BY ELDON L. HAM

Unnecessary Roughness

Sports injuries and assumption of the risk. What's fair? What's foul?

FROM HIGH SCHOOL TO THE NBA, NFL, SKIING, AND BEYOND, sports-injury liability is gaining visibility and legal traction. After all, there are nearly eight million high school athletes in America, with another 480,000 playing intercollegiate sports.[1] Sports injuries, naturally, are very common. Courts, though, have largely insulated athletes from liability to each other for on-field injuries, even serious ones. Courts felt unequipped to referee disputed testimony about on-field sports mayhem, so they did not try.

In 2021, 3.2 million participants experienced sports injuries serious enough to visit an emergency room in the U.S.[2] Moreover, about 3.5 million kids from ages 5 to 14 years are injured from sports each year, according to Johns

1. NCSA College Recruiting, High School Sports, law.isba.org/43bhVuE.
2. NSC Injury Facts, Sports and Recreational Injuries, law.isba.org/42.5Pudq.

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ISBA RESOURCES >>

- Pete Sherman, *Baseball and Modern Life*, 109 Ill. B.J. 12 (May 2021), law.isba.org/3MXe3Fp.
- Owen Blood & John-Michael Poerretta, *Litigating Sports Brain Injuries: The New Ball Game*, 104 Ill. B.J. 28 (June 2016), law.isba.org/43c0szB.
- Ray Rossi, *Sports Injuries: High Liability Standard for Nonparticipants*, 98 Ill. B.J. 98 (Apr. 2010), law.isba.org/3WxSfoW.

Hopkins Medicine, which defines a "sports injury" as one that causes a loss of participation time.[3]

Assumption of the risk

Did a football player blow out his own knee or was his ACL torn by an unnecessarily rough opponent? Even with more discernable facts, there still remains an implied or express "assumption of the risk" argument for football, basketball, and other contact sports. But where does one draw the line between accepting the risk inherent in a sport and litigating bad behavior that leads to injury? Most people would agree that while players assume the typical risks of rough contact, a line has been crossed when an opponent carves the skin off the face of a downed opponent with a player's football cleats, demolishes a quarterback's arm after a play is over, pummels an opposing NBA player within inches of his life, and paralyzes a high school hockey opponent.

Contact-sports exception

Illinois relies on the contact-sports exception[4] to carve simple negligence from matters of more culpable, actionable conduct. But through the years, Illinois and non-Illinois caselaw concerning sports injuries have evolved. Some courts, including in Illinois, are rethinking assumption-of-the-risk arguments for game injuries. Some recent decisions are taking the issue beyond the usual contact-sports exception and applying new assumption-of-the-risk standards for full-contact sports.

Concerning sports-injury cases, courts often try to determine whether the activity is a sport, how voluntary was the injured participant's involvement, and was the harmful contact willful and wanton? These and other questions arose from a 2019 Utah Supreme Court case, *Nixon v. Clay*, addressed elsewhere herein, which adopted a new approach for full-contact sports.[5] The following questions are now used to assess on-field injuries:

- Was it a sport, a contact sport, or a full-contact sport?
- Was the injured party a participant?
- Was the participation voluntary?
- Was the alleged misconduct negligent, willful, or wanton?
- Could the conduct and intent give rise to a criminal action?

What is a sport, contact sport, and full-contact sport? The term "sport" generally means a sanctioned event with referees, published rules, and spectators such as high school football and Little League Baseball.

But what about a pickup basketball game? Or a company picnic softball game? College boys playing an improvised kick-the-can game? A made-up game called "killer ball" during school recess?[6] A girls' high school "powder puff" football game?

Courts have held that a "sport" need not be a formally sanctioned activity, but it should have enough rules (whether official, informal, oral, or implied) to define the activity and establish shared expectations about the risks.[7] If it is a contact sport, the players do not owe each other a duty of care for simple negligence, but they must refrain from willful and wanton conduct. A baseball player assumes a reasonable risk of breaking a leg during the game from a mere accident or even negligent conduct, but not for a surprise attack to the leg with a baseball bat.

The difference helps define the nature of

3. Johns Hopkins Medicine, Sports Injury Statistics, law.isba.org/3ou1iV7.
4. *Id.*
5. *Nixon v. Clay*, 2019 UT 32 (2019).
6. See Bradley Nahrstadt & Mathew Kuehl, *The Contact Sports Exception Under Illinois Tort Law*, 89 Ill. B.J. 640 (Dec. 2001), *available at* law.isba.org/45rtFXP.
7. *Nabozny v Barnhill*, 31 Ill. App. 3d 212 (1st Dist. 1975).

TAKEAWAYS >>

- When assessing on-field injuries, courts often will consider the level of inherent contact and risk in the sport; the nature of the injured athlete's participation; and whether the injury was caused by negligence or willful and wanton intent.
- Illinois courts distinguish simple negligence from culpable and intentional conduct. An assumption of risk for participating in a sport is balanced against "the restraints of civilization" by which all players are expected to abide.
- More recent Illinois and non-Illinois caselaw concerning sports injuries are rethinking assumption-of-the-risk arguments for game injuries (where the existence of video can be of great assistance).

IN 2021, 3.2 MILLION PARTICIPANTS EXPERIENCED SPORTS INJURIES SERIOUS ENOUGH TO VISIT AN EMERGENCY ROOM IN THE U.S. MOREOVER, ABOUT 3.5 MILLION KIDS AGES FROM 5 TO 14 YEARS ARE INJURED FROM SPORTS EACH YEAR, ACCORDING TO JOHNS HOPKINS MEDICINE, WHICH DEFINES A "SPORTS INJURY" AS ONE THAT CAUSES A LOSS OF PARTICIPATION TIME.

the risk assumed, generally regarded as mishaps germane to the game. Collisions are common to football, basketball, and virtually all contact sports. Even so, tackling, while a necessary object of football, is not a necessary element of basketball. Whether an activity is a contact sport largely depends on circumstances. Skiing is not a contact sport, and so ordinary negligence applies (see below),[8] but a leading Wisconsin case overturned prior rulings by finding that high school cheerleading can be a contact sport even though the contact and danger involve one's own teammates.[9]

Some rulings are rethinking portions of a broad 1995 Illinois Supreme Court decision in *Pfister v. Shusta* that applied the contact-sports exception to a spontaneous dormitory kick-the-can game and cited, among others, the Illinois Appellate Court's 1975 opinion in *Nabozny v. Barnhill*.[10]

In *Nabozny,* a soccer goalie was injured by a kick to the head.[11] The Court rejected the "hands-off" approach and found that "some of the restraints of civilization must accompany every athlete onto the playing field."[12] Since then, Illinois courts have recognized a contact-sports exception to grapple with the risk question.[13] The following standard emerged: Voluntary participants in a contact sport waive claims for injuries arising out of ordinary negligence. Every key word of that definition is meaningful, including "voluntary."

In *Karas v. Strevell*, the Illinois Supreme Court sought to reconcile the "willful conduct standard where rough physical contact is, at least in part, a principal feature of the game itself, like football blocking or hockey bodychecks."[14] In *Karas*, the Court redefined such activity as a full-contact sport requiring a modified standard where the usual "willful and wanton" is unworkable and contrary to the rationale of *Pfister*. Citing a prior California decision, *Knight v. Jewett*,[15] the *Karas* Court found that "a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct totally outside the range of the ordinary activity involved in the sport."[16]

But does *Karas* go too far? Its approach seems more relevant to criminal intent than tort duties of care. After all, the "assumption of the risk" already addresses both the nature of a sport and the inherent risks assumed. Yes, the application of *Karas* still should find liability where a football player rakes his football cleats across the helmetless face of a downed opponent resulting in 30 stitches around his eye. However, would *Karas* find liability where a large defensive lineman lifts and upends an opposing quarterback, then slams him to the turf onto an already injured shoulder? After all, rough tackles, even if they are personal fouls, are an inherent part of a full-contact football game. But is that a license to maim?

Both those foregoing events actually occurred in separate NFL games.[17] The cleats belonged to the Tennessee Titans' Albert Haynesworth who stomped a downed Dallas Cowboys player and received a five-game suspension in 2006. The shoulder slam was committed by Green Bay Packers lineman Charles Martin against the Chicago Bears' quarterback Jim McMahon on Nov. 23, 1986. Martin was ejected, suspended two games, and fined $15,000. McMahon missed the rest of the season (and the Bears failed to repeat their 1985-1986 Super Bowl championship). Parenthetically, the Packers that day wore towels with the numbers of several Bears players, including McMahon's, as a hit list, which suggests intent. Even so, would the *Karas* Court let the McMahon injury slide as an inherent part of the full-contact game? It might.

In 2019, the Utah Supreme Court weighed in on a similar risk dilemma in *Nixon v. Clay*,[18] citing *Knight, Nabozny*, and *Hackbart v. Cincinnati Bengals*,[19] among others. In *Nixon*, the plaintiff was injured by the defendant's "reach and sweeping" move in a basketball game, followed by an unnecessary tackle. The Court addressed the sweep move as part of the game; it did not address the tackle because the tackle did not cause the injury. It then rejected the contact-sports exception as arbitrary, cited *Knight,* and held that "voluntary participants in a sport cannot be held liable for injuries arising out of any contact that is 'inherent' in the sport."[20]

Who is a participant? Sometimes the issue of participation is blurred. The U.S. Court of Appeals for the 10th Circuit was presented with an insurance-coverage dispute involving a rodeo and, specifically, an event called Money the Hard Way.[21] James Remaley, the plaintiff, an adult male, attended the rodeo as a spectator. The rodeo offered a contest inviting a spectator to enter the arena to remove a 50

8. *Novak v. Virene*, 224 Ill. App. 3d 317 (1st Dist. 1991).
9. *Noffke v. Bakke*, 209 WI 10 (2009).
10. *Pfister v. Shusta*, 167 Ill. 2d 417 (1995).
11. *Nabozny v Barnhill*, 31 Ill. App. 3d 212 (1st Dist. 1975).
12. *Id*.
13. See Nahrstadt and Kuehl, *supra*, note 6.
14. *Karas v. Strevell*, 227 Ill. 2d 440 (2008).
15. *Knight v. Jewett*, 3 Cal. 4th 296 (1992).
16. *Karas*, 227 Ill. 2d at 440.
17. See Associated Press, *Haynesworth Suspended for Unprecedented Five Games*, ESPN (Oct. 2, 2006), law.isba.org/3omAsCB; David Haugh, *To Bears Fans, Charles Martin Will Always Be Recalled for the Body Slam that Ended Jim McMahon's Season in 1986. But There Was More to the Man They Buried Monday*, Chicago Tribune (Feb. 1, 2005), law.isba.org/3OBW9Jm. Note also: at the time, this author was part of the McMahon legal team that analyzed the attack and injury.
18. *Nixon v. Clay*, 2019 UT 32 (2019).
19. *Hackbart v. Cincinnati Bengals, Inc*., 601 F.2d 516 (10th Cir. 1979).
20. *Nixon*, 2019 UT at 32.
21. *Zurich Reinsurance v. James Curtis Remaley*, No. 99-7101 (10th Cir., 2000) WL 107440

dollar bill from the horns of a bull, clearly evoking the name of the game. Remaley volunteered and was injured by the bull. His lawsuit raised the applicability of the rodeo insurance coverage. The Court held that Remaley began as a spectator but had become a rodeo participant when the injury occurred.

What is a voluntary participant? Most participants are voluntary by definition. But there are exceptions. Two particularly interesting cases involved a girls "powder puff" football game and a pick-up Little League Baseball game.

In 2000, a Texas appeals court considered the case of a father injured by a pitch to the head while playing in a parent-child, pick-up baseball game.[22] The game started when a scheduled Little League game was canceled at the last minute and various players and parents stayed to participate anyway at the designated field. Wayne Downing, the injured parent, sued various Little League organizations alleging negligence for a number of lapses, one of which was "failing to honor Downing's request that he not have to bat."[23]

Apparently, Downing argued he was not a voluntary participant. The Texas appeals court found that acquiescing to pressure from the others to play the pick-up game did not make the Little League a sponsor of the impromptu game, and thus was not liable for his other claim of "negligent instruction."[24] Perhaps the court was influenced by the totality of the circumstances, which makes a strong case for assumption of the risk. The plaintiff alleged that the defendants should have required batters to wear helmets, should not have allowed an opposing Little League pitcher to play because he was too old for a minor-division game, and failed to instruct the plaintiff how to look for a pitched ball at night. It appears this father willfully played in the impromptu game; batted but did not wear a helmet; and faced an experienced Little League pitcher—all at dusk or in darkness. He not only participated voluntarily, he assumed a lot of risk.

A May 4, 2003, incident involving an informal girls powder puff football game addressed an entirely different fact question about voluntary participation.[25] Can an event transform itself from a sport to something else? If so, what about the assumption of risk? This game had become a traditional "senior girls versus junior girls" initiation of incoming seniors at Glenbrook North High School, a large Chicago suburban school with about 2,000 students. The game was essentially a flag football game among the girls. It was not officially school sanctioned, nor was it on school property. The event began at a local Cook County forest preserve with rules generally associated with flag football. However, it soon devolved into a hazing of the junior girls; and then, apparently, devolved further into a violent melee. Published reports indicate that many or all of the girls understood this to be a "mild" hazing event. Did the girls accept the risk of flag football? Almost certainly they did. Was this a sport? At first, yes, and probably a contact sport.

Depending on the nature of the hazing, even benign hazing elements could possibly have been part of the game rules. But what about the ensuing melee? That was not a sport. No one accepted the risk of serious intentional harm, which included beatings, punches, and assaults with mud and human feces. Five girls were hospitalized for injuries such as a fractured skull, hearing loss, and a concussion.

The school superintendent later described the brawl as "deplorable treatment."[26] Three girls would sue for $500,000 in damages each.[27] Criminal charges, mostly for misdemeanor battery, were also brought against 16 teenagers. (Two adults also were charged, one for allowing underage drinking at her home; the other, for buying three kegs of beer.)

Six video tapes were eventually gathered as evidence, so most of the facts were discernable.[28] Were the victims willing participants accepting the risk of the powder puff game? Yes. But they were not "voluntary participants" for the riot that followed. Overall, 33 seniors were expelled, and 20 participating juniors were disciplined. (The civil lawsuits were scheduled for mediation in 2005.)

COURTS HAVE HELD THAT A "SPORT" NEED NOT BE A FORMALLY SANCTIONED ACTIVITY, BUT IT SHOULD HAVE ENOUGH RULES (WHETHER OFFICIAL, INFORMAL, ORAL, OR IMPLIED) TO DEFINE THE ACTIVITY AND ESTABLISH SHARED EXPECTATIONS ABOUT THE RISKS.

Criminal culpability on the field. American courts, Illinois included, have been reluctant to find criminal conduct during games. The Haynesworth incident would probably justify criminal penalties had charges been brought. The McMahon slam is less clear.

So far, Canadian courts have been more open to criminal charges in sports. In 2000, Boston Bruins' Marty McSorley was found guilty of an especially egregious stick slash from behind that struck Vancouver Canucks player Donald Brashear in the head, knocking him to the ice and causing a concussion.[29] The game was in Canada, there were only three seconds left, but the attack was televised, widely viewed, and left no doubt about the facts. The Canadian court found McSorley guilty of assault with a weapon and gave him 18 months of probation. Since slashing is common to NHL hockey, the courts deciding the *Karas* and *Nixon* cases may not have even found civil liability, which would seem unjust to Brashear since he was attacked from

22. (unpublished).
23. *Downing v. Little League Baseball Inc.*, No. 09-98-096 CV (Tex. Ct. App., 2000).
24. *Id.*
25. *Id.*
26. Rome Neal, *15 Face Charges in Hazing Incident*, CBS News (May 20, 2003), law.isba.org/3oxafRC.
27. *Id.*
28. M. Daniel Gibbard, *3 Girls Seek $1.5 Million in Lawsuit Over Hazing*, Chicago Tribune (May 6, 2004), law.isba.org/3Mzki0r.
29. Lisa Black & Courtney Flynn, *Hazing Suspects Go to Court*, Chicago Tribune (July 16, 2003), law.isba.org/3qa6277.

behind, injured, and missed several weeks of game action.

Also in 2000, a similar attack occurred at an Illinois high school hockey game (again involving Glenbrook North) with two interesting differences: It occurred seconds after the game-ending buzzer and there was no video. A Glenbrook North player skated the length of the ice and violently checked New Trier High School player Neal Goss into the boards from behind, paralyzing him the from the waist down and sending him to the hospital for three months.[30]

Since the attack came seconds after the game, the Lake County circuit court did not feel constrained by the assumption-of-risk problem. But by then the home video cameras were not running. By luck, two high school hockey refs were in attendance and could capably testify about the events. The assailant, age 15, was charged with two felony counts of aggravated battery, later reduced to misdemeanor battery, and he received two years on probation, was not allowed to play contact sports, and had to perform 120 hours of community service for a facility that treats paralysis. Again, the *Karas* and *Nixon* courts might not agree.

More recently, in 2015, a San Francisco area teen was charged with felony assault and battery for breaking the nose of an opposing water polo player during a high school game.[31] Contra Costa County prosecutors reviewed game video to assess intent. After viewing that the perpetrator had pulled the victim under the water and kneed him to the face, prosecutors decided to file criminal charges. With video evidence, there is no reason to ignore relevant facts.

During the 2012 NHL playoffs, the Phoenix Coyotes' Raffi Torres leveled Marion Hossa of the Chicago Blackhawks with an airborne shoulder to the head.[32] Hossa was motionless on the ice for about a minute before being hospitalized. The NHL suspended Torres for 25 games (reduced to 21 on appeal), in part because the hit violated three rules at once (interference, charging, and an illegal check to the head), and partly because Torres was a repeat offender with five similar violations. (Later, in 2015, Torres was suspended for 41 games—half the regular season—for yet another check to the head of an Anaheim Ducks player.) Replay video showed that Torres had launched off the ground to hit the puckless Hossa, hence the charging violation. No legal actions ensued, but the hit was probably egregious enough to warrant a civil case for damages (if not the possibility of criminal charges, especially in today's concussion-sensitive environment. Hossa was able to return for the following season, during which the Blackhawks won the Stanley Cup).

Conclusion

New assumption-of-the-risk standards for full-contact sports may be creating precedent with unintended consequences if egregious conduct is allowed in the name of sports.

On March 30, 2023, a Utah jury cleared actress Gwyneth Paltrow of wrongdoing in a widely followed ski-collision case.[33] She was not deemed at fault (and there was no video), but she had been at risk partly because skiing is a noncontact sport and so she could be held to the lower standard of simple negligence rather than the willful-and-wanton threshold for contact sports injury claims.

Do all contact sports participants, even full contact, waive all rights to recovery? No, they do not. And should not. IBJ

Videos and Replays

As video proliferates and courts are more mindful of sports misconduct on the field, our understanding of duties of care and the "assumption of the risk" doctrine, especially for full-contact sports, are changing. But some of these changes may not always be for the better.

Over four billion photos (not to mention cellphone videos) are taken each day,[34] many at sporting events. Hands-off doctrinal rules are evolving in large part due to technology and the pervasiveness of video.

The proliferation of available technologies, like hand-held video cameras and smartphones, offers a tipping point. Today nearly every contest of any age or level is recorded by dozens, if not hundreds, of devoted parents and fans.

Official video replays are now used to determine facts, such as whether a player stepped out of bounds, ran out the clock, or exhibited intent as with flagrant 1 and flagrant 2 fouls in the NBA.[35] The public is exposed to such proofs regularly, such as the NFL's "incontrovertible visual evidence" threshold to discern myriad game events like catches, fumbles, first downs, and touchdowns.

The increasing availability of game videos is becoming instrumental in determining the facts for both tort and criminal conduct.

30. ABC News, *NHL Player Found Guilty of Assault* (Oct. 6, 2000), law.isba.org/3BVzcJA.

31. Christopher Price, *Hockey Player Pleads No Contest*, ESPN (July 16, 2000), law.isba.org/3qdFWQn; see also Rummana Hussain, *Probation for Teen Who Delivered Hockey Hit*, Chicago Tribune (Oct. 27, 2000), law.isba.org/3qcdzhC.

32. Jodi Hernandez, *Video Shows Incident That Landed High School Water Polo Player in Criminal Court*, NBC Bay Area (Feb. 3, 2016), law.isba.org/3q3XgY5.

33. ESPNChicago.com, *Raffi Torres Banned Until Hearing* (Apr. 18, 2012), law.isba.org/3Wyrdvt.

34. Sam Metz, *Gwyneth Paltrow Gets Vindication at Ski Collision Trial*, AP News (Mar. 31, 2023), *available at* law.isba.org/3MxWevd.

35. Peter Suciu, *A Photo Used to Be Worth a Thousand Words, But Thanks to Social Media Photos Have Lost Their Value*, Forbes Oct. 24, 2019), *available at* law.isba.org/43h2BtG.

36. The NBA Rules define Flagrant as "unnecessary" and "unnecessary and excessive," including various criteria like severity of the conduct, whether it was a legitimate basketball play, and the extent of the injury. See NBA Official, Flagrant Fouls, law.isba.org/3MtxZ1b.

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