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## Tort Liability in Professional Sports: Battle in the Sports Arena: *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977), *appeal docketed*, No. 77-1812 (10th Cir. Aug. 25, 1977)

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# Tort Liability in Professional Sports: Battle in the Sports Arena

*Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352 (D. Colo. 1977), *appeal docketed*, No. 77-1812 (10th Cir. Aug. 25, 1977).

Are American sports especially violent because they are forced to reflect the inherent violence of our society? I think so.

—James A. Michener<sup>1</sup>

## I. INTRODUCTION

On September 16, 1973, one man struck another in the back of the head. The blow was such that

in the context of common community standards there can be no question but that . . . [it] . . . would generate civil liability. It would involve a criminal sanction if the requisite intent were present. The difference here [was] that this blow was delivered on the field of play during the course of action in a regularly scheduled professional football game.<sup>2</sup>

The resultant case, *Hackbart v. Cincinnati Bengals, Inc.*,<sup>3</sup> has drawn additional attention to the subject of violence in professional sports.<sup>4</sup> However, the judicial system did not prove to be a successful avenue of redress for Hackbart, the injured professional football player. This note will discuss whether the court was correct in declining to declare "open season" on overzealous athletes

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1. J. MICHENER, *SPORTS IN AMERICA* 436 (1976).
  2. *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 358 (D. Colo. 1977), *appeal docketed*, No. 77-1812 (10th Cir. Aug. 25, 1977).
  3. 435 F. Supp. 352 (D. Colo. 1977), *appeal docketed*, No. 77-1812 (10th Cir. Aug. 25, 1977).
  4. See, Recent Decision, *Torts—Assumption of Risk—A Professional Football Player Assumes the Risk of Receiving a Blow, Delivered Out of Anger and Frustration but without Specific Intent to Injure, During a Game*, 12 GA. L. REV. 380 (1978). While *Hackbart* involved professional football, other sports have not been immune to violence. See, e.g., NEWSWEEK, Dec. 26, 1977, at 79, for a report of the on-court incident which sent professional basketball player Rudy Tomjanovich to the intensive-care unit of a hospital with a double fracture of the jaw, a broken nose, and a concussion.

who have injured an opponent, or whether it erected a precedential blockade for injured sports participants.

## II. THE FACTS

The incident occurred during a professional football game between the Denver Broncos and the Cincinnati Bengals. Cincinnati attempted a forward pass, during which Charles "Booby" Clark, a fullback on the Bengals' offensive team, headed for the corner of the north end zone as a prospective receiver. He was then within the area of responsibility of Dale Hackbart, a free safety on the Broncos' defensive team. The pass was intercepted by a Bronco who began to run the ball upfield, thus reversing the offensive and defensive roles of the teams. Hackbart attempted to block Clark in the end zone and in so doing fell to the ground. Then, with one knee on the ground, Hackbart watched the play continue upfield.<sup>5</sup> In the words of the court, "[a]cting out of anger and frustration, but without a specific intent to injure, Charles Clark stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head with sufficient force to cause both players to fall forward to the ground."<sup>6</sup> No words were exchanged and the two players returned to their benches. No penalty was called, as the incident was not observed by any of the officials.<sup>7</sup> Hackbart did not report the incident to anyone during the game, but the next day he continued to feel pain. In the next two games he played on specialty team assignment for the Broncos before being released on waivers.<sup>8</sup> Not until after the release did he seek medical advice, and it was discovered that he had suffered a neck injury. Hackbart subsequently instituted the lawsuit.

## III. HISTORICAL BACKGROUND

"The aggravated assault trial of professional hockey player Dave Forbes, in Minnesota, in July of 1975, focused public and legal attention on the issue of violence in sports."<sup>9</sup> Although the courts

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5. 435 F. Supp. at 353.

6. *Id.*

7. A similar situation occurred in a 1978 Superbowl playoff game between the Pittsburgh Steelers and the Denver Broncos. Steeler defensive tackle "Mean" Joe Greene had frequently complained to the officials that Bronco guard Paul Howard had been repeatedly holding him on plays. Receiving little sympathy from the officials, "he took matters into his own hands. Or fists. Mean Joe leveled Howard with a devastating bolo punch to the solar plexus. Astonishingly, Greene's punch escaped the eyes of only six people—the members of Barth's [officiating] crew." *SPORTS ILLUSTRATED*, Jan. 2, 1978, at 14.

8. 435 F. Supp. at 353-54.

9. *Hallowell & Meshbesh, Sports Violence and the Criminal Law*, TRIAL, Jan. 1977, at 27.

have not completely abstained from involvement in the area of professional sports injuries,<sup>10</sup> their intervention has been limited.

Many of the courts which have imposed liability for injury caused by one participant to another have done so in the area of amateur sports. *Bourque v. Duplechin*<sup>11</sup> involved a softball game in which the participants were sponsored by business establishments. The plaintiff, a twenty-two year old second baseman, sued for negligence when a member of the opposing team, running from first to second base, deviated from the baseline to run into the plaintiff and in so doing, brought his arm up under the plaintiff's chin.<sup>12</sup> The court found that the defendant "was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. This duty was breached by defendant, "whose behavior was, according to the evidence, substandard and negligent."<sup>13</sup>

Assault and battery was the theory relied upon by another injured sports participant. In *Griggas v. Clauson*,<sup>14</sup> an amateur basketball player brought suit when an opponent struck him in the head with his fist. The court, although mainly addressing whether the damages awarded were excessive, found the jury's verdict was supported by the weight of the testimony and affirmed a judgment for the plaintiff.<sup>15</sup>

A high school soccer match was the scene of another sports injury in *Nabozny v. Barnhill*.<sup>16</sup> During the course of the game, the defendant, a forward, kicked the plaintiff goalkeeper's head, causing severe injuries. The plaintiff had been within the penalty area at all times and the game was being played under organizational rules which prohibit contact with a goalkeeper who is in the penalty area and in possession of the ball.<sup>17</sup> The *Nabozny* court set out the following requirements for recovery for injuries suffered in athletic contests:

[W]hen athletes are engaged in an athletic competition; all teams involved are coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained

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10. See *Averill v. Luttrell*, 44 Tenn. App. 56, 311 S.W.2d 812 (1957), in which the court, referring to an unappealed jury verdict in the lower court, held a professional baseball player liable for injuries to an opponent whom he had struck with his fist.

11. 331 So. 2d 40 (La. App. 1976).

12. *Id.* at 41.

13. *Id.* at 42.

14. 6 Ill. App. 2d 412, 128 N.E.2d 363 (1955).

15. *Id.* at 418, 128 N.E.2d at 366. The court noted that "[i]f the testimony on behalf of [plaintiff] is true, he was subjected to a wanton and unprovoked assault and was struck at a time when he had his back to defendant." *Id.*

16. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

17. *Id.* at 214, 334 N.E.2d at 260.

therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule.<sup>18</sup>

Not all injured parties have recovered damages for incidents occurring during sports participation. Courts have attempted to distinguish between injuries that are an expected part of the game and those that would not ordinarily be anticipated to result from engaging in athletic competition.<sup>19</sup> As noted by one court, "[a]cts or omissions which may constitute negligence off the playing field may not be such when taking place upon it."<sup>20</sup>

#### IV. THE HACKBART DECISION

The *Hackbart* court began its analysis by stating that "this case must be considered in the context of football as a commercial enterprise."<sup>21</sup> This would seem to be a logical starting point, since professional football today is no longer considered "just a game." The court noted that its commercial nature is evidenced by its organizational structure. The National Football League Players' Association is the bargaining representative of professional football players in the National Football League (NFL). An agreement exists between the Players' Association and the National Football League Player Relations Association, a bargaining agent for the member clubs of the NFL. The agreement covers, among other things, terms and conditions of employment and also provides a procedure for resolving disputes between players and their employers. But the agreement does not provide for resolution of dis-

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18. *Id.* at 215, 334 N.E.2d at 260-61. Finding that under the facts of the case a duty clearly arose, the court stated that

a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other players so as to cause injury to that player, the same being a question of fact to be decided by a jury.

*Id.* at 215, 334 N.E.2d at 261.

19. *See, e.g.*, *Tavernier v. Maes*, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966) (baserunner sliding into fielder at base); *Benedetto v. Travelers Ins. Co.*, 172 So. 2d 354 (La. App. 1965) (injuries sustained when bat slipped from defendant's hands); *McGee v. Board of Educ.*, 16 A.D.2d 99, 226 N.Y.S.2d 329 (1962) (teacher helping with baseball practice hit by a ball); *Gordon v. Deer Park School Dist. No. 414*, 71 Wash. 2d 119, 426 P.2d 824 (1967) (involving injuries sustained when bat slipped from defendant's hands). *See also* *Thomas v. Barlow*, 5 N.J. Misc. 764, 138 A. 208 (1927); 26 MICH. L. REV. 322 (1927-1928).
20. *Niemczyk v. Burleson*, 538 S.W.2d 737, 741 (Mo. App. 1976). This court, however, did find that the petition stated a sufficient cause of action against a shortstop in a softball game who had collided with plaintiff baserunner as she was advancing from first to second base.
21. 435 F. Supp. at 354. *See also* *Koppett, Sports and the Law: An Overview*, 18 N.Y.L.F. 815 (1973).

putes between players of different teams.<sup>22</sup>

Because of its commercial nature, professional football is not the same game it was in years past. As one note has stated,

the type of conduct that a participant can reasonably expect to occur in some of today's professional sports markedly differs from the type of conduct he could have reasonably expected in the days when the participants played for the love of the game. At that time there was not the strong motivation to win that exists in professional sports today. A participant could expect that fellow players would conduct themselves in a manner that was in keeping with the letter and the spirit of the rules. Today, the economic rewards or losses from winning or losing encourage players to adopt the attitude that one must do almost anything to win.<sup>23</sup>

There are rules which impose limitations on the ways in which an NFL player may make contact with opposing players. But as noted by the *Hackbart* court, "because of the speed and violence of the game, their application is often a matter of subjective evaluation of the circumstances."<sup>24</sup> The court referred to the common occurrence of disabling injuries in this type of athletic event and noted that "[p]rofessional football players are conditioned to 'play with pain' and . . . are expected to perform even though they are hurt."<sup>25</sup>

Football as a commercial enterprise and the violent nature of the game are important considerations when analyzing a case such as *Hackbart*. However, the court's decision seemed to overemphasize these aspects, and minimized the real issue, that one person suffered injury at the hand of another.

#### A. Is There a Duty Owed?

The plaintiff sought to impose liability upon the defendant on

22. 435 F. Supp. at 354.

23. Note, *Consent in Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 159 n.39 (1976). The attitude in amateur sports may not be all that different, especially in college sports where scholarships may be at stake. Even where economic rewards are not present, other types of motivations may contribute to an attitude that one must do anything in order to win, both during training sessions and on the field. See generally J. MICHENER, *supra* note 1, at 421-22, 433-35.

24. 435 F. Supp. at 354. The court further stated:

During 1973, the rules were enforced by six officials on the playing field. The primary sanction for a violation was territorial with the amounts of yardage lost being dependent upon the particular infraction. Players were also subject to expulsion from the game and to monetary penalties imposed by the league commissioner.

*Id.* However, fines and penalties have not proved an effective solution to the elimination of violence in sports. Flakne & Caplan, *Sports Violence and the Prosecution*, TRIAL, Jan. 1977, at 33.

25. 435 F. Supp. at 355.

theories of reckless misconduct<sup>26</sup> and negligence. A theory of intentional misconduct was barred by the statute of limitations.<sup>27</sup> Both of plaintiff's theories, according to the court, depended upon whether the defendant owed a duty to the plaintiff. "Thus, the question is what would a reasonably prudent professional football player be expected to do under the circumstances confronting Charles Clark in this incident?"<sup>28</sup> Although former players testified that such conduct "could not be considered customary or acceptable,"<sup>29</sup> the court placed emphasis on the fact that players are not trained to regard the safety of opposing players.<sup>30</sup> It is questionable whether the court was correct when it stated that "[i]t is wholly incongruous to talk about a professional football player's duty of care for the safety of opposing players when he has been trained and motivated to be heedless of injury to himself."<sup>31</sup>

Some courts have recognized that a participant in a sports event owes a minimum duty to the other participants.<sup>32</sup> However, these courts were not dealing with the subject of professional athletics. As the *Hackbart* court noted, the differences between high school, college and professional games "are largely reflective of the fact that at each level the players have increased physical abilities, improved skills and differing motivations."<sup>33</sup> It would seem to follow that an athlete's ability to cause a more serious injury also increases. Thus, to say that a professional football player owes no duty to his opponents is to give him "free rein" every time he steps on the playing field.<sup>34</sup> The *Hackbart* court seemed to encourage this result when it stated that "[t]he character of NFL competition negates any notion that the playing conduct can be circumscribed by any standard of reasonableness."<sup>35</sup>

## B. The Defenses.

According to the *Hackbart* court, the plaintiff's theories of liability were subject to the defenses of consent<sup>36</sup> and assumption of

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26. See RESTATEMENT (SECOND) OF TORTS § 500 (1965).

27. Thus, the *Hackbart* decision may not be applicable in other than a negligence situation.

28. 435 F. Supp. at 355.

29. *Id.* at 356.

30. *Id.* at 355-56.

31. *Id.* at 356.

32. See, e.g., *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975); *Bourque v. Duplechin*, 331 So. 2d 40 (La. App. 1976).

33. 435 F. Supp. at 354. See note 23 & accompanying text *supra*.

34. Although players are limited to some extent by penalties and fines, this does little to compensate the injured party.

35. 435 F. Supp. at 356.

36. The defense of consent is usually associated with intentional torts rather than negligence.

risk. Defining the scope of actual consent in the sports setting presents some difficulties in that "[t]he number of objective indications available to evaluate the mental state of the participant in this context is limited."<sup>37</sup> Participation in the game is seen as implying consent.<sup>38</sup> However, it has also been said that "[t]he defendant's privilege is limited to the conduct to which the plaintiff consents, or at least to acts of a substantially similar nature."<sup>39</sup>

The question remains whether defendant Clark's conduct was within the realm of that consented to by Hackbart when he entered the game. A football player does consent to being tackled and to other contacts that are an inevitable part of the game. But even so, it would seem that Hackbart would not reasonably expect to experience forcible contact when the action on his end of the field had ceased. Thus, had the play already been called dead, a finding that Hackbart consented to the conduct might have been less certain.

It has been suggested that the scope of consent should be defined according to the rules of the game.<sup>40</sup> One commentator has stated: "[t]hus, because '[o]ne who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game,' aggravated fighting in the athletic arena would appear to be without the aid of the defense under traditional rules."<sup>41</sup> Commentators advocating criminal sanctions<sup>42</sup> as a solution to violence in professional sports note that

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37. Note, *supra* note 23, at 156.

38. *Id.*

39. W. PROSSER, *TORTS* § 18, at 103 (4th ed. 1971).

40. See *Nabozny v. Barnhill*, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). *RESTATEMENT (SECOND) OF TORTS* § 50, Comment b (1965) provides:

Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of the rule.

41. Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 775 n.27 (quoting W. PROSSER, *supra* note 39).

42. The possibility of imposing criminal sanctions is a relevant inquiry since [i]n both the criminal and tort setting, the factfinder must look at all the evidence to determine whether the victim in fact consented. . . . Since the issue of the party's subjective state of mind is the same, the resolution of problems concerning actual consent that arise in the civil context applies equally to those problems that arise in a criminal trial.

Note, *supra* note 23, at 150 n.12.

[w]hether the defense of consent then may be raised successfully should be dependent on whether the injuries were occasioned through an accident while the actor was in compliance with the rules of the game or whether the injuries were inflicted under such circumstances that they tend to show a definite resolve on the part of the actor to cause a serious injury to another.<sup>43</sup>

It has also been suggested that perhaps the "rules of the game" approach is too narrow.<sup>44</sup> The following alternative has been proposed:

Any player's conduct that is not consistent with society's notions of how the game should be played should not be considered "part of the game." Thus, this concept can serve as a standard for defining the scope of a participant's consent: An athlete consents only to that conduct which is a part of the game.<sup>45</sup>

This alternative has its limitations but the advantage "is that it focuses on the controlling consideration—the extent to which society will tolerate injury-causing activity in the sports context."<sup>46</sup>

The *Hackbart* court accepted Clark's conduct as a part of the game when it stated that "[t]he record . . . reflects that what he did is, unfortunately an example of the excesses of violence which have become expectable as a result of the style of play in the NFL."<sup>47</sup> Even if such conduct is *expectable*, it does not necessarily follow that it should be *tolerable*, nor can it be said that consent to such conduct exists in every case. However, the defense of consent has met with success. As one commentator hypothesizes: "One possible reason why consent has been deemed effective more frequently in sports than in other contexts is that athletic events have beneficial aspects that justify society's toleration of certain injuries."<sup>48</sup> The *Hackbart* court conceded that even had a duty existed, there could be no recovery for the plaintiff because of the defense of assumption of risk.<sup>49</sup> The court explained:

[T]he level of violence and the frequency of emotional outbursts in NFL football games are such that Dale Hackbart must have recognized and ac-

43. Flakne & Caplan, *supra* note 24, at 35.

44. One of the reasons suggested is that some infractions which occur frequently do not seem serious to the players. "It may not be improper to consider such violations as part of the game; thus, a player may be deemed to have consented to such actions although a rule designed to protect the players has been violated." Note, *supra* note 23, at 158.

45. *Id.* at 160.

46. *Id.* at 161.

47. 435 F. Supp. at 357.

48. Note, *supra* note 23, at 173-74.

49. It has been stated that

[w]ith respect to injuries caused by the intentional conduct of others, it seems proper to speak in terms of consent; with respect to injuries caused by the unintentional or inadvertent conduct of others, it seems proper to speak in terms of assumption of risk.

*Id.* at 156 n.30.

cepted the risk that he would be injured by such an act as that committed by the defendant Clark on September 16, 1973. Accordingly, the plaintiff must be held to have assumed the risk of such an occurrence.<sup>50</sup>

It is not argued that assumption of risk should never be applied in the context of professional sports. As stated in *Bourque v. Duplechin*:

A participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and foreseeable. A participant does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating.<sup>51</sup>

The risk of an opponent's negligence may be assumed "when the player knows the dangerous act is taking place and he voluntarily exposes himself to the risk."<sup>52</sup> But it is questionable whether a professional athlete's consent is really voluntary. The athlete may be opposed to the violence present in his sport, but participate in order to earn his living.<sup>53</sup> The *Hackbart* court stated: "Like coal mining and railroading, professional football is hazardous to the health and welfare of those who are employed as players."<sup>54</sup> However, certainly there are risks in their jobs that even coalminers and railroad employees do not assume.

Athletic injuries illustrate that "overly simplified rules relating to assumption of risk cannot be applied automatically in this type of litigation."<sup>55</sup> It must first be recognized that certain injuries are inevitable in a sports contest. Then the facts of each case must be carefully investigated before automatically rejecting the claim of an injured participant as an assumed risk.<sup>56</sup>

In rendering its decision, the *Hackbart* court noted certain facts. Hackbart did return to play in the second half of the game after his injury and did not report the incident to his coaches during the game.<sup>57</sup> It was not until after Hackbart lost his employment that he sought medical assistance.<sup>58</sup> However, the rationale behind the court's decision seems to be its reluctance to become involved in what it believes "a task for which the courts are not

50. 435 F. Supp. at 356.

51. 331 So. 2d 40, 42 (La. App. 1976) (citations omitted).

52. Recent Cases, *Torts—Participant in Athletic Competition States Cause of Action for Injuries Against Other Participant*, 42 MO. L. REV. 347, 354 (1977).

53. Note, *supra* note 23, at 159 n.39.

54. 435 F. Supp. at 357.

55. Hofeld, *Athletes—Their Rights and Correlative Duties*, 1975 TRIAL LAW. GUIDE 383, 400.

56. *Id.* at 401.

57. 435 F. Supp. at 353. As noted by the court, "this incident was clearly shown on the Denver Broncos' defensive game films, which were routinely reviewed by the defensive players and coaching staff, [and] none of them made it a matter of special attention or concern." *Id.* at 356.

58. 435 F. Supp. at 354.

well suited."<sup>59</sup>

## V. SHOULD THE COURTS BECOME INVOLVED?

After making its decision on the particular facts of the case, the *Hackbart* court further noted that the case "raises the larger question of whether playing field action in the business of professional football should become a subject for the business of the courts."<sup>60</sup> It is believed that society benefits when individuals participate in sports or act as observers.<sup>61</sup> It is said that sports also contribute to the development of a person's self-image.<sup>62</sup> However, violence in American sports may also reflect the violence in our society.<sup>63</sup>

Because violence is an inherent factor in many sports, legal intervention is difficult.<sup>64</sup> Part of the problem is "the widespread feeling that sports comprise a unique institution that cannot be legally ordered without grave damage to the institution itself."<sup>65</sup> Not every injured athlete should have a cause of action. However, "our society never intended to excuse unjustified brutality merely because it occurs on a playing field."<sup>66</sup> Although speaking about high school athletics, the court in *Nabozny v. Barnhill*<sup>67</sup> explained "that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized competition does not exist in a vacuum. Rather some of the restraints of civilization must accompany every athlete onto the playing field."<sup>68</sup> Professional sports do not exist

59. *Id.* at 358.

60. *Id.* at 357.

61. Note, *supra* note 23, at 174.

62. Slusher, *Sport: A Philosophical Perspective*, 38 L. & CONTEMP. PROB. 129 (1973).

63. J. MICHENER, *supra* note 1, at 436. Michener states:

Within recent years the new frontier created by urban disruption has produced shocking levels of violence. I have just seen a report which states that in American schools last year there were 204,000 instances in which students beat up their teachers in the classroom, 9,000 cases of rape in washrooms, and about 100 murders during school hours. Such conduct is incredible, and there had better be a retreat from this dangerous addiction. One place to start would be sports, both in the way they are played and in the behavior of spectators. Ice hockey and football have become too violent, and they set a deplorable example for other sports.

*Id.* And as noted by the *Hackbart* court, part of the attraction for some persons to the game of football is the "spectacle of savagery." 435 F. Supp. at 355.

64. Hallowell & Meshbesh, *supra* note 9, at 27.

65. *Id.* at 28.

66. Hofeld, *supra* note 55, at 405.

67. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

68. *Id.* at 215, 334 N.E.2d at 260.

in a vacuum either, but the *Hackbart* court came to the opposite conclusion stating that “[t]here are no Athenian virtues in this form of athletics. The NFL has substituted the morality of the battlefield for that of the playing field, and the ‘restraints of civilization’ have been left on the sidelines.”<sup>69</sup>

“[P]rofessional football has been a self-regulated industry.”<sup>70</sup> But this self-regulation may not be adequate to protect professional athletes.<sup>71</sup> “It is by no means certain . . . that private organizations themselves are capable of adequately protecting societal interests without judicial or other government involvement.”<sup>72</sup> Judicial intervention into the area of sports can be based on the “recognition that the sports establishment is often unable, or unwilling, to provide justice to players injured by adversaries playing outside the rules of the game.”<sup>73</sup>

There are problems with the judicial system becoming involved in professional sports. The concerns of the *Hackbart* court were the difficulty of the application of the NFL rules of play, the problem of causation in light of the frequency of forceful collisions, the enormous amount of litigation that would result, and the likelihood that the courts would develop differing and conflicting principles of law.<sup>74</sup> In balancing all the factors, it would seem that the present system of internal control in sports no longer provides a workable or adequate solution to the problem of the injured sports participant. It has been suggested that federal and state sports commissions be created and given primary review of sports-related matters, with only extreme cases being referred to the judi-

69. 435 F. Supp. at 358. This seems to be borne out by the testimony of John Ralston, the 1973 Broncos coach:

[T]he pre-game psychological preparation should be designed to generate an emotion equivalent to that which would be experienced by a father whose family had been endangered by another driver who had attempted to force the family car off the edge of a mountain road. The precise pitch of motivation for the players at the beginning of the game should be the feeling of that father when, after overtaking and stopping the offending vehicle, he is about to open the door to take revenge upon the person of the other driver.

*Id.* at 355.

70. *Id.* at 357.

71. See Comment, *supra* note 41, at 784-89.

72. Note, *supra* note 23, at 175.

73. *Sports, Torts, Courts*, TRIAL, Jan. 1977, at 21. While there do not seem to be statistics correlating the number of injuries occurring in football to the violations of safety rules, there are startling numbers of injuries occurring in each game, some of which are the result of violations of the rules. Between 1969 and 1974, there were an estimated 5110 NFL player injuries. And in the 1973-1974 season, the estimated cost to the NFL's 26 teams in salaries and other compensation amounted to \$17,600,000. Hofeld, *supra* note 55, at 401-02.

74. 435 F. Supp. at 358.

cial system.<sup>75</sup> This would be worth investigating as a type of intermediary ground. However, the judicial system should not be overlooked as a viable alternative. In any event, a solution must be developed because the professional athlete injured today by conduct outside the scope of the game will be without recourse if courts follow the example of *Hackbart* and place undue emphasis on the idea of sports as an institution rather than on the injury itself.

*Patricia K. Schuett '79*

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75. Hallowell & Meshbesher, *supra* note 9, at 32.