutors have experienced great difficulty in obtaining testimony sufficient to convict professional athletes of assault. In both *Maki* and *Green*, the courts emphasized that hockey is played at great speed.[56] Because of the speed at which most professional athletic

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49. *Id.* at 142.

50. *Id.* at 140. For a detailed analysis of the consent defense as it applies in athletic competition, see Flakne & Caplan, *supra* note 2, at 35; Hechter, *supra* note 22, at 442-50; Comment, *The Consent Defense: Sports, Violence, and the Criminal Law*, 13 Am. Crim. L. Rev. 235 (1975) [hereinafter cited as *Consent Defense*]; *Consent in Criminal Law*, *supra* note 37.

51. State v. Forbes, No. 63280 (Minn. Dist. Ct., dismissed Aug. 12, 1975), *noted in* Flakne & Caplan, *supra* note 2, at 34 (co-authored by *Forbes* prosecutor); Hallowell & Meshbesher, *supra* note 12, at 27 (co-authored by chief defense counsel in *Forbes* case); Hechter, *supra* note 22, at 431-33; *Consent Defense*, *supra* note 50, at 235; *Violence in Sports*, *supra* note 2, at 771-72; *Consent in Criminal Law*, *supra* note 37, at 148.

52. State v. Forbes, No. 63280 (Minn. Dist. Ct., dismissed Aug. 12, 1975).

53. Regina v. Maloney, 28 C.C.C.2d 323, 330 (Ont. Co. Ct. 1976).

54. *See* Hallowell & Meshbesher, *supra* note 12, at 29.

55. A handful of players have avoided prosecution by pleading guilty to lesser offenses and paying fines. During the third game of the 1976 NHL quarterfinal playoff series between the Philadelphia Flyers and the Toronto Maple Leafs, an altercation arose between Don Saleski and Joe Watson of the Flyers and several fans. As a result, Saleski was charged with two counts of assault. Watson was charged with four counts of assault, including two counts of assaulting a police officer. Another Flyer, Mel Bridgman, was also charged with two counts of assault for his attack on Toronto player Borje Salming later in the same game. Still another Flyer, Bob Kelly, was charged with two counts of assault for his part in an incident involving a fan in the following game. Pursuant to an agreement between the Flyers and the Canadian government, Joe Watson pleaded guilty to one count of simple assault and was fined $1,000, and Bob Kelly pleaded guilty to one count of simple assault and was fined $500. The charges against both Saleski and Bridgman were dropped. Telephone Interview with Gilbert Stein, Gen. Counsel, NHL (Feb. 19, 1980) (transcript on file with the *Fordham Law Review*). *See generally* Reed, *supra* note 16, at 22-24. Similarly, Rick Jodzio of the now defunct World Hockey Association (WHA) was charged with causing bodily harm with intent to wound for viciously assaulting an opponent during the 1976 WHA playoffs. *Id.* at 25. Jodzio pleaded guilty to a lesser charge and was fined $3,000. Regina v. Jodzio, No. 01-1824-76 (Que. Ct. Sess. Aug. 17, 1977).

56. Regina v. Green, 16 D.L.R.3d 137, 140 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164, 165 (Ont. Prov. Ct. 1970).

contests are played, it is often impossible to find any individual who has witnessed all the events leading up to a particular incident.[57] This is true even of those refereeing the contest.[58] The problem is compounded further in the case of players, coaches and spectators, who may be affected by both the "excitement of the moment" and personal biases.[59] It is difficult, therefore, even to develop an accurate account of the facts of a case.[60]

There are often problems with "[a]pplying statutory definitions of intent to traditional sports activity."[61] The rules and customs of all professional team sports permit a significant amount of body contact.[62] As a result, it may be difficult for a judge or jury to distinguish between an assault and permissible contact.[63] In sports that permit violent physical contact, many of the collisions that occur during the course of a game are, in fact, technically assaults.[64] Moreover, refusal to convict may be spurred by a feeling that, because violence has become such an integral and accepted part of professional sports, a player acting in accordance with established practices of the game does not have the requisite mental state to be found guilty of assault.[65] This is evidenced by the feeling of three of the jurors in the Forbes case that, under the circumstances, Forbes did not intend to inflict bodily harm.[66]

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57. *See* Létorneau & Manganas, *supra* note 22, at 578.

58. In Regina v. Watson, 26 C.C.C.2d 150 (Ont. Prov. Ct. 1975), a case involving an altercation during a juvenile hockey league game, the court warned against overestimating the capacity of officials to witness everything that happens on the ice. *Id.* at 152-53; *see* Létorneau & Manganas, *supra* note 22, at 578-79.

59. *See* Létorneau & Manganas, *supra* note 22, at 578-80.

60. *Compare* Regina v. Green, 16 D.L.R.3d 137, 138-41 (Ont. Prov. Ct. 1970) *with* Regina v. Maki, 14 D.L.R.3d 164, 164-65 (Ont. Prov. Ct. 1970). Although the introduction of videotaped evidence might reduce some of the problems encountered in the prosecution of professional athletes, *see* Létourneau & Manganas, *supra* note 22, at 580-92, it does not solve them completely. There is no guarantee that a violent outburst will be captured on film and, in any event, the difficulty of obtaining evidence of all the events leading up to the incident would remain. As with actual witnesses, different camera angles may produce different accounts of the same incident. Finally, the use of slow motion photography to alleviate problems caused by the speed of the game may create additional difficulties. For example, when replayed in slow motion, a glancing blow delivered during the course of the game may instead appear to be a serious assault.

61. Hallowell & Meshbesher, *supra* note 12, at 29.

62. Football and hockey present obvious examples. In baseball, whether a collision between two players constitutes obstruction by a fielder or interference by a runner or batter is subject to the umpire's judgement. Official Baseball Rules §§ 7.06, .09, at 57-58, 62-64 (The Sporting News pub. 1978). In basketball, contact is permitted between players while guarding an opponent or fighting for a rebound. National Basketball Association, Official Rules, Comments II.A.1-2, at 33-34, *reprinted in* NBA Guide (The Sporting News pub. 1979). The fact that hockey is a contact sport figured significantly in the *Maki* and *Green* decisions. *See* Regina v. Green, 16 D.L.R.3d 137, 140-41 (Ont. Prov. Ct. 1970); Regina v. Maki, 14 D.L.R.3d 164, 165 (Ont. Prov. Ct. 1970).

63. For example, in Regina v. Green, 16 D.L.R.3d 137 (Ont. Prov. Ct. 1970), the trial judge stated that he could not "envision a circumstance where an offence of common assault . . . could readily stand on facts produced from incidents occurring in . . . a [professional] hockey game . . . ." *Id.* at 143.

64. *Id.* at 140-41; Flakne & Caplan, *supra* note 2, at 35.

65. *See* Hallowell & Meshbesher, *supra* note 12, at 28.

66. N.Y. Times, July 19, 1975, at 17, col. 2.

The juries in both the Forbes and Maloney cases had difficulty in deciding whether the acts in question occurred during the course of the game or out of play.[67] Indeed, there are many aspects of professional athletic contests that are difficult for the nonsports-minded individual to grasp.[68] The consequent likelihood of disagreement among jurors[69] reduces the prospect of conviction.[70] Any inconsistent results that might arise because of such unfamiliarity would only serve to undermine the deterrent effect of criminal prosecutions in this area.[71]

Many factors play a significant role in fostering violent behavior in athletics. There is, of course, the inherent competitive nature of the sport itself.[72] Professional athletes compete for personal accolades and for significant monetary awards.[73] The tension created by such competition is then compounded by the significant amount of violence permitted under the rules of most professional team sports.[74] Finally, violent behavior may be expressly or implicitly encouraged by team coaches, administrators and owners.[75] On some professional teams " 'the coach does everything he can to get players in an emotional pitch, which on occasion leads them to do things they might not normally do, and, might not really want to do.' "[76] Violence is encouraged because it serves two very important purposes for professional athletic teams. First, it sells tickets. Many spectators look upon a fight during a sporting event as a highlight.[77] Second, aggressive play often intimidates opposing players, thus giving the aggressor's team a competitive advantage.[78]

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67. *See* Hallowell & Meshbesher, *supra* note 12, at 29.

68. *Id.* The subtle intricacies of each sport take on added significance in light of the admission of Gary Flakne, the prosecutor in the *Forbes* case, that "[t]he prosecution strategy was to select jurors who were not hockey fans and who had no particular reverence for athletics in general." Flakne & Caplan, *supra* note 2, at 34.

69. This is evidenced by the outcome of the *Forbes* case. *See* Hallowell & Meshbesher, *supra* note 12, at 29.

70. The *Forbes* case resulted in a hung jury. State v. Forbes, No. 63280 (Minn. Dist. Ct., dismissed Aug. 12, 1975). In deciding not to retry Forbes, the Hennepin County Attorney considered the likelihood that the jury would again be unable to reach a verdict. *See* Flakne & Caplan, *supra* note 2, at 34.

71. Certainty of punishment is a primary deterrent. *See* notes 17-18 *supra* and accompanying text.

72. *See, e.g.*, Hechter, *supra* note 22, at 438 (opinion of Dwight White, an NFL player with the Pittsburgh Steelers, expressed during an interview with the author); J. Tatum & W. Kushner, *supra* note 20, at 24-25 (description of the fierce level of competition that exists between the NFL's Oakland Raiders and Pittsburgh Steelers).

73. For example, a player on the professional football team that wins the NFL's Super Bowl may earn as much as $35,000 more than a player with a comparable salary on a team that did not advance to the playoffs. *See* NFL Players Ass'n, Collective Bargaining Agreement arts. XXVI-XXVIII, at 47-49 (1977).

74. *See* note 62 *supra* and accompanying text.

75. The former president of one NHL team was known to say that " '[i]f you can't beat [opposing teams] in the alley, you can't beat them on the ice.' " Flakne & Caplan, *supra* note 2, at 33 (quoting Conn Smythe, former president of the NHL's Toronto Maple Leafs).

76. Hechter, *supra* note 22, at 439 (quoting Alan Page, at the time a defensive lineman with the NFL's Minnesota Vikings).

77. *See* note 34 *supra*.

78. It was often charged that Fred Shero, the coach of the championship Philadelphia Flyer

Perhaps the most serious shortcoming of applying the criminal law in the sports context is its inability to subject to liability those other than the player who actually inflicted the injury. Vicarious criminal liability is limited to a small class of cases.[79] Generally, when an employer does not authorize or consent to the commission of criminal conduct he cannot be held criminally responsible, even though the employee was acting within the scope of his employment.[80] Thus, to hold team coaches, administrators or owners criminally liable for an assault committed by a player, state prosecutors must prove beyond a reasonable doubt[81] that these parties authorized the assault, conspired with the player to inflict injury on an opposing player, or otherwise aided or encouraged him to do so.[82] Even those who advocate the use of the

hockey teams of the mid-1970's, "sen[t] his men onto the ice looking for a fight." Time, Jan. 6, 1975, at 71, col. 2. The team had several players whose major role was to instill fear in the hearts of opposing players. One of those players, Dave Shultz, freely admitted that he was "more valuable [to the team] in the penalty box than . . . sitting on the bench." Milwaukee J., Feb. 20, 1975, at 10, col. 3.

79. *See* State v. Pennsylvania R.R., 84 N.J.L. 550, 554-55, 87 A. 86, 88 (1913) (nuisance); Commonwealth v. Rovnianek, 12 Pa. Super. Ct. 86, 93-94 (1899) (libel); The Queen v. Stephens, L.R. 1 Q.B. 702, 704 (1866) (nuisance). In the case of libel, several states have held employers criminally liable "unless the unlawful publication was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary precaution on his part to prevent it." Commonwealth v. Morgan, 107 Mass. 199, 204 (1871)(citation omitted); *accord,* People v. Fuller, 238 Ill. 116, 135, 87 N.E. 336, 342 (1909); State v. Mason, 26 Or. 273, 280-81, 38 P. 130, 132 (1894); *see* State v. Pennsylvania R.R., 84 N.J.L. 550, 554, 87 A. 86, 88 (1913) (similar proposition with respect to nuisance). Vicarious criminal liability is also imposed when it is expressly or impliedly provided by state statute. *See* W. LaFave & A. Scott, Handbook on Criminal Law § 32, at 224-27 (1972); Sayre, *Criminal Responsibility for the Acts of Another,* 43 Harv. L. Rev. 689, 712-14 (1930). Such statutes usually prohibit petty misdemeanors and involve only light monetary fines, *see* W. LaFave & A. Scott, *supra,* § 32, at 224-25; Sayre, *supra,* at 712, 720, although there have been cases in which the employer was imprisoned. *See, e.g., Ex parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946) (employer sentenced to 90 days in jail because an employee violated a state weights and measures statute); Hershorn v. People, 108 Colo. 43, 113 P.2d 680 (1941) (employer fined $500 and sentenced to 60 days in jail because an employee violated a statute prohibiting the sale of intoxicating liquors to minors). *But see* Commonwealth v. Koczwara, 397 Pa. 575, 585-86, 155 A.2d 825, 830 (1959), *cert. denied,* 363 U.S. 848 (1960) (imprisonment for vicarious liability is a denial of due process under state constitution); R. Perkins, Criminal Law 815 (1969) (imprisonment imposed on the basis of vicarious liability is "manifestly unsound"); Sayre, *supra,* at 717 (vicarious criminal liability offends "deep-rooted notions" and the "subconscious sense of justice of the man on the street"). With respect to corporations, the general rule appears to be that in the absence of statutory liability, a corporation is not criminally responsible for the acts of its employees unless performed, authorized or consented to by an officer of the corporation or a high-level executive. *See* United States v. Hangar One, Inc., 406 F. Supp. 60, 139 (N.D. Ala. 1975), *rev'd on other grounds,* 563 F.2d 115 (5th Cir. 1977); State v. Adjustment Dep't Credit Bureau, Inc., 94 Idaho 156, 158-60, 483 P.2d 687, 689-91 (1971); 2 G. Hornstein, Corporation Law and Practice § 566, at 47 (1959).

80. *See* State v. Pinto, 129 N.J.L. 255, 257, 29 A.2d 180, 181 (1942); State v. Nelson, 83 S.D. 655, 662, 165 N.W.2d 55, 59 (1969) (quoting State v. Carmean, 126 Iowa 291, 297, 102 N.W. 97, 99 (1905)). *See also* Blacketer v. State, 485 P.2d 1069, 1072 (Okla. Crim. App. 1971) (similar proposition with respect to corporate officers).

81. The "reasonable doubt" standard is the standard of proof required to convict any individual of a criminal charge. *See* note 87 *infra.*

82. *See* People v. Travers, 52 Cal. App. 3d 111, 114, 124 Cal. Rptr. 728, 729 (1975); *Ex parte* Malone, 378 S.W.2d 330, 332 (Tex. Crim. App. 1964).

criminal forum as a means to deter violence in professional sports recognize that charges against these individuals will encounter serious evidentiary problems:

> A conspiracy to use violence is accompanied by a conspiracy to remain silent. Coaches are often parties to the violence committed by one of their players. It is by no means easy, however, to prove that a player acted at the request or on the orders of his coach. More often than not, what the police and the public witness is a coach's failure to even attempt to control his players. It is true that in law passivity can amount to complicity But in order to do so, the passive behaviour must be deliberate and have the purpose of aiding and abetting a crime. In the context of sport, these two components are almost impossible to prove.[83]

It may be unrealistic to require players to divulge information that implicates their coaches and owners. Such behavior is likely to affect the player's professional career within the league adversely.[84] Nevertheless, it is often unfair to hold the player solely responsible for an injury to an opposing player.[85]

Despite these shortcomings, there are aspects of the criminal law that suggest it may be the most appropriate means of dealing with the problem of violence in professional sports. Many commentators fear that acceptance of civil or criminal intervention in the realm of professional sports will open a floodgate of litigation over the most technical violations of the law, and will therefore have a drastic effect on athletic competition.[86] The probability of such an adverse effect is less in the criminal forum than in the civil forum. Because the burden of proof required to convict an individual of a criminal charge is greater than that required to find liability in civil cases,[87] athletes are more carefully protected from culpability for frivolous claims in criminal

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83. Létorneau & Manganas, *supra* note 22, at 599 (footnote omitted). The authors suggest that "in the absence of evidence to the contrary [a presumption be raised] that the team acts at the request or under the instruction of its coach. The coach would then have to establish that the blame lay with the individual players." *Id.* at 600. Presumptions of this sort have been established in the past to combat similar evidentiary problems in the United States *See, e g*, State v. McCance, 110 Mo. 398, 405, 19 S.W. 648, 649 (1892) (employer presumed to have authorized employee to sell liquor to minors); State v Pennsylvania R R., 84 N J L 550, 555, 87 A. 86, 88 (1913) (railroad company presumed to have knowledge of excessive emission of smoke by trains); Verona Cent. Cheese Co. v. Murtaugh, 50 N Y. 314, 319-20 (1872) (employer presumed to have authorized employee to sell adulterated milk). There is no indication, however, that such presumptions have been utilized to establish complicity for charges as serious as assault

84. *Cf.* Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 Geo L.J. 771, 793 (1972) [hereinafter cited as *Discipline in Sports*] (similar point made with respect to litigation against unfair disciplinary measures).

85. At least one juror in the *Forbes* case espoused this view When asked why he favored acquittal, he responded: " 'Just like if I had committed some crime because of my job then my employer should suffer or should answer [for] it—not me.' " Hallowell & Meshbesher, *supra* note 12, at 28.

86. *See* Flakne & Caplan, *supra* note 2, at 35; Jacobson, *supra* note 4, at 95, Nat'l L J., Sept. 3, 1979, at 3, col. 1, at 13, col. 3.

87. In criminal cases the prosecution must prove the defendant's guilt beyond a reasonable doubt. *See* Clark & Marshall, A Treatise on the Law of Crimes § 1 04, at 22-23 (M Barnes ed 1967); H. Kerper, Introduction to the Criminal Justice System 204 (2d ed 1979) In civil cases the plaintiff need only prove that it is more probable than not that the defendant caused the injury *See* W. Prosser, Handbook of the Law of Torts § 41, at 242 (4th ed 1971)

proceedings. Furthermore, the state has neither the time nor the interest to litigate unmerited claims.[88] The criminal law also provides the external control over violence in sports that some believe essential,[89] because criminal proceedings are instituted by the state prosecutor in the name of the state.

Admittedly, criminal liability should occasionally be imposed against professional athletes. If an athlete enters the arena intending to maim or otherwise seriously injure an opposing player,[90] criminal charges are appropriate. It is doubtful, however, that many professional athletes harbor this intent.[91] Rather, the conduct that ultimately results in injury is fostered by the violence which is permitted within the rules of the game, by the fiercely competitive nature of professional athletics, and by encouragement from coaches, teammates and even spectators. When this is the case, the civil forum is a more appropriate means of dealing with the problem.

III. The Civil Forum and Violence in Professional Sports

The civil forum appears to have greater potential than its criminal counterpart for deterring violence in sports. The lesser burden of proof required in civil cases[92] coupled with the greater flexibility of tort law[93] suggests that an incidence of success higher than that experienced by state prosecutors in criminal proceedings may be possible. Moreover, civil actions provide a compromise between those who favor internal control of professional sports and those who believe that external control is essential.[94] The criminal law represents the epitome of external control—the action is instituted by the state prosecutor and the injured athlete merely plays the role of a witness in the proceedings. In the civil forum, however, the action may be brought by either the injured player or his team or by both.[95] Thus, the control is initiated from

88. The possibility of players nearing the end of their careers bringing suit to "supplement" their incomes has been mentioned. *See* Jacobson, *supra* note 4, at 95. *But see* note 96 *infra*.

89. Flakne and Caplan argue that "to suggest that the governing body of a particular sport determine appropriate sanctions for a quasi-criminal or a criminal act would be tantamount to granting the board of directors of General Motors jurisdiction over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman." Flakne & Caplan, *supra* note 2, at 33-34. This view, however, is not universally held. Others believe that " '[t]here are two great national institutions which simply cannot tolerate . . . external interference: Our Armed Forces and our . . . sports programs.' " Slusher, *Sport: A Philosophical Perspective,* 38 Law & Contemp. Prob. 129, 129 (1973) (quoting Dr. Max Rafferty, former Superintendent of Public Instruction, State of California).

90. This appears to be the intention that at least one player brings into each game. Jack Tatum "like[s] to believe that [his] best hits border on felonious assault." J. Tatum & W. Kushner, *supra* note 20, at 11.

91. Dave Elmendorf, a defensive player with the NFL's Los Angeles Rams, suggests that Tatum is " 'a minority of one.' " Time, Jan. 28, 1980, at 69, col. 1.

92. *See* note 87 *supra*.

93. For example, vicarious liability is rather limited under criminal law. *See* notes 79-80 *supra* and accompanying text. In contrast, under the doctrine of respondeat superior, an employer may be held civilly liable whenever his employee commits a tort within the scope of his employment. *See* notes 115, 133-35 *infra* and accompanying text.

94. *See* note 89 *supra*.

95. Another action arising out of the Tomjanovich incident was initiated by Tomjanovich's employer, the Houston Rockets. Houston Rockets, Inc. v. California Sports, Inc., No. H-78-416 (S.D. Tex., filed Mar. 6, 1978). The suit was subsequently settled out of court.

within. This situation is favorable because the coaches and players of a particular sport are more qualified in most cases than a state prosecutor to determine whether an opposing player or team is guilty of an unacceptable violation of the rules of the sport.[96]

Perhaps the most important advantage of the civil forum is its ability to subject professional sports teams, owners, administrators and coaches to suit. These parties may be subject to liability through the doctrine of respondeat superior, which holds the employer liable for the tortious conduct of his employees committed in the scope of their employment.[97] Moreover, retention of the employee after the tort was committed, when coupled with other circumstances, may be considered ratification of the act and as such may subject the employer to individual liability for punitive damages.[98] Finally, an employer may be held liable for his own negligence in hiring or for his failure to control or properly supervise an employee.[99]

A. *Respondeat Superior*

Several theories are often cited in support of the doctrine of respondeat superior.[100] Each one may also be used to justify the doctrine's application to professional sports. Perhaps the most common justification is that the employer has a "deeper pocket" than his employees and, thus, is more likely to have the financial resources to satisfy a judgment.[101] This is certainly true in the world of professional sports. Many professional teams are multi-million dollar franchises,[102] whereas most professional athletes earn between $62,500[103] and $180,000[104] per year.

Another principle often called upon in support of respondeat superior is the

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96. It is arguable that players injured during professional athletic events would be motivated to sue by the prospect of large recoveries or the desire for revenge. The attitudes of players questioned concerning the propriety of judicial intervention in professional sports, however, suggest that abuse of legal process is unlikely. Even those players who recognize that legal intervention may be necessary are quick to point out that this is true only in exceptional cases. *See, e.g.*, Hechter, *supra* note 22, at 439 (NFL's Alan Page suggesting that criminal prosecution would be proper only in the case of aggravated assault); Jacobson, *supra* note 4, at 95 (Chris Ward of the NFL would consider bringing suit only if he were seriously injured by an opponent's intentional misconduct). Moreover, fear that they may be scorned by players and teams throughout the league for bringing suit should discourage players from pursuing unmerited claims. *Cf. Discipline in Sports, supra* note 84, at 793 (similar proposition made with respect to litigation against unfair disciplinary measures).

97. W. Prosser, *supra* note 87, § 70, at 460; *see* notes 115, 133-35 *infra* and accompanying text.

98. *See* notes 156-59 *infra* and accompanying text.

99. *See* notes 176-83 *infra* and accompanying text.

100. *See generally* T. Baty, Vicarious Liability 146-54 (1916); 2 F. Harper & F. James, The Law of Torts §§ 26.1-.5, at 1361-74 (1956); W. Prosser, *supra* note 87, § 69, at 459.

101. *See* T. Baty, *supra* note 100, at 154; 2 F. Harper & F. James, *supra* note 100, § 26.5, at 1370-71; W. Prosser, *supra* note 87, § 69, at 459.

102. *See* note 33 *supra*.

103. *See* N.Y. Times, Dec. 30, 1979, § 5 (Sports), at 6, col. 1 (inset: average salary of professional football player in 1978).

104. *Id.* This figure represents the average salary of a professional basketball player in 1979. In that year, the average salary of a major league baseball player was $121,000, while in the NHL, the average salary was $102,500. *Id.*

entrepreneur theory.[105] This theory contemplates that damages incurred because of the tortious activity of employees should be considered part of the cost of doing business and treated accordingly.[106] Indeed, a professional sports franchise could insure against such liability[107] or pass the cost on to the general public in the form of higher ticket prices.[108]

A third rationale relies on an employer's right and duty to maintain control over his employees.[109] According to this view, holding the employer responsible for his employee's tortious conduct provides an incentive to the employer to exercise his right of control.[110] This rationale suggests that respondeat superior may be an extremely valuable weapon in combatting violence in professional sports. The doctrine makes it possible to punish professional sports teams and management for encouraging violence. This, in turn, might then induce management to control the violent tendencies of the players.[111]

It is arguable that the inducement to control violence provided by team liability under respondeat superior is seriously undermined by the team's right to indemnity from the player causing the injury. Generally, an employer may sue for indemnification whenever he is held liable for the tortious conduct of his employees.[112] In practice, however, this right is seldom pursued.[113] Moreover, indemnity actions against professional athletes would have a deterrent effect all their own. It is doubtful that a team could exercise its right of indemnity and still successfully encourage violent behavior by its players.

Generally, to hold an employer vicariously liable for his employee's acts a plaintiff must prove that a master/servant relationship existed between the

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105. *See* Lange v. National Biscuit Co., 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973); Morris, *The Torts of an Independent Contractor,* 29 Ill. L. Rev. 339, 340-41 (1934).

106. Johnston v. Long, 30 Cal. 2d 54, 64, 181 P.2d 645, 651 (1947) (Traynor, J.) ("The principal justification for the application of the doctrine of *respondeat superior* . . . is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business"); 2 F. Harper & F. James, *supra* note 100, § 26.1, at 1363-64; W. Prosser, *supra* note 87, § 69, at 459; Douglas, *Vicarious Liability and Administration of Risk* (pt. 1), 38 Yale L.J. 584, 585 (1929); Morris, *supra* note 105, at 340-41.

107. *See* 2 F. Harper & F. James, *supra* note 100, § 26.1, at 1364 n.12; W. Prosser, *supra* note 87, § 69, at 459; Morris, *supra* note 105, at 340.

108. *See* 2 F. Harper & F. James, *supra* note 100, § 26.1, at 1364 n.12; W. Prosser, *supra* note 87, § 69, at 459; Morris, *supra* note 105, at 340-41.

109. *See* 2 F. Harper & F. James, *supra* note 100, § 26.3, at 1366.

110. *Id.* at 1368-69. W. Prosser, *supra* note 87, § 69, at 459; Morris, *supra* note 105, at 341

111. *But see* notes 77-78 *supra* and accompanying text.

112. *See* Fritts v. Safeway Stores, Inc., 408 F. Supp. 828, 831-32 (D. Or. 1976); Clark v. Brooks, 377 A.2d 365, 371 (Super. Ct. 1977), *aff'd sub nom.* Blackshear v. Clark, 391 A.2d 747 (Del. 1978); Restatement of Restitution § 96 (1937).

113. *See* Wills, *Joinder of Master and Servant,* 23 Ohio St. L.J. 488, 498-99 (1962). The author states that "the master seldom attempts to enforce his right of indemnity against the servant. Policies of liability insurance carried by the master often protect the servant as well. And even when the servant is not protected by the master's liability insurance policies, there are often considerations which make it inadvisable for the master to assert his right of indemnity against the servant." *Id.; accord,* 2 F. Harper & F. James, *supra* note 100, § 26.1, at 1363 (except where employer is held vicariously liable for the torts of an independent contractor, the right of indemnity "is purely theoretical and is not pursued").

two.[114] Additionally, the plaintiff must prove that the employee was acting "within the scope of his employment" when the tort occurred.[115] A master/servant relationship exists when the employer has control, or the right of control, over the employee's performance of his duties.[116] Many factors are considered in determing the existence of control,[117] including the extent of the employer's control over the details of the work,[118] the manner of payment,[119] whether the employee is performing in the course of the employer's business rather than in some collateral capacity,[120] whether the employee offers his services to the public rather than to one individual,[121] and whether the employer has the right to terminate the employment.[122]

When viewed in light of these criteria, it is clear that the relationship between a professional sports organization and its players is one of master and servant. To illustrate, a professional football team's coaches and administrators have significant control over the manner in which the player performs

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114. *See* Mauk v. Wright, 367 F. Supp. 961, 966 (M.D Pa 1973); Scottsdale Jaycees v Superior Court, 17 Ariz. App. 571, 574, 499 P.2d 185, 188 (1972), Kuberski v Noonan, 23 Ill. App. 3d 237, 239, 318 N.E.2d 677, 679 (1974). An employer is generally not liable for the torts of an independent contractor. *See* Gaeta v. Compagnie Maritime Belge (Lloyd Royal) S.A , 359 F Supp. 493, 496 (S.D.N.Y. 1973); Hare v. Federal Compress & Warehouse Co., 359 F. Supp. 214, 216 (N.D. Miss. 1973). The key element distinguishing servants from independent contractors is the extent to which the employer exercises control over the employee's performance of his duties *See* Pruden v. United States, 399 F. Supp. 22, 25 (E.D.N.C. 1974), *aff'd*, 511 F 2d 1398 (4th Cir 1975); Bible v. First Nat'l Bank, 21 Ariz. App. 54, 56-57, 515 P.2d 351, 353-54 (1973); Wells v Whitaker, 207 Va. 616, 624, 151 S.E.2d 422, 429 (1966). *See also* notes 116-22 *infra* and accompanying text.

115. *See* Insurance Co. of N. America v. Hewitt-Robbins, Inc., 13 Ill. App. 3d 534, 535, 301 N.E.2d 78, 80 (1973); Peters v. Department of State Highways, 66 Mich. App. 560, 564 n.6, 239 N.W.2d 662, 665 n.6 (1976); W. Prosser, *supra* note 87, § 70, at 460.

116. *See* Turley v. Kotter, ___ Pa. Super. Ct. ___, ___, 398 A.2d 699, 702 (1979); Gifford-Hill & Co. v. Moore, 479 S.W.2d 711, 714 (Tex. Civ. App. 1972); 2 F. Harper & F. James, *supra* note 100, § 26.6, at 1374; W. Prosser, *supra* note 87, § 70, at 460, Restatement (Second) of Agency § 220(1) (1958).

117. *See generally* Restatement (Second) of Agency § 220(2)(a)-(j) (1958).

118. *See* Avis Rent A Car Sys., Inc. v. United States, 503 F.2d 423, 429 (2d Cir 1974), Gradler v. Prudential Property & Cas. Ins. Co., 464 F. Supp. 575, 578 (W.D. Pa. 1979), Mav Freight Serv., Inc. v. United States, 462 F. Supp. 503, 507 (E.D.N Y. 1978); Lilly v. County of Cook, 60 Ill. App. 3d 573, 578, 377 N.E.2d 136, 140 (1978).

119. *See* Youngblood v. Morrison Grain Co., 467 F. Supp. 758, 761 (W D La 1978) (how party was paid and by whom), *aff'd*, 591 F.2d 1207 (5th Cir. 1979); Mav Freight Serv , Inc. v. United States, 462 F. Supp. 503, 507 n.1 (E.D.N.Y. 1978) (manner of payment); Savoie v Fireman's Fund Ins. Co., 347 So. 2d 188, 191 (La. 1977) (payment of wages)

120. *See* Avis Rent A Car Sys. Inc. v. United States, 503 F.2d 423, 429 (2d Cir 1974), Mav Freight Serv., Inc. v. United States, 462 F. Supp. 503, 507 (E.D.N.Y 1978).

121. *See* Mav Freight Serv., Inc. v. United States, 462 F Supp. 503, 507 n 1 (E.D.N Y 1978); Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D Va. 1962).

122. *See* Gradler v. Prudential Property & Cas. Ins. Co., 464 F Supp. 575, 578 (W D. Pa. 1979); Mav Freight Serv., Inc. v. United States, 462 F. Supp. 503, 507 n 1 (E.D.N Y 1978), Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E D Va 1962), Lilly v County of Cook, 60 Ill. App. 3d 573, 578, 377 N.E.2d 136, 140 (1978), Savoie v Fireman's Fund Ins. Co., 347 So. 2d 188, 191 (La. 1977).

his assigned duties.[123] This control often extends beyond the course of the game and covers the player's conduct off the playing field.[124] The team may, for example, enforce certain conditioning requirements,[125] establish a public dress code,[126] or even impose a nightly curfew on its players.[127] The team also has the right to discipline any player who violates any provision of the constitution, bylaws, rules or regulations of the league or the team.[128] In addition, players are generally compensated in equal semi-monthly installments rather than on a per game basis.[129] In the event that a player is injured during a game he continues to receive his salary and the team bears the cost of medical and hospital care.[130] While under contract, a player is barred from

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123. *See* NFL Standard Player Contract cl. 2 [hereinafter cited as NFL Contract], *reprinted in* E. Farnsworth, W. Young & H. Jones, Cases and Materials on Contracts 261 (2d ed. Supp. 1972) [hereinafter cited as Farnsworth Supp.] ("The Player agrees that . . . he will play football . . . as directed by the Club according to: this contract; the Constitution and By-Laws, Rules and Regulations of the League and of the Club . . . ."); Uniform Player's Contract cl. 9(a) [hereinafter cited as Baseball Contract], *reprinted in* Am. League of Professional Baseball Clubs, Nat'l League of Professional Baseball Clubs & Major League Baseball Players Ass'n, Basic Agreement 59-60 (1976) [hereinafter cited as Basic Agreement].

124. *See* Mauk v. Wright, 367 F. Supp. 961, 964-65 (M.D. Pa. 1973) (regulations imposed by Washington Redskin coach during pre-season training); Baseball Contract cl. 3(b), *reprinted in* Basic Agreement, *supra* note 123, at 54-55.

125. *See* Mauk v. Wright, 367 F. Supp. 961, 964-65 (M.D. Pa. 1973) (players required to meet certain weight requirements); *cf.* NFL Contract cl. 6, *reprinted in* Farnsworth Supp., *supra* note 123, at 262 (team can terminate contract if, in the opinion of the head coach, the player has not maintained himself in excellent physical condition); Baseball Contract cl. 7(b)(1), *reprinted in* Basic Agreement, *supra* note 123, at 58 (same).

126. *See* Mauk v. Wright, 367 F. Supp. 961, 965 (M.D. Pa. 1973) (players required to wear coats and neckties in all public places); NFL Management Council & NFL Players Ass'n, Collective Bargaining art. V, § 2. at 10 (teams may make and enforce reasonable rules governing players' appearance while representing the team both on the field and in public places); Baseball Contract cl. 3(b), *reprinted in* Basic Agreement, *supra* note 123, at 54-55.

127. *See* Mauk v. Wright, 367 F. Supp. 961, 964 (M.D. Pa. 1973).

128. NFL Contract cl. 4, *reprinted in* Farnsworth Supp., *supra* note 123, at 261; *see* Baseball Contract, reg. 5, *reprinted in* Basic Agreement, *supra* note 123, at 64.

129. NFL Contract cl. 3, *reprinted in* Farnsworth Supp., *supra* note 123, at 261; *see* Baseball Contract cl. 2, *reprinted in* Basic Agreement, *supra* note 123, at 53-54.

130. NFL Contract cl. 14, *reprinted in* Farnsworth Supp., *supra* note 123, at 263; *see* Baseball Contract, regulation 2, *reprinted in* Basic Agreement, *supra* note 123, at 63. This clause strongly suggests that the team and the player contemplate the existence of a master and servant relationship. Independent contractors are generally not covered by workman's compensation laws. *See* Holman Enterprise Tobacco Warehouse v. Carter, 536 S.W.2d 461, 462-63 (Ky. 1976); *In re* Dudley, 256 A.2d 592, 594 (Me. 1969); Cromwell Gen. Contractor, Inc. v. Lytle, 222 Tenn. 633, 641-42, 439 S.W.2d, 598, 602 (1969). *But cf.* Mass. Ann. Laws ch. 152, § 1(4) (Michie/Law. Co-op 1976) (professional athletes excluded from definition of "employee" under Massachusetts workman's compensation statute when the contract between team and player provides for the payment of wages during any disability arising out of such employment). The Restatement (Second) of Agency provides that the contemplation of the parties should be considered in determining whether a master and servant relationship exists between them. Restatement (Second) of Agency § 220(2)(i), Comment h (1958); *accord,* Nicholas v. Moore, 570 P.2d 174, 177 (Alaska 1977). *See also* Taylor v. Local No. 7, Int'l Union of Journeyman Horseshoers, 353 F.2d 593, 600 (4th Cir. 1965) (horseshoers' belief that they were independent contractors considered although court determined that employer/employee

playing football or participating in any other sporting event for another employer or on his own behalf without the team's prior consent.[131] Finally, the team may terminate a player's contract if he fails to exhibit the skill required of a professional football player.[132] The combination of all these factors tends to establish the existence of a master/servant relationship.

The second element of the plaintiff's respondeat superior claim is that the act occurred within the scope of the servant's employment. The term "within the scope of employment"[133] is used to convey a rather nebulous concept incapable of precise definition. "It is . . . no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not."[134] The Restatement (Second) of Agency attempts to provide some guidance: "To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized."[135] Nevertheless, the success of a suit against a professional athletic team, owner or coach under respondeat superior is heavily dependent upon the facts of the case and the jurisdiction in which the action is brought.

For example, if a football player recklessly or intentionally[136] injures an opposing player while executing a block or a tackle, both requirements of the respondeat superior doctrine would appear to be met—an employment relationship exists between the player and the team[137] and the act causing the

relationship did exist between horseshoers and trainers), *cert. denied*, 384 U.S. 969 (1966); Cape Shore Fish Co. v. United States, 330 F.2d 961, 969-70 (Ct. Cl. 1964) (fact that owner of scallop boat insured against claims by captain and crew for accidents at sea, coupled with the fact that captain did not believe that he needed to insure against the possibility of such accidents, indicated that parties believed an employer/employee relationship existed between them).

131. NFL Contract cls. 3, 5, *reprinted in* Farnsworth Supp., *supra* note 123, at 261, 261-62; *see* Baseball Contract cls. 5(a), (b), *reprinted in* Basic Agreement, *supra* note 123, at 56. In football, the commissioner's consent is also required before a player can play football for an employer other than his team. *See* NFL Contract cl. 5, *reprinted in* Farnsworth Supp., *supra* note 123, at 261-2.

132. NFL Contract cl. 6, *reprinted in* Farnsworth Supp., *supra* note 123, at 262; *see* Baseball Contract cl. 7(b)(2), *reprinted in* Basic Agreement, *supra* note 123, at 58.

133. Although "within the scope of employment" is the most commonly used term, courts frequently use other terms interchangeably. *See, e.g.*, Rusnack v. Giant Food, Inc., 26 Md. App. 250, 261, 337 A.2d 445, 451 (1975) ("course of employment"); Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524, 534 (Mo. 1968) ("course and scope of employment").

134. W. Prosser, *supra* note 87, § 70, at 460.

135. Restatement (Second) of Agency § 229 (1) (1958). Section 229(2) lists several matters that should be considered in determining whether an act was committed within the scope of employment, including the time, place and purpose of the act, the previous relations between the master and servant, whether the act is commonly performed by such servants, whether performance of the act by the servant was foreseeable, the similarity of the act performed to the act authorized and the extent of departure from the normal manner of carrying out the master's business. *See* Restatement (Second) of Agency § 229(2)(a)-(j) (1958). *But see* notes 133-34 *supra* and accompanying text.

136. In *Hackbart*, the United States Court of Appeals for the Tenth Circuit suggested that negligent conduct that causes injury in the course of a game is not actionable. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524-25 (10th Cir.), *cert. denied*, 100 S. Ct. 275 (1979); *see* notes 7-8 *supra* and accompanying text.

137. *See* notes 116-32 *supra* and accompanying text.

injury—the block or tackle—is clearly authorized. The fact that the player deliberately tried to injure his opponent does not relieve the team of liability, as it is well settled that an employer is liable for the intentional torts of his employees committed within the scope of employment.[138] It is also irrelevant that the act was probably carried out in an unauthorized manner. If it is clear that the player's action was simply his own manner of accomplishing an authorized purpose, the team "cannot escape responsibility no matter how specific, detailed and emphatic [the coach's] orders may have been to the contrary."[139] Moreover, the team would be held liable even if the player's action was partially motivated by a desire for personal revenge. In general, vicarious liability attaches if the employee's conduct was at least partially designed to carry out his employer's business.[140]

If the player strikes an opponent when play has ended, however, the team's liability would not be as clear. Although the employment relationship would still exist, the act causing the injury would probably be unauthorized. Thus, it is possible that a jury might find that the player was not acting within the scope of his employment. The outcome of the case might depend upon how strictly the jurisdiction in which the suit is brought applies the doctrine of respondeat superior.

In jurisdictions that apply the doctrine narrowly, vicarious liability for unauthorized intentional torts attaches only if the employee was acting in furtherance of his employer's interest.[141] The employer is held liable only if it can be shown that "the employee's [act] was in response to the plaintiff's conduct which was *presently* interfering with [his] ability to perform his duties

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138. *See* Clark Equip. Co. v. Wheat, 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874, 882 (1979); Pelletier v. Bilbiles, 154 Conn. 544, 547, 227 A.2d 251, 252 (1967); Davis v. Childers, 134 Ga. App. 534, 536, 215 S.E.2d 297, 299 (1975); Awe v. Striker, 129 Ill App. 2d 478, 480-81, 263 N.E.2d 345, 346 (1970); W. Prosser, *supra* note 87, § 70, at 464. An exception to this rule is sometimes made when the employee's conduct is highly outrageous. *See, e.g.*, Wellman v. Pacer Oil Co., 504 S.W.2d 55 (Mo.) (oil company and filling station owner not liable for injuries suffered by patron when station attendant shot him), *cert. denied*, 416 U.S. 961 (1974); Howard v. Zaney Bar, 369 Pa. 155, 85 A.2d 401 (1952) (employer not liable for injuries sustained by patron when shot by employee bartender). *But see* Monk v. Veillon, 312 So. 2d 377 (La. Ct. App. 1975) (lounge operator held liable for injuries sustained by patron when bouncer shot him in leg).

139. W. Prosser, *supra* note 87, § 70, at 461 (footnote omitted); *see* Ohio Farmers Ins. Co. v. Norman, 122 Ariz. 330, 331-32, 594 P.2d 1026, 1027-28 (Ct. App. 1979); Richard v. Illinois Bell Tel. Co., 66 Ill. App. 3d 825, 847, 383 N.E.2d 1242, 1259 (1978); Rusnack v. Giant Food Inc., 26 Md. App. 250, 264, 337 A.2d 445, 453 (1975); Restatement (Second) of Agency § 230 (1958).

140. *See* Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 17 & n.6 (Minn. 1979); Best Steel Bldgs., Inc. v. Hardin, 553 S.W.2d 122, 128 (Tex. Civ. App. 1977); Combined Ins. Co. v. Sinclair, 584 P.2d 1034, 1041 (Wyo. 1978); W. Prosser, *supra* note 87, § 70, at 461; Restatement (Second) of Agency § 236, Comment a, Illustration 1 (1958).

141. *See, e.g.*, Sandman v. Hagan, 261 Iowa 560, 568-69, 154 N.W.2d 113, 118 (1967) (court recognized "modern trend" to impose liability on employers whenever tort was committed "because of the employment situation" but refused to extend vicarious liability this far; "[t]he employment must be something more than the mere occasion for the fracas"); Williams v. Community Drive-In Theater, Inc., 214 Kan. 359, 366, 520 P.2d 1296, 1301-02 (1974); Miller v. Federated Dep't Stores, Inc., 364 Mass. 340, 350, 304 N.E.2d 573, 580 (1973); Kuehn v. White, 24 Wash. App. 274, ___, 600 P.2d 679, 681-83 (1979).

successfully."[142] In these jurisdictions, in the absense of a finding that the blow was expressly or impliedly authorized, it is doubtful that the team would be held liable for the player's conduct. Under the circumstances, the player's response did not eliminate a present interference with his ability to carry out his assigned duties. It is irrelevant whether the blow was unprovoked or was designed to punish the opposing player for past offenses. In either case, the team would not be liable for any injury that the opponent may have sustained.[143]

Other jurisdictions, however, apply respondeat superior more liberally when dealing with intentional torts. Some jurisdictions hold the employer responsible for an employee's intentional misconduct if it is incidental to the performance of the employee's duties.[144] Under this standard, if a player strikes an opponent out of anger and frustration developed over the course of the game, the team may be subject to liability.[145] Still other jurisdictions appear to have replaced the traditional requirement of "within the scope of employment" with the much broader workmen's compensation standard, which holds the employer liable for all tortious acts committed by the employee "arising out of the employment."[146] In these jurisdictions, it appears that liability is imposed on the employer simply because the employee was in a position to commit the act as a result of his employment.[147] Under this

142. Miller v. Federated Dep't Stores, Inc., 364 Mass. 340, 350, 304 N E.2d 573, 580 (1973) (emphasis added).

143. *See* Miller v. Federated Dep't Stores, Inc., 364 Mass. 340, 350, 304 N E 2d 573, 580 (1973) (employer not liable for employee's assault on plaintiff customer although there was some evidence that in the past plaintiff had interfered with employee in the performance of his duties), Averill v Luttrell, 44 Tenn. App. 56, 60-61, 311 S.W.2d 812, 814 (1957) (minor league baseball team not liable for assault by player on an opponent in response to opponent's act of throwing bat toward pitcher).

144. *See, e.g.*, Lyon v. Carey, 533 F.2d 649, 652 (D.C. Cir. 1976) (employee's attack spurred by a dispute which arose "naturally and immediately . . . about two items of great significance in connection with his job"); LeBrane v. Lewis, 292 So. 2d 216, 218 (La. 1974) (assault was "reasonably incidental" to the performance of supervisory employee's duty to fire subordinate employees), Lange v. National Biscuit Co., 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973) (employer liable for employee's assault "when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place")

145. *See, e.g.*, LeBrane v. Lewis, 292 So. 2d 216 (La. 1974) (employer held liable for injuries sustained by plaintiff, a former employee, in an altercation with a supervisory employee soon after the plaintiff's discharge even though the two had agreed to go outside and fight)

146. Carr v. William C. Crowell Co., 28 Cal. 2d 652, 654, 171 P.2d 5, 7 (1946) (Traynor, J.), *see* Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 621, 124 Cal Rptr 143, 150 (1975), Coats v Construction & Gen. Laborers Local No. 185, 15 Cal. App. 3d 908, 913, 93 Cal Rptr 639, 641 (1971). The only other court to apply the workman's compensation standard to respondeat superior cases appears to be the United States Court of Appeals for the Second Circuit In Ira S Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968), a drunken Coast Guard seaman who was not on duty opened three water intake valves on a dry dock located near his ship As a result, the ship slid off the block upon which it was perched and crashed into the drydock wall. The owner of the drydock subsequently sued the United States for the damage done to the wall. The court held for the plaintiff, reasoning that "[t]he proper test here bears . resemblance to that which limits liability for workmen's compensation . . . . The employer should be held to expect risks, to the public also, which arise 'out of and in the course of' his employment of labor " *Id* at 171-72 (quoting 2 F Harper & F. James, *supra* note 100, § 26.7, at 1377-78).

147. *See* Carr v. William C. Crowell Co., 28 Cal. 2d 652, 656, 171 P 2d 5, 7 (1948) (Traynor, J.)

approach, the team's liability for any unauthorized blow delivered by one of its players is almost certain.

Because the incident giving rise to the *Tomjanovich* suit occurred in California, the case was decided under the law of that state, a jurisdiction which adopts a very liberal construction of respondeat superior.[148] Thus, it is difficult to determine what the result of the *Tomjanovich* case—insofar as it held the team liable on the basis of respondent superior—might have been in another jurisdiction. This is especially true in light of two earlier cases involving minor league baseball teams. In *Atlanta Baseball Co.* v. *Lawrence*,[149] a spectator brought an action against a minor league baseball team for injuries suffered when a player, allegedly responding to catcalls and criticism of his play, went into the stands and assaulted the spectator.[150] The court held that the team could not be held liable under respondeat superior because the assault "was not within the scope of [the player's] employment nor in the prosecution of his master's business, but was his own personal affair in resenting a real or fancied insult."[151] Similarly, in *Averill* v. *Luttrell*,[152] a minor league baseball player sued an opposing player and his team for injuries suffered when the defendant player struck him in the back of the head during a game. Relying heavily on *Atlanta Baseball*,[153] the court dismissed the action against the team, characterizing the assault as "a wilful independent act on Averill's part, entirely outside the scope of his duties."[154] Although these cases can be distinguished from *Tomjanovich* in a variety of ways,[155] the most compelling distinction appears to be that they were decided in jurisdictions following a stricter approach to respondeat superior.

If it is established that the player's intentional or reckless misconduct occurred within the scope of his employment, the team may be liable for punitive damages. Punitive damages are often awarded when it is evident that the tortfeasor deliberately tried to injure the plaintiff or otherwise acted with a conscious disregard for the safety of others.[156] In some jurisdictions, an

("defendant's enterprise required an association of employees with third parties, attended by the risk that someone might be injured. 'The risks of such associations and conditions were risks of the employment.' " (quoting Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 472, 128 N.E. 711, 711 (1920) (Cardozo, J.))).

148. *See* Court's Instructions to the Jury at 8, Tomjanovich v. California Sports, Inc., No. H-78-243 (S.D. Tex. Aug. 17, 1979); note 146 *supra* and accompanying text.

149. 38 Ga. App. 497, 144 S.E. 351 (1928).

150. *Id.* at 498-99, 144 S.E. at 352.

151. *Id.* at 499, 144 S.E. at 352.

152. 44 Tenn. App. 56, 311 S.W.2d 812 (1957).

153. *Id.* at 62-63, 311 S.W.2d at 815.

154. *Id.* at 61, 311 S.W.2d at 814.

155. One distinction is that *Atlanta Baseball* and *Averill* involved baseball, one of the least violent of all sports, rather than basketball. Because basketball is also generally not considered a violent sport, however, this distinction is weak. It should also be noted that *Atlanta Baseball* and *Averill* were decided 50 and 20 years ago, respectively. Because *Tomjanovich* was decided in an atmosphere of intensive athletic violence, it was arguably more reasonable to consider such an outburst within the scope of employment.

156. *See* Kelite Prods., Inc., v. Binzel, 224 F.2d 131, 143-44 (5th Cir. 1955); Honaker v. Leonard, 325 F. Supp. 212, 214 (E.D. Tenn. 1971); W. Prosser, *supra* note 87, § 2, at 9-10. Four states reject the doctrine of punitive damages. *See* Baggett v. Richardson, 473 F.2d 863, 865 (5th Cir.

employer is held liable for punitive damages whenever an employee, while acting within the scope of his employment, commits a tort for which punitive damages may be assessed.[157] In other jurisdictions, an employer cannot be held liable for punitive damages in the absence of proof that he or his responsible representative was guilty of a wrongful act.[158] In these jurisdictions, punitive damages will lie against the employer if it is found that the employee's tortious conduct was authorized prior to its commission or subsequently ratified.[159]

As in the criminal forum, proving that a player was expressly authorized to assault an opponent would be extremely difficult.[160] Under tort law, however, authority may be implied from the statements or conduct of the employer.[161] As a result, evidence indicating that the team's administrators and coaches generally condone and encourage violence[162] may be sufficient to render the team liable for punitive damages.[163] In addition, by retaining the player after the incident, the team may be found to have ratified his behavior and thus become subject to punitive liability.[164] Generally, retention alone does not

1973) (Louisiana); Caperci v. Huntoon, 397 F.2d 799, 801 & n.2 (1st Cir.) (Massachusetts; punitive damages not recoverable unless authorized by statute), *cert. denied*, 393 U.S. 940 (1968); Miller v. Kingsley, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975); Maki v. Aluminum Bldg. Prods., 73 Wash. 2d 23, 25, 436 P.2d 186, 187 (1968) (punitive damages not recoverable unless authorized by statute).

157. *See* Ray Dodge, Inc. v. Moore, 251 Ark. 1036, 1044, 479 S.W. 2d 518, 523 (1972); Wackenhut Corp. v. Greene, 238 So. 2d 431, 432 (Fla. Dist. Ct. App. 1970); Chupp v. Henderson, 134 Ga. App. 808, 812, 216 S.E.2d 366, 368 (1975); Johnson v. Allen, 448 S.W.2d 265, 269 (Mo. Ct. App. 1969); Stroud v. Denny's Restaurant, Inc., 271 Or. 430, 435, 532 P.2d 790, 793 (1975); Note, *Liability of Employers for Punitive Damages Resulting from Acts of Employees*, 54 Chi.-Kent L. Rev. 829, 840-41 & n.98 (1978) [hereinafter cited as *Punitive Damages*]; Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 Yale L.J. 1296, 1299-1300 & 1299 n.33 (1961) [hereinafter cited as *Assessment of Punitive Damages*].

158. *See* Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 424-25 (1976); Security Aluminum Window Mfg. Corp. v. Lehman Assocs., Inc., 108 N.J. Super. 137, 146, 260 A.2d 248, 253 (1970); Couillard v. Bank of N.M., 89 N.M. 179, 181, 548 P.2d 459, 461 (1976); *Punitive Damages*, *supra* note 157, at 831 & n.20; *Assessment of Punitive Damages*, *supra* note 157, at 1300 & n.35.

159. *See* Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 424-25 (1976); Security Aluminum Window Mfg. Corp. v. Lehman Assocs., Inc., 108 N.J. Super. 137, 146, 260 A.2d 248, 253 (1970); Couillard v. Bank of N.M., 89 N.M. 179, 181, 548 P.2d 459, 461 (1976); *Punitive Damages*, *supra* note 157, at 831.

160. *See* notes 81-83 *supra* and accompanying text.

161. *See* Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101, 114 (1893); Washington Garage Co. v. Klare, 248 A.2d 681, 683 (D.C. 1968) (quoting District Motor Co. v. Rodill, 88 A.2d 489, 494 (D.C. 1952)); W. Seavey, Handbook of the Law of Agency § 21 H (1964) (principal's acquiescence in agent's conduct implies authority).

162. *See* notes 75, 78 *supra*.

163. *See* Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 844 & n.21 (2d Cir. 1967) (Friendly, J.) (punitive damages may lie against an employer "if the proof warrant[s] a finding that misconduct by [employees] was so widespread as to indicate authorization or a deliberate practice [by the employer] of keeping [his] eyes closed"); Allard v. Church of Scientology, 58 Cal. App. 3d 439, 452, 129 Cal. Rptr. 797, 805 (1976) (religious organization's general policy condoning harrassment of organization's "enemies" constituted authorization of malicious prosecution of plaintiff by member), *cert. denied*, 429 U.S. 1091 (1977).

164. Holland v. Nelson, 5 Cal. App. 3d 308, 314, 85 Cal. Rptr. 117, 121 (1970); Shoopman v.

constitute ratification;[165] additional evidence suggesting that the employer had knowledge of the act and an intent to ratify is necessary.[166] In professional athletics, this approval may be established in several ways. Coaches and team administrators have been known to express approval of the violent tendencies of their players.[167] Armed with evidence of such statements, it may not be difficult to convince a jury that by retaining the player the team intended to ratify his behavior.[168] Ratification may also be established by the team's retention of the player in light of continuous displays of violence[169] or by the team's failure to take any disciplinary action against the player.[170]

Ratification played an important role in the *Tomjanovich* case. Under California law, punitive damages cannot be assessed against an employer

Pacific Greyhound Lines, 169 Cal. App. 2d 848, 856, 338 P.2d 3, 9 (1959); McChristian v. Popkin, 75 Cal. App 2d 249, 256, 171 P.2d 85, 90-91 (1946). The team's contractual obligations to the player do not require that he be retained at all costs to the team Generally, professional sports contracts provide that the team may terminate the contract if the player fails to comply with league- or team-imposed rules and regulations. *See* NFL Contract cls. 4, 6, *reprinted in* Farnsworth Supp., *supra* note 123, at 261, 262; Baseball Contract cl. 7(b)(1), *reprinted in* Basic Agreement, *supra* note 123, at 58 (team can terminate the contract any time the player "fail[s], refuse[s] or neglect[s] to conform his personal conduct to the standards of good citizenship and good sportsmanship"). Moreover, even if the team does not terminate the contract, it may negative any presumption of ratification by releasing the player while continuing to fulfill its obligations under the contract. For example, the New York Yankees continued to pay former manager Billy Martin's salary for several weeks after dismissing him following his involvement in an altercation in a hotel lobby. *See* N.Y. Times, Feb. 18, 1980, § C (Sports), at 9, col. 4. As punitive damage awards may be quite large, the team may choose to take this course of action in order to limit liability. Finally, it is significant to note that the jury in the *Tomjanovich* case was expressly instructed that it could consider the Lakers' retention of Kermit Washington after the incident as evidence of ratification. *See* note 173 *infra*.

165. *See, e.g.*, Woodard v. City Stores Co., 334 A.2d 189, 191 (D.C. 1975); Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 635, 446 P.2d 821, 827 (1968).

166. *See* Witt v. United States, 319 F.2d 704, 710 (9th Cir. 1963) (quoting Tauscher v. Doernbecher Mfg. Co., 153 Or. 152, 164, 56 P.2d 318, 323 (1936)); Woodard v. City Stores Co., 334 A.2d 189, 191 (D.C. 1975); Abraham v. S.E. Onorato Garages, 50 Hawaii 628, 635, 446 P.2d 821, 827 (1968).

167. While coaching the Philadelphia Flyers, Fred Shero was asked to comment on a bench-clearing brawl which arose out of a fight between Orest Kindrachuk of the Flyers and an opposing player. Shero responded: " 'Some people say I should have been fined for not controlling my players . . . . Hell, I would have fined them if they hadn't gone in to support Kindrachuk.' " Time, Jan. 6, 1975, at 71, col. 2; *see* notes 75-78 *supra* and accompanying text

168. Expressions of approval of a violent act already committed would not aid the prosecutor in a criminal action against the coach or team official. An individual cannot aid or abet the commission of a completed crime. Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969). Moreover, ratification does not establish the basis of criminal liability. United States v. Food & Grocery Bureau, 43 F. Supp. 966, 971 (S.D. Cal. 1942); Cook v. Commonwealth, 141 Ky 439, 441, 132 S.W. 1032, 1032 (1911).

169. *See, e.g.*, Coats v. Construction & Gen. Laborers Local No. 185, 15 Cal. App. 3d 908, 913-14, 915-16, 93 Cal. Rptr. 639, 642, 643 (1971) (union president had knowledge of violent propensities of two union employees prior to their assault of a union member).

170. *See* Jameson v. Gavett, 22 Cal. App. 2d 646, 650, 71 P 2d 937, 939 (1937) (employer discussed assault with employee and expressed no disapproval of the act); May Dep't Stores Co. v. Devercelli, 314 A.2d 767, 770 (D.C. 1973) (defendant department store failed to respond to plaintiff's letter requesting that it repudiate tortious conduct of its employees).

unless the wrongful act requirement[171] is satisfied.[172] Tomjanovich recovered $1.5 million in punitive damages, with the jury evidently finding sufficient evidence, including the retention of the defendant player after the incident,[173] to conclude that the team ratified his actions.

The rationales underlying respondeat superior strongly support the application of the doctrine to professional sports. A master/servant relationship exists between the team and its players and the doctrine appears to apply in all jurisdictions when tortious conduct occurs in the course of play. When violence occurs out of play, however, the vagaries of state law make it difficult to determine the outcome of a suit against the team under respondeat superior.

B. *Negligent Hiring/Failure to Supervise*

In jurisdictions that adopt a rather stringent approach to the doctrine of respondeat superior as applied to intentional torts,[174] the player injured by an opponent's violent outburst may alternatively be able to recover from the opposing team under theories based on the negligent hiring principle.[175] These theories provide several advantages that may be beneficial in the fight against professional sports violence.

An employer can be held directly liable to an injured third party if he himself is negligent or reckless in his hiring practices[176] or in supervising and controlling his employees.[177] The employer is expected to use reasonable care in selecting[178] and retaining[179] employees who, as a direct result of the

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171. *See* notes 158-59 *supra* and accompanying text.

172. *See* Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18-19, 130 Cal. Rptr 416, 424-25 (1976).

173. The jurors were expressly instructed that they could consider retention as some evidence of ratification. Court's Instructions to the Jury at 13, Tomjanovich v. California Sports, Inc., No. H-78-243 (S.D. Tex. Aug. 17, 1979).

174. *See* notes 141-43 *supra* and accompanying text.

175. *See generally* Restatement (Second) of Agency § 213 (1958); Restatement (Second) of Torts § 317 (1965); Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi.-Kent L. Rev. 717 (1977).

176. *See, e.g.*, Colwell v. Oatman, 32 Colo. App. 171, 176, 510 P.2d 464, 466-67 (1973) (defendant employment agency selected unfit employee to perform temporary labor for plaintiff); Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 932, 387 N.E.2d 1241, 1248 (1979) (employer's reckless hiring practices led to employment of an individual who had previously been arrested twice to serve as an armed security guard); Evans v. Morsell, 284 Md. 160, 166, 395 A.2d 480, 483 (1978) (quoting Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951)); Restatement (Second) of Agency § 213(b) (1958).

177. *See* International Distrib. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 139-40 (D.C. Cir. 1977) (reversed and remanded because jury might conclude that defendant burglar alarm company inadequately supervised its employees); Sanchez v. United States, 506 F.2d 702, 705 (10th Cir. 1974) (master must exercise reasonable care to control his servants for the protection of third parties); Parr v. McDade, 161 Ind. App. 106, 117-18, 314 N.E.2d 768, 774 (1974) (quoting Restatement (Second) of Torts § 317 (1965)) (landlord permitted employee residing in building to use an open-flame gas heater); Restatement (Second) of Agency § 213(c), (d) (1958), Restatement (Second) of Torts § 317 (1965).

178. *See* Colwell v. Oatman, 32 Colo. App. 171, 176, 510 P.2d 464, 466-67 (1973); Evans v. Morsell, 284 Md. 160, 166, 395 A.2d 480, 483 (1978) (quoting Fleming v. Bronfin, 80 A.2d 915, 917

employment,[180] will be in contact with third persons.[181] This duty has been interpreted as requiring a minimal investigation into the prospective employee's background prior to hiring.[182] Once the individual is hired, the employer has a duty to exercise reasonable care in the supervision of his activities.[183]

The Restatement (Second) of Agency states that an employer who negligently hires a dangerous person to perform a task that puts him in direct contact with third persons is subject to liability "for harm caused by the [person's] vicious propensity."[184] This language is particularly appropriate to the *Tomjanovich* situation. Prior to the incident resulting in that suit, Kermit Washington, the basketball player who assaulted Tomjanovich, "was known as a so-called 'enforcer', and . . . had a reputation or propensity for unsportsmanlike conduct or vicious physical violence."[185] It is doubtful his

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D.C. 1951); Vanderhule v. Berinstein, 285 A.D. 290, 294, 136 N.Y.S.2d 95, 100 (3d Dep't), *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (3d Dep't 1954)); Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 412-13, 189 N.W.2d 286, 288 (1971).

179. *See, e.g.,* Vanderhule v. Berinstein, 285 A.D. 290, 294-95, 136 N.Y.S.2d 95, 100-01 (3d Dep't), *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (3d Dep't 1954) (employer who observed employee acting strangely prior to his assault of a customer should have realized that it was dangerous to retain him), *quoted in* Evans v. Morsell, 284 Md. 160, 166, 395 A.2d 480, 483 (1978); Dempsey v. Walso Bureau, Inc., 431 Pa. 562, 565-66, 246 A.2d 418, 419-20 (1968) (quoting Restatement (Second) of Torts § 317(a) (1965)).

180. *See, e.g.,* Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 534 P.2d 1073 (1975) (connection between employment and plaintiff not sufficient when a guard, employed only to patrol the premises and summon help, accidently shot plaintiff while having a company car serviced); Insurance Co. of N. America v. Hewitt-Robbins, Inc., 13 Ill. App. 3d 534, 301 N.E.2d 78 (1973) (connection to employment not sufficient when employee, using a company car for personal reasons, collided with plaintiff's vehicle); Restatement (Second) of Torts § 317(a)(i) (1965) (employee must be in a place where he is privileged to be as a result of the employment).

181. *See, e.g.,* Evans v. Morsell, 284 Md. 160, 166, 395 A.2d 480, 483 (1978) (quoting Fleming v. Bronfin, 80 A.2d 915, 917 (D.C. 1951)) (duty imposed on employers who serve the public); Restatement (Second) of Agency § 213(b) (1958) (employer may be liable for negligently employing unfit persons "in work involving risk of harm to others").

182. *See* Kendall v. Gore Properties, Inc., 236 F.2d 673, 677-80 (D.C. Cir. 1956) (employer found negligent for failing to make any inquiry into employee's background); Evans v. Morsell, 284 Md. 160, 166-68, 395 A.2d 480, 484 (1978) (employer required to make a reasonable inquiry but need not inquire about a possible criminal record); Weiss v. Furniture-in-the-Raw, 62 Misc. 2d 283, 284-85, 306 N.Y.S.2d 253, 254-55 (Civ. Ct. N.Y. 1969) (employer found negligent for failing to make a cursory or routine inquiry into employee's background). *See also* Tyus v. Booth, 64 Mich. App. 88, 92, 235 N.W.2d 69, 71 (1975) (in-depth investigation not required).

183. *See* International Distrib. Corp. v. American Dist. Tel. Co., 569 F.2d 136, 139-40 (D.C. Cir. 1977); Sanchez v. United States, 506 F.2d 702, 705 (10th Cir. 1974); Parr v. McDade, 161 Ind. App. 106, 117-18, 314 N.E.2d 768, 774 (1974); Restatement (Second) of Agency § 213(c), (d) (1958); Restatement (Second) of Torts § 317 (1965).

184. Restatement (Second) of Agency § 213, Comment d (1958); *see* Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 932, 387 N.E.2d 1241, 1248 (1979); Evans v. Morsell, 284 Md. 160, 166, 395 A.2d 480, 484 (1978).

185. Plaintiffs' Original Petition at 5, Tomjanovich v. California Sports, Inc., No. H-78-243 (S.D. Tex. Aug. 17, 1979); *see* Papanek, *The Enforcers,* Sports Illustrated, Oct. 31, 1977, at 43, col. 1, at 44, col. 2.

team was unaware of this reputation. Thus, it may be argued that the team was negligent in failing to instruct Washington properly and to control his behavior. Even if the team had no knowledge of his past conduct, however, it would probably still be subject to liability under the negligent hiring theory, as a minimal investigation surely would have uncovered Washington's "vicious propensity."[186]

The importance of the theories of negligent hiring and supervision in the context of violence in professional sports cannot be overemphasized. Under these theories of liability, as opposed to respondeat superior, it is not necessary that the tort be committed within the scope of employment. The employer's liability is based on his own misfeasance or nonfeasance rather than that of his employee.[187] "Liability results . . . because the employer antecedently had reason to believe that an undue risk of harm would exist *because* of the employment."[188] Moreover, because the teams and coaches are subject to direct rather than vicarious liability,[189] no option of indemnity exists to lessen the deterrent effect of team liability.[190] Finally, punitive damages are also available to the plaintiff under these theories, though only if the team was at least reckless in its employment of the violent player.[191]

As noted above, it appears that violent players are hired and violent conduct is encouraged because violence increases the profitability of professional team athletics.[192] It is unfortunate that in some jurisdictions teams that implicitly encourage violence may escape liability under the doctrine of respondeat superior because the player's conduct is considered outside the scope of his employment. Theories of recovery based on the negligence of

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186. Restatement (Second) of Agency § 213, Comment d (1958).

187. *See* Lange v. B & P Motor Express, Inc., 257 F. Supp. 319, 323-24 (N.D. Ind. 1966). It is interesting to note that in *Lange* the court suggested that, under Indiana law, the theories of respondeat superior and negligent hiring are mutually exclusive. *Id.* at 323; *see* Restatement (Second) of Torts § 317, Comment a (1965) (negligent hiring theory only applies when employee was acting outside the scope of his employment). Some jurisdictions refuse to recognize the negligent hiring theory in actions brought by third parties. *See, e.g.*, Lewis v. Southern Pac. Co., 102 Ariz. 108, 109, 425 P.2d 840, 841 (1967) ("failure of an employer to hire only competent and experienced employees does not of itself constitute an independent ground of actionable negligence") (citations omitted); Central Truckaway Sys., Inc. v. Moore, 304 Ky. 533, 538, 201 S.W.2d 725, 728 (1947) (theory is an extension of the fellow servant rule and only applies in actions brought by servants to recover for injuries caused by the negligence of fellow servants).

188. Restatement (Second) of Agency § 213, Comment d (1958) (emphasis added).

189. The effect of ratification on the master's right to indemnification is unclear. *See* F. Mechem, Outlines of the Law of Agency § 213, at 138 n.24 (1952); W. Seavey, *supra* note 161, § 39, at 77.

190. *But see* notes 112-13 *supra* and accompanying text.

191. *See* Restatement (Second) of Agency § 217C(b) (1958), *cited in* Easley v. Apollo Detective Agency, Inc., 69 Ill. App. 3d 920, 932, 387 N.E.2d 1241, 1248 (1979); Restatement (Second) of Torts § 909 (1979). Mere negligence is generally not considered sufficient grounds for awarding punitive damages. *See, e.g.*, Hall v. Motorists Ins. Corp., 109 Ariz. 334, 337, 509 P.2d 604, 607 (1973) (evidence of recklessness or wanton disregard for the safety of others necessary), Price v. Griffin, 359 A.2d 582, 589 (D.C. 1976) (ordinary negligence without proof of exacerbating circumstances does not establish grounds for awarding punitive damages).

192. *See* notes 77-78 *supra* and accompanying text.

team administrators and coaches in hiring, supervising and controlling their players may serve to prevent this injustice.

C. *Advantages of the Civil Forum*

The civil forum appears to provide a fair and potentially effective means of dealing with the problem of violence in professional team sports. The defendant player is neither required to bear full responsibility for the injury nor unjustly burdened by the social stigma usually attached to criminal prosecution and conviction. It is arguable that a team's ability to insure against the tortious conduct of its players and coaches[193] may decrease the deterrent effect of civil actions brought against the franchise. Increased premiums, the consequent need to raise ticket prices and the possibility of bad publicity from having to defend several law suits, however, should combine to make it worthwhile for the team to exercise control over its players. It is also important to note that even when recovery is primarily sought from a defendant team, the player who inflicted the injury is not relieved of liability for his actions. Deterrence can be effected by holding him legally responsible as well.

The injured player can join, in a single action, both the team and the player inflicting the injury. In a vast majority of jurisdictions, this can be done either if the plaintiff has a separate cause of action against the team[194] or if the team's liability is based solely upon the doctrine of respondeat superior.[195] Moreover, some jurisdictions permit apportionment of damages between joint tortfeasors if a reasonable basis for apportionment exists.[196] Although it is generally stated that there is no logical basis for apportioning damages between employer and employee when the employer's liability is vicarious,[197] apportionment may be possible in those situations when the team is subject to liability under the negligent hiring or failure to supervise theories. Under these theories the team is charged with an independent act of negligence.[198] A jury may be able to determine the extent to which the team's negligence contributed to the plaintiff's injury.[199]

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193. *See* note 107 *supra* and accompanying text.

194. For example, the player may bring a cause of action against the team based upon the negligent hiring theory. *See* notes 176-83 *supra* and accompanying text.

195. *See* W. Prosser, *supra* note 87, § 47, at 295-96; Restatement (Second) of Agency § 217B (1958). Ohio is one jurisdiction that refuses to join master and servant when the master's liability is solely vicarious. *See* Shaver v. Shirks Motor Express Corp., 163 Ohio St. 484, 496, 127 N.E.2d 355, 361-62 (1955).

196. *See, e.g.*, Mahler v. Draker, 273 F. Supp. 537, 539 (D.S.C. 1967); S.W. Corum Hauling, Inc. v. Tilford, 511 S.W.2d 220, 224 (Ky. 1974); Brown v. City of New York, 40 A.D.2d 785, 785, 337 N.Y.S.2d 685, 687 (1st Dep't 1972). *But see* Gates v. L. G. DeWitt, Inc., 528 F.2d 405, 413 (5th Cir.) (apportionment of damages among joint tortfeasors not permitted under Georgia law), *modified*, 532 F.2d 1052 (5th Cir. 1976) (en banc); Robbins v. Forsburg, 288 Ala. 108, 111, 257 So. 2d 353, 355 (1971) (same under Alabama law); Pure Gas & Chem. Co. v. Cook, 526 P.2d 986, 989-90 (Wyo. 1974) (same under Wyoming law).

197. *See* Estate of Canale v. Binghamton Amusement Co., 45 A.D.2d 424, 427-28, 357 N.Y.S.2d 931, 934 (3d Dep't 1974), *aff'd*, 37 N.Y.2d 875, 340 N.E.2d 729, 378 N.Y.S.2d 362 (1975); W. Prosser, *supra* note 87, § 52, at 315; Restatement (Second) of Agency § 217B, Comment d (1958).

198. *See* notes 187-88 *supra* and accompanying text.

199. The elements required to establish that an employer was negligent in hiring an individual to

The apportionment of damages between player and team could have a significant impact on violence in professional sports. In the normal employment situation, an employer derives no benefit from a violent employee. Consequently, if he is held liable to a third person for injuries caused by a violent employee, he may take action designed to punish the employee for his conduct. Professional athletic teams, however, do indeed benefit from violent players[200] and, as a result, are not likely to punish them for their behavior. If the team is held directly liable and damages are apportioned, it is possible to punish both the team for encouraging violence and the player for behaving violently. Thus, there is a double dose of deterrence.

D. *Inadequacy of Civil Intervention*

It is not suggested that the civil forum can purge professional sports of violence. Certain factors indicate that violence may continue despite judicial intervention of any kind. Because tort law differs from one jurisdiction to another,[201] the results of civil actions against professional athletes and teams will undoubtedly be inconsistent and unpredictable. For example, a team playing a game in California may be held liable for an injury inflicted by one of its players during the game while, under identical circumstances, a team playing in Massachusetts may not.[202] This uncertainty of result is likely to reduce the deterrent effect of civil actions in this area.

Furthermore, the success of the civil forum as a means to deter violence in professional sports depends largely upon the attitudes of the players and teams toward judicial intervention. Fear that they might be blacklisted throughout the league as "troublemakers" may discourage players from initiating lawsuits.[203] Although at least one civil action is currently pending,[204] it appears that professional athletes have mixed feelings toward judicial intervention.[205] Similarly, reservations concerning the effect that court actions

perform a certain task are arguably easier for a juror to conceptualize than the intricacies which arise under the rules and customs of most professional sports. *See* notes 67-71 *supra* and accompanying text. Further, because the standard of proof in civil cases is less than in criminal cases, *see* note 87 *supra*, a juror need not be convinced beyond a reasonable doubt of the team's negligence in hiring an excessively violent player.

200. *See* notes 77-78 *supra* and accompanying text.

201. *See* notes 141-47, 157-59 *supra* and accompanying text.

202. Massachusetts has adopted the strict approach to respondeat superior as it applies to intentional torts. *See* notes 141-42 *supra* and accompanying text.

203. A similar point has been made with respect to litigation against unfair disciplinary measures taken by league commissioners. *See Discipline in Sports*, *supra* note 84, at 793.

204. Dave Forbes' victim, Henry Boucha, *see* notes 51-52 *supra* and accompanying text, has initiated an action against Forbes, the Boston Bruins and the NHL for personal injuries resulting from that incident. *See* Jacobson, *supra* note 4, at 95. In support of the action against the NHL, Boucha's attorney reasons that " 'for years they [the NHL] promulgated violence by doing nothing to deter it. In fact, they have enhanced it.' " *Id.* The NHL is also currently being sued by a number of fans as a result of an incident involving several players on the Boston Bruins team in December, 1979. *See* note 25 *supra*. Such actions may induce the league to establish stricter rules governing violent behavior and, as a result, may have a significant impact on the problem of professional sports violence.

205. *Compare* Jacobson, *supra* note 4, at 95 (Norm Bulaich of the NFL's Miami Dolphins recognizes the need for some control over unnecessary violence, but does not believe that the courts

may have on league solidarity may discourage litigation by teams.

The best means of deterring violence in professional sports is to make it unprofitable. Damage awards against players and teams are certainly a step in this direction. Sanctions that affect the competitiveness of the team, however, are arguably even more effective.[206] Nevertheless, the imposition of such measures would appear to be beyond the power of the judiciary.[207]

CONCLUSION

The civil forum alone cannot rid professional sports of unnecessary violence. In fact, much of the violence that occurs in sports such as football and hockey is permitted by the rules of the games.[208] The violence will not subside unless the leagues enact strict rules regulating violent conduct and impose severe sanctions against those who violate them.[209] It is evident, however, that in the absence of action by the leagues some immediate action from other quarters is necessary. At the present time, both internal control and judicial intervention must combine to quell the violence. Activity that results in an injury to an opposing player serious enough to warrant stricter punishment

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are the proper forum to deal with the problem) *and* Hechter, *supra* note 22, at 438 (Dwight White of the NFL's Pittsburgh Steelers vehemently opposed to judicial intervention) *with* Jacobson, *supra* note 4, at 95 (Chris Ward of the NFL's New York Jets would consider going to court if seriously injured by an opponent's intentional misconduct) *and* Hechter, *supra* note 22, at 439 (Alan Page, currently with the Chicago Bears of the NFL, recognizes that judicial intervention may be necessary to eliminate the problem).

206. *See Violence in Sports, supra* note 2, at 786.

207. A court would not suspend a player sua sponte. Rather, the injured player would have to request that the player causing the injury be enjoined from further play. Injunctive relief, however, is not designed to punish the defendant for past wrongs but to protect the plaintiff from future injury. Jenkins v. Pederson, 212 N.W.2d 415, 420 (Iowa 1973); Verdun v. Scallon Bros. Contractors, Inc., 263 La. 1073, 1078, 270 So. 2d 512, 513 (1972); Sandfield v. Goldstein, 33 A.D.2d 376, 379, 308 N.Y.S.2d 25, 29 (3d Dep't 1970), *aff'd*, 28 N.Y.2d 794, 270 N.E.2d 723, 321 N.Y.S.2d 904 (1971). In order to qualify for injunctive relief the plaintiff must prove that, in the absence of an injunction, there is a clear possibility that he will suffer irreparable harm at the hands of the defendant. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730, 736-37 (7th Cir. 1976); Lewis v. S.S. Baune, 534 F.2d 1115, 1121 (5th Cir. 1976). In the context of professional sports violence, the injured player would have to prove that there is a distinct possibility that he will be reinjured some time in the future due to the defendant player's unusually violent style of play. Such a claim is highly speculative and, thus, not deserving of injunctive relief. Moreover, even if an injunction were issued, it is not likely to be so broad as to ban the player causing the injury from all future sports participation. Injunctions are granted under terms that ensure the protection of all parties whose interests it may affect. Locomotive Eng'rs v. Missouri-K.-T. R.R., 363 U.S. 528, 532 (1960) (quoting Inland Steel Co. v. United States, 306 U.S. 153, 157 (1939)); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 799 (8th Cir. 1967). Thus, injunctions designed to deter excessive violence in professional sports are likely to require that teams not hire individuals solely on the basis of their violent tendencies and that players refrain from utilizing unnecessarily violent tactics in future games.

208. Jack Tatum, pro football's "assassin," asserts that although he plays violently, he also abides by the rules of the game. *See* J. Tatum & W. Kushner, *supra* note 20, at 11.

209. One such measure may be to deduct points or runs from the score of a team whenever one of its players exhibits an unnecessary display of violence. If the player is guilty of blatantly violent conduct, the team could be forced to forfeit the contest. Of course, the guilty player could be fined and suspended as well. *See* notes 14-16 *supra* and accompanying text.

than a nominal fine or short suspension should lead to civil action. To this end, the players must realize both that they have a right to earn a living without being assaulted in the process and that they have an obligation to themselves, to fellow players and to the sport itself to assist in the control of violence.

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