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INSIDE THE LINES: BASING NEGLIGENCE LIABILITY IN SPORTS FOR SAFETY-BASED RULE VIOLATIONS ON THE LEVEL OF PLAY

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INTRODUCTION

In order to minimize the risk of injury to participants, an adult recreational soccer league adopts a "no slide tackle" rule.[1] An offensive player is seriously injured when he collides with the opposing goalie, as each tries to gain control of the ball. The offensive player claims that the goalie slide tackled him, in violation of the league rule. The goalie claims that the contact merely resulted from both players trying to kick the ball simultaneously. If the goalie is found to have violated the safety rule, who should bear the costs of the injury?

One of the purposes of modern tort law is to redress harms wrongfully inflicted.[2] Sports participants often suffer physical injuries, and some may look to the civil torts system to recover for their harms.[3] Many may not, however, because in the sports arena players

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1. This hypothetical is based on *Lestina v. West Bend Mutual Insurance Co.*, 501 N.W.2d 28 (Wis. 1993).

2. As Justice Holmes wrote, "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not." O. W. Holmes, Jr., The Common Law 79 (1881). The Restatement (Second) of Torts lays out some of the purposes for which tort actions are maintainable: "(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help." Restatement (Second) of Torts § 901 (1979); *see, e.g.*, United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) (holding that "[t]he fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party"); *see also* Don Dewees et al., Exploring the Domain of Accident Law 5-10 (1996) (describing the three main rationales of tort law as: deterrence, compensation and corrective justice); Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. Ill. U. L. Rev. 41 (2003).

3. *See, e.g.*, Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979); Babych v. McRae, 567 A.2d 1269 (Conn. Super. Ct. 1989); Gauvin v. Clark, 537

are encouraged to "toughen up," be "macho,"[4] and forego their right to sue.[5] Thus, a disconnect exists between the legal system of tort liability and the sports world.

The concept of "sports" is vast and varied, including activities as diverse as golf, boxing, roller-skating, and football.[6] Thus, finding a single standard of liability in tort law that is appropriate to all sports is a challenge.[7] This Note argues that the level of play—i.e., professional, college, high school, or recreational—should serve as a guide for courts in this area.

This Note examines the cause of action for injuries sustained by participants as a result of the violation of a safety-based rule by co-participants in sporting events. Part I discusses the development of the negligence cause of action, both generally and in the context of sports. Part I goes on to discuss defenses to negligence and the role of public policy in judicial decision making in this area of tort law. Part II evaluates the state of tort law within the sports context and the policies that are involved in setting a standard for liability. This analysis reveals that there is a place for negligence in this field of tort law. Part III argues that the applicable duty of care should be adjusted based on the participants' level of play and concludes that safety-based rule violations by high school and recreational league sports participants should constitute negligence per se.

N.E.2d 94 (Mass. 1989); Vendrell v. Sch. Dist. No. 26C, 376 P.2d 406 (Or. 1962); Davis v. Greer, 940 S.W.2d 582 (Tex. 1996); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28 (Wis. 1993).

4. The environment surrounding athletes has been labeled "a work culture steeped in excessively macho values." Donald T. Meier, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout From the Tragedies on the Training Ground for American Values*, 2 Va. Sports & Ent. L.J. 80, 153 (2002) (quotations omitted).

5. Some authors have acknowledged that:

> The most serious problem with using the tort system as a solution to the problem of sports violence is the infrequency with which professional athletes avail themselves of this remedy. Their reluctance is the result of the tremendous pressure players feel from teammates, opponents, coaches, and management to resolve disputes without recourse to external sanctions such as the civil and criminal law.

Chris J. Carlsen & Mathew Shane Walker, Note, *The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. Cal. L. Rev. 399, 412-13 (1982); *see also* Comment, *Discipline in Professional Sports: The Need for Player Protection*, 60 Geo. L.J. 771, 793 (1972) (recognizing that athletes are reluctant to appeal to courts for fear of being "black-listed" in a sport or being labeled a "clubhouse lawyer"). These discussions relate only to professionals and their unwillingness to bring suit for their injuries. This hesitance is an indication of how the culture of professional athletes would pose an added challenge to accomplishing the courts' goals by requiring a negligence standard at the professional level.

6. Random House Webster's College Dictionary defines "sport" as "an athletic activity requiring skill or physical prowess and often of a competitive nature." Random House Webster's College Dictionary 1294 (1992).

7. *See infra* Part I.E.

I. DEVELOPMENT OF THE NEGLIGENCE DOCTRINE

This part examines the development of the doctrine of negligence and the role it plays within the law, as part of a larger inquiry into how courts apply negligence law in the sports context.[8] In addition, this part considers the sometimes confusing interplay between rules in sports and the laws of wider society.[9]

A. *The Introduction of a Negligence Cause of Action*

1. The Common Law Approach

At common law, the "writ system" governed the law of physical injuries to a plaintiff,[10] and causes of action were based on the type of injury.[11] Over time, new types of injuries arose in society, many of which did not fit neatly into the writ system.[12] The writ system evolved to account for some new types of torts, such as those that resulted indirectly.[13] However, the writ system remained very rigid,[14] and civil tort liability eventually became a fault-based system.[15]

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8. *See infra* Parts I.A.-E.

9. *See infra* Part I.F.

10. There were two forms of action, trespass and trespass on the case. *See generally* Patrick Kelley, *Infancy, Insanity, and Infirmity in the Law of Torts*, 48 Am. J. Juris. 179, 181 (2003). This approach focused on pleading requirements, rather than on substantive issues. *Id.*; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914-18 (1987); Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of 'Tort Reform': Has the Case Been Made?*, 42 Am. U. L. Rev. 1465, 1487-88 (1993).

11. Recovery under the writ system was also dependent upon whether the injury was direct or indirect. This organizational structure differs from the modern approach, which is classified by causes of action and the defendant's state of mind. *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 10 (2002).

12. *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 362-63 (1951); Rustad & Koenig, *supra* note 11, at 11.

13. *See* Gregory, *supra* note 12, at 363.

14. *Id.* at 359-63.

15. By the fourteenth century, the writ system was accompanied by the less rigid equity system, which allowed individuals to petition the chancellor in exceptional cases. *See* Michael T.G. Long, *The Replying Game: Making the Case for Adopting the Fifth Circuit's Use of Particularized Replies in § 1983 Actions*, 34 Seton Hall L. Rev. 389, 397-98 (2003); Subrin, *supra* note 10, at 921; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347 (2003). The chancellor was able to consider issues beyond the pleadings, such as questions of fairness and morality and could provide specific relief, rather than purely money damages. *See* Subrin, *supra* note 10, at 918-19. By the mid-nineteenth century, however, in response to the problems inherent in the writ system and its rigidity, legal scholars, and eventually courts, reorganized the structure of civil tort liability to an essentially fault-based system. *See* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L. Rev. 447, 454-55 (1990). In addition, an emphasis on the importance of juries in the aftermath of the American Revolution, as well as the move towards studying law at schools rather than by

Negligence is the primary standard for liability in the modern tort law system.[16] Legal historians generally cite *Brown v. Kendall*[17] as the case which introduced a fault-based system to American tort law.[18] Following *Brown*, courts became more willing to balance the social benefit of an activity with the risk of harm to the public in determining

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apprenticeships, influenced reformers. *See* Lawrence M. Friedman, A History of American Law 278-80, 525-38 (1973); Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure 411-12 (4th ed. 1992); William E. Nelson, Americanization of the Common Law 20-21 (1975); Subrin, *supra* note 10, at 928; Sward, *supra*, at 372-73; Vandevelde, *supra*, at 454-55. In 1848, New York adopted the Field Code, which merged the systems of law and equity, and did away with the writ system. *See* Sward, *supra*, at 382-83; Vandevelde, *supra*, at 454-55. Twenty-four states adopted the Field Code by 1870, and other states made similar reforms of their own. *See* Joseph H. Koffler & Alison Reppy, Handbook of Common Law Pleading 25 (1969); Vandevelde, *supra*, at 455. This move away from the traditional writ system, along with the influence of prominent legal scholars such as Oliver Wendell Holmes, Jr. (who proposed a "tripartite division" of intentional torts, negligence and strict liability), Sir Frederick Pollock, Melville Bigelow, and Thomas Cooley, along with the development of case law, eventually led to the tort law structure that is present today. *See id.* at 456-66. In 1934, the American Law Institute published the first Restatement of the Law of Torts, and although it modified the scheme significantly, the Restatement was essentially grounded in the tripartite scheme advocated by Holmes. *Id.* at 469.

16. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601, 607 (1992). Negligence, however, is a relatively new concept in tort law. *See* James A. Henderson, Jr. et al., The Torts Process 163 (5th ed. 1999). It was not until the nineteenth century, in response to a changing social and political environment, that the negligence cause of action was first recognized. *Id.* at 163-64. Under early Anglo-Saxon and medieval common law, individuals were strictly liable for causing injury to another individual. *Id.* at 164. John H. Wigmore wrote that liability was absolute because "the doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer." John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 317 (1894). Liability accrued if the plaintiff could show that the defendant caused the injury by direct or immediate force. *See* C. Peck, Negligence and Liability Without Fault in Tort Law, Department of Transportation Study of Automobile Insurance and Compensation (1970), *reprinted in* Henderson et al., *supra*, at 164-67. Throughout the fifteenth century, courts began to consider whether the defendant was at fault. *See id.* at 165 (noting that in the *Case of Thorns*, Y.B. 6 Edw. 4, fol. 7a, pl. 18 (1466), the defendant failed to allege whether he could have acted in another way when charged with liability for trespass to real property). Absolute liability persisted until the sixteenth century, when defendants were able to escape liability by showing that they were without blame. *Id.* at 165; *see also* Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1617).

17. 60 Mass. (6 Cush.) 292 (1850).

18. *See* Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 Detroit C.L. Mich. St. U. L. Rev. 1207, 1211-12. In *Brown v. Kendall*, the defendant was trying to separate two fighting dogs when he accidentally struck the plaintiff in the eye with a stick, causing serious eye injury. Justice Shaw, of the Massachusetts Supreme Judicial Court, held that "the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable." *Brown*, 60 Mass. at 295-96. Justice Shaw also introduced essential concepts of negligence that remain viable today, including "ordinary care," "prudent and cautious men," and the use of care that is appropriate under the circumstances. *Id.* at 296.

whether the defendant imposed an unreasonable risk of harm on another.[19]

2. Modern Tort Law

In the latter part of the twentieth century, tort law arguably became more plaintiff-oriented, as illustrated by the institution of comparative negligence in a majority of jurisdictions, as well as an expansion of legal duties.[20] In the last twenty years, however, many courts and legislatures have become more cautious.[21]

The legal standard of negligence is an act or omission which violates a legal duty and creates an unreasonable risk of harm to another, resulting in injury.[22] To determine the appropriate standard of care, a court must assess how an "ordinary, reasonable person would act *under like circumstances*."[23]

B. *Negligence Standard of Care*

The hypothetical reasonable person[24] standard used in negligence law was first employed in the 1837 English case of *Vaughan v. Menlove*.[25] Since that seminal case, the difficult task of determining what individual characteristics to take into account when assessing

19. *See* Rustad & Koenig, *supra* note 11, at 27. From 1850 through the close of the nineteenth century, much of the courts' work in the negligence area dealt with injuries that resulted from rising industrial development at the time. This included, for example, injuries resulting from railroads, bridges, and factories. *See, e.g.*, Flinn v. Philadelphia, Wilmington & Baltimore R.R., 6 Del. (1 Houst.) 469 (Del. Super. Ct. 1857); Baltimore & Ohio R.R. v. Lamborn, 12 Md. 257, 261 (1858); Baltimore & Susquehanna R.R. v. Woodruff, 4 Md. 242, 243 (1853); Zemp v. W. & M. R.R., 43 S.C.L. (9 Rich.) 84, 93 (S.C. Ct. App. 1855); *see also* Morton Horwitz, The Transformation of American Law 1780-1960 99-108 (1977); Rustad & Koenig, *supra* note 11, at 27; Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 667-70 (1989). Along with industrialization came injury, and the courts were left to balance the benefits of the industrial revolution with the severe injuries that resulted, as well as to provide incentives for industries to place more emphasis on safety. *See* Rustad & Koenig, *supra* note 11, at 27; *see, e.g.*, Hough v. Ry. Co., 100 U.S. 213 (1879); Thane v. Scranton Traction Co., 43 A. 136 (Pa. 1899).

20. *See* James P. End, *The Open and Obvious Danger Doctrine: Where Does it Belong in Our Comparative Negligence Regime?*, 84 Marq. L. Rev. 445, 448 (2000); *see also infra* Part I.D.

21. *See* Rustad & Koenig, *supra* note 11, at 65-70 (recognizing that the majority of states have enacted one or more tort law limitations since 1980).

22. *See* Washington v. La. Power and Light Co., 555 So. 2d 1350 (La. 1990); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Case v. Consumers Power Co., 615 N.W.2d 17 (Mich. 2000); Restatement (Second) of Torts § 282 (1965).

23. Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for On-the-Field Assaults Committed by Their Players*, 1 Va. J. Sports & L. 266, 269 (1999).

24. This Note adopts the more modern usage of "reasonable person" to replace "reasonable man."

25. 132 Eng. Rep. 490, 492 (C.P. 1837) (applying a reasonably prudent person standard in holding that defendant had a duty to use his land so as to not injure others where defendant's haystack burned and destroyed plaintiff's property).

reasonableness under the circumstances has burdened the courts.[26] Similarly, in the sports context, courts must determine what characteristics should be accounted for in determining reasonableness under the circumstances.

1. Fixed Standards of Care

a. *Mental Incapacity*

In a majority of jurisdictions, the standard of conduct for negligence liability is not adjusted for insanity or other mental incapacity.[27] Individuals who suffer from insanity or mental incapacity are still held to the standard of a reasonable person under like circumstances.[28] Courts have put forth several rationales for this position.[29] Most

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26. Some factors, such as infancy, physical incapacity, or professional training, are generally taken into account in determining reasonableness under the circumstances. *See infra* Part I.B.2. Other factors, such as mental incapacity and voluntary intoxication, however, are routinely ignored—those individuals are held to the standard of a reasonable person without those characteristics. *See infra* Part I.B.1.

27. For examples of cases dealing with mental incapacity short of insanity, see Bessemer Land & Improvement Co. v. Campbell, 25 So. 793 (Ala. 1899); Worthington v. Mencer, 11 So. 72 (Ala. 1892); Ga. Cotton Oil Co. v. Jackson, 37 S.E. 873 (Ga. 1901); Jankee v. Clark County, 612 N.W.2d 297 (Wis. 2000); Deisenrieter v. Kraus-Merkel Malting Co., 72 N.W. 735 (Wis. 1897). For examples of cases dealing with insane individuals, see Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961); Shapiro v. Tchernowitz, 155 N.Y.S.2d 1011 (Sup. Ct. 1956); Sforza v. Green Bus Lines, Inc., 268 N.Y.S. 446 (Mun. Ct. 1934). *But see* Seattle Elec. Co. v. Hovden, 190 F. 7 (9th Cir. 1911) (disagreeing with the majority rule and holding that an individual's mental capacity should be taken into account in determining negligence), *aff'g* Hovden v. Seattle Elec. Co., 180 F. 487 (W.D. Wash. 1910); Noel v. McCaig, 258 P.2d 234 (Kan. 1953) (noting that an individual who suffers from a mental deficiency is required to exercise that degree of care which might be expected of an individual of his mental capacity, and not the standard of a person without any mental incapacity). Many courts have also made exceptions for individuals with Alzheimer's Disease, especially for causes of action deriving from injuries suffered by the patients' caregivers. *See, e.g.*, Colman v. Notre Dame Convalescent Home, Inc., 968 F. Supp. 809, 814 (D. Conn. 1997); Herrle v. Estate of Marshall, 53 Cal. Rptr. 2d 713, 719 (Ct. App. 1996); Mujica v. Turner, 582 So. 2d 24, 25 (Fla. Dist. Ct. App. 1991); Creasy v. Rusk, 730 N.E.2d 659, 667 (Ind. 2000); Gould v. Am. Family Mut. Ins. Co., 543 N.W.2d 282, 287 (Wis. 1996).

28. *See* Restatement (Second) of Torts § 283B (1965); *see also* Epstein v. Fatzinger, 45 Pa. D. & C.3d 1 (Com. Pl. 1987) (holding that insanity or mental deficiency does not relieve an individual from liability for negligence); Burch v. Am. Family Mut. Ins. Co., 543 N.W.2d 277 (Wis. 1996) (holding that the reasonable person standard applies to retarded individuals).

29. The rationales for the mental incapacity rule include: First, it is difficult for a court to determine when an individual has a mental deficiency as distinguished from low intelligence, emotional status, or the individual's temperament. *See, e.g.*, *Creasy*, 730 N.E.2d at 664 (holding that requiring a reasonable person standard for individuals claiming insanity or mental deficiency avoids the problem of proving mental deficiency); Vinccinelli v. Musso, 818 So. 2d 163, 166 (La. Ct. App. 2002) (same). Second, mental incapacity may be easy for an individual to fake. *See* Thomas M. Cooley, A Treatise on the Law of Torts, or The Wrongs Which Arise Independent of

courts, however, hold that an infant with a mental deficiency should be held to a lower standard than that of the "reasonable person."[30]

b. *Voluntary Intoxication*

Voluntary intoxication, like mental deficiency, will not excuse negligence; the intoxicated individual is required to meet the standard of care of a sober person.[31] This is distinguished from involuntary intoxication, in which the individual would be treated as if he were physically incapacitated.[32]

2. Flexible Standards of Care

There are, however, several instances in which the law does allow for personal characteristics and adjusts the reasonable person standard accordingly. In cases involving children and individuals with physical disabilities, the standard of care required will generally be lower than that of the ordinary reasonable person.[33] In contrast, when the defendant is acting within the scope of her professional training, courts may hold the individual to a higher standard than that of the

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Contract 100-01 (Fred B. Rothman 1993) (1880); *see also Creasy*, 730 N.E.2d at 664; *Gould*, 543 N.W.2d at 287. Finally, the rule may serve to encourage those charged with caring for mentally incapacitated individuals to be more careful and attentive. *See* Cooley, *supra*; *see also Gould*, 543 N.W.2d at 287; McGuire v. Almy, 8 N.E.2d 760, 762 (Mass. 1937); Van Vooren v. Cook, 75 N.Y.S.2d 362 (App. Div. 1947).

30. *See, e.g.*, Soledad v. Lara, 762 S.W.2d 212, 214 (Tex. App. 1988); *see also* Restatement (Second) of Torts § 283A cmt. b ("'Intelligence' includes other mental capacities . . . [t]he fact that the child is mentally retarded, . . . is to be taken into account."). For example, in *Soledad*, the court allowed consideration of a sixteen year-old's mental capacity, because he was not an adult, in determining whether he met the reasonable person standard when he was injured while playing on a land development project. *See Soledad*, 762 S.W.2d at 214. The evidence showed that the teenager "was in a special education class in school; was also lacking in mental development; was a slow learner and was seeing a psychologist regularly." *See id.*

31. *See, e.g.*, Muldovan v. McEachern, 523 S.E.2d 566 (Ga. 1999); Collins v. Rocky Knob Assoc., Inc., 911 S.W.2d 608 (Ky. Ct. App. 1995); Harlow v. Connelly, 548 S.W.2d 143 (Ky. Ct. App. 1977); O'Neal v. Burlington N., Inc., 413 N.W.2d 631 (Minn. Ct. App. 1987); Hines v. Pollock, 428 N.W.2d 207 (Neb. 1988); Del Tufo v. Township of Old Bridge, 685 A.2d 1267 (N.J. 1996); Tome v. Berea Pewter Mug, Inc., 446 N.E.2d 848 (Ohio Ct. App. 1982). *But see* Simco v. Ellis, 222 F. Supp. 2d 1139 (W.D. Ark. 2000) (recognizing that voluntary intoxication may be a factor considered by the fact-finder in determining negligence).

32. *See* Restatement (Second) of Torts § 283C, cmt. d; *see also infra* Part I.B.2.b. Voluntary intoxication in itself, however, does not constitute negligence, rather there must be separate evidence of negligent conduct. *See* Kay v. Menard, 754 A.2d 760, 766-67 (R.I. 2000) (discussing that voluntary intoxication is not negligence per se, but also it does not excuse failure to act as a reasonable and prudent person under the circumstances); *see also* Dezort v. Village of Hinsdale, 342 N.E.2d 468 (Ill. App. Ct. 1976); Lynch v. Clark, 194 P.2d 416 (Or. 1948).

33. *See infra* Part I.B.2.a.-b.

ordinary reasonable person, requiring such professionals to use their unique skills and training.[34]

a. *Infancy*

A majority of courts do not require children to meet the standard of a reasonable person. These courts hold that the reasonableness of a child's actions should be judged according to what would be expected of children of a similar age, intelligence, and experience.[35] Most courts recognize an exception to this rule, holding that where a child engages in an adult activity—particularly an activity which requires special skill—and this behavior causes harm, then the child's age, intelligence, and experience should not be taken into account and the child should be held to the standard of a reasonable person.[36]

b. *Physical Incapacity*

Most courts are willing to distinguish between physical incapacities and mental incapacities, adjusting the reasonable person standard for defendants suffering from the former and holding that an individual with a physical disability must act as a reasonable person with a similar disability.[37] The rationale for this distinction is the greater public familiarity with physical disabilities, as well as the comparative ease and certainty with which physical disabilities can be proved.[38]

c. *Profession/Training*

When an individual seeks to use his particular skill or training, courts will hold him to a standard of conduct of those in the same

34. *See infra* Part I.B.2.c.

35. *See* Hoyt v. Rosenberg, 182 P.2d 234 (Cal. Ct. App. 1947); Lutteman v. Martin, 135 A.2d 600 (Conn. C.P. 1957); Faith v. Massengill, 121 S.E.2d 657 (Ga. Ct. App. 1961); Harvey v. Cole, 153 P.2d 916 (Kan. 1944); Charbonneau v. MacRury, 153 A. 457 (N.H. 1931); Kuhns v. Brugger, 135 A.2d 395 (Pa. 1957); Chernotik v. Schrank, 79 N.W.2d 4 (S.D. 1956); Restatement (Second) of Torts § 283A.

36. *See* Dellwo v. Pearson, 107 N.W.2d 859 (Minn. 1961); Carano v. Cardina, 184 N.E.2d 430 (Ohio Ct. App. 1961); Nielsen v. Brown, 374 P.2d 896 (Or. 1962); Wittmeier v. Post, 105 N.W.2d 65 (S.D. 1960); Renegar v. Cramer, 354 S.W.2d 663 (Tex. Civ. App. 1962); *see also supra* note 35 and accompanying text. For example, this exception applies in instances where a child drives a car or operates a motorboat. *See, e.g.*, Constantino v. Wolverine Ins. Co., 284 N.W.2d 463 (Mich. 1979); *Dellwo*, 107 N.W.2d 859; *Wittmeier*, 105 N.W.2d at 65.

37. *See, e.g.*, Sterling v. New England Fish Co., 410 F. Supp. 164 (W.D. Wash. 1976); Borus v. Yellow Cab Co., 367 N.E.2d 277 (Ill. App. Ct. 1977); *see also* Restatement (Second) of Torts § 283C. In order to meet this standard, however, in some instances physically disabled parties may be required to take more precautions than one who is not so disabled. *See, e.g.*, Darter v. Greenville Cmty. Hotel Corp., 301 F.2d 70, 78 (4th Cir. 1962); *Sterling*, 410 F. Supp. at 167; King v. Inv. Equities, Inc., 264 So. 2d 297 (La. Ct. App. 1972).

38. *See supra* note 29 and accompanying text.

profession or trade in good standing in similar communities.[39] Thus, the individual must use that skill to the extent that a reasonable person would use it.[40]

C. *Negligence Per Se*

In some instances, courts incorporate a statutory standard into the negligence inquiry in order to ease the difficulty of determining what conduct is "reasonable."[41] In this way, the statute or ordinance may aid the finder of fact in determining whether the standard of reasonableness has been met.[42] The use of applicable statutes or ordinances as the defining standard of conduct is known as negligence per se.[43] Ezra Ripley Thayer, an early proponent of the negligence per se doctrine, asserted that the doctrine's underlying rationale is

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39. *See, e.g.*, Fitzgerald v. Manning, 679 F.2d 341, 346 (4th Cir. 1982) (applying the profession rule to a physician); Fort Washington Res., Inc. v. Tannen, 901 F. Supp. 932 (E.D. Pa. 1995) (applying the profession rule to a F.D.A. employee); Brune v. Belinkoff, 235 N.E.2d 793 (Mass. 1968) (applying the profession rule to an anesthesiologist specialist). Training as a specialist may also be taken into consideration. For example, in the case of a heart surgery, a heart surgeon will be held to the standard of a reasonable heart surgeon, and not that of a reasonable general practitioner. *See, e.g.*, Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark, 39 F.3d 812 (7th Cir. 1994); N.N.V. v. Am. Assn. of Blood Banks, 89 Cal. Rptr. 2d 885 (Ct. App. 1999); Shilkret v. Annapolis Emergency Hosp. Ass'n, 349 A.2d 245 (Md. 1975).

40. *See, e.g.*, McIntire v. Lee, 816 A.2d 993 (N.H. 2003); Grider v. Naaman, 83 S.W.3d 241 (Tex. App. 2002); Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989). The individual may represent that he has less skill or training than is common to the profession, in which case he will be required to exercise the level of skill he has represented that he does have. *See, e.g.*, MacKown v. Ill. Pub. & Printing Co., 6 N.E.2d 526, 529 (Ill. App. Ct. 1937). Generally, this standard incorporates the individual's community, so a cardiologist in rural Iowa is held to the standard of a reasonable cardiologist in rural Iowa, and not that of a reasonable cardiologist in New York City. The community standard also allows courts to make allowances for the various levels of technology and equipment that may be present across the country, as well as differences in custom throughout the country, within the same profession. *But see* Nesbitt v. Cmty. Health, 467 So. 2d 711, 714 (Fla. Dist. Ct. App. 1985); Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253 (Ill. 1965); Kalsbeck v. Westview Clinic, P.A., 375 N.W.2d 861, 868 (Minn. Ct. App. 1985); McCarty v. Mladineo, 636 So. 2d 377, 381 (Miss. 1994); Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977); Philip G. Peters, Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 Wash. & Lee L. Rev. 163, 164 (2000) (suggesting that courts are moving away from custom in favor of a reasonable physician standard of care, especially in medical malpractice cases).

41. *See* Carlos E. González, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 Or. L. Rev. 447, 554-55 (2001).

42. *See id.* at 555.

43. Literally, "negligence in itself." Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920). Negligence per se requires that the conduct violates a statute, and also (1) the injured party was part of the class of people the statute was designed to protect; and (2) the injury is that which the statute was designed to protect against. *See id.*

that reasonable men do not violate the law, and thus a statute is the standard of reasonable conduct.[44]

1. Development of the Doctrine

Negligence per se has its roots in the 1874 English case of *Gorris v. Scott*.[45] In *Martin v. Herzog*,[46] Justice Benjamin N. Cardozo articulated a two-part test for negligence per se: the conduct must violate a statute, and the plaintiff must also prove that (1) the injured party was part of the class of people the statute was designed to protect; and (2) the injury is the type of injury which the statute was designed to protect against.[47] Cardozo emphasized the importance of adhering to statutes.[48]

2. Application Today

Cardozo's articulation of the negligence per se rule in *Martin v. Herzog*,[49] that violation of a statute is conclusive evidence of negligence, is the majority rule today.[50] Not all courts, however,

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44. Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317, 322 (1914).

45. 9 L.R.-Ex. 125 (1874). In *Gorris*, the plaintiff's sheep were being transported on the defendants' ship when they washed overboard. *Id.* The defendant failed to comply with a statute, the Contagious Diseases (Animals) Act, which required livestock to be kept enclosed in pens when they were being transported in order to prevent the spread of disease among the animals. *Id.* at 127-28. The plaintiff sued the defendant, arguing that if the defendant had complied with the statute, the sheep would not have washed overboard. *Id.* at 125-26. The court held, however, that the statute must have been intended to protect the plaintiff from the harm that he suffered, and also that the harm must have resulted from the defendant's failure to comply with the statute. *Id.* at 125-29.

46. 126 N.E. at 814.

47. *Id.* at 815; *see also* Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 Theoretical Inquiries L. 333, 394-95 (2002). In *Martin*, the plaintiff's husband was killed when his buggy collided with the defendant's car because the defendant swerved out of his lane on the highway. *Martin*, 126 N.E. at 814. The plaintiff's husband, however, was driving at night without his lights on, in violation of a statute "intended for the protection of travelers on the highway." *Id.* at 815. Cardozo held that the decedent and the defendant were both members of the class of persons that the statute sought to protect—highway travelers—and that the collision and the harm that resulted were the types of harm that the statute sought to prevent. *See id.* Thus, the decedent was contributorily negligent per se. *See id.* at 815-16.

48. Cardozo wrote that "[a] statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform." *Id.* at 816.

49. *Id.* at 815.

50. *See* Hurd & Moore, *supra* note 47, at 395; *see, e.g.*, Couch v. Donahue, 259 F.2d 325, 327 (5th Cir. 1958); Deering v. Carter, 376 P.2d 857, 860 (Ariz. 1962); Larkins v. Kohlmeyer, 98 N.E.2d 896, 899 (Ind. 1951); Annis v. Britton, 205 N.W. 128, 129 (Mich. 1925); Wojtowicz v. Belden, 1 N.W.2d 409, 410 (Minn. 1942); Cantwell v. Cremins, 149 S.W.2d 343, 346 (Mo. 1941); White v. Gore, 110 S.E.2d 228, 231 (Va. 1959).

adhere to this majority rule.[51] In addition, in some instances a statutory violation may be excused.[52]

Several legal commentators are critical of the negligence per se doctrine for delegating judicial responsibility to the legislature and also for the potential of negligence per se to impose substantial liability for a minor statutory violation.[53] Furthermore, critics argue

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51. Some courts, for example, have held that violation of a statute merely provides a rebuttable presumption of negligence. *See, e.g.*, Landeros v. Flood, 551 P.2d 389, 397 (Cal. 1976); Satterlee v. Orange Glenn Sch. Dist., 177 P.2d 279, 283 (Cal. 1947); Landry v. Hubert, 141 A. 593, 595 (Vt. 1928). *See generally* Thomas Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669*, 11 Pac. L.J. 907 (1980). Others have held that the statutory violation serves only as evidence of negligence. *See, e.g.*, New Amsterdam Cas. Co. v. Novick Transfer Co., 274 F.2d 916 (4th Cir. 1960); Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597 (Ark. 1938); Jones v. Coop. Ass'n of Am., 84 A. 985 (Me. 1912); Harsha v. Bowles, 51 N.E.2d 454 (Mass. 1943); Rotter v. Detroit United Ry., 171 N.W. 514 (Mich. 1919); Evers v. Davis, 90 A. 677 (N.J. Ct. Err. & App. 1914); Carlock v. Westchester Lighting Co., 197 N.E. 306 (N.Y. 1935).

52. Violation of an applicable statute may be excused where adherence to the statute would cause a greater risk of harm than nonadherence. *See* Tedla v. Ellman, 19 N.E.2d 987 (N.Y. 1939); *see also* Hopson v. Goolsby, 86 S.E.2d 149 (Va. 1955); Restatement (Second) of Torts § 288A(2)(e) (1965). For example, in *Tedla*, the court excused the plaintiff's failure to walk facing traffic because the traffic was much heavier on the opposite side of the road and she would have been in more danger had she followed the statute. *See Tedla*, 19 N.E.2d at 989-92. In addition, if the defendant is unable to comply with a statute due to his incapacity, then such a violation will be excused. *See* Restatement (Second) of Torts § 288A(2)(a) (1965); *see also* Alabama Power Co. v. Bowers, 39 So. 2d 402 (Ala. 1949); Galbraith v. Thompson, 239 P.2d 468 (Cal. Dist. Ct. App. 1952); Michalsky v. Gaertner, 5 N.E.2d 181 (Ohio Ct. App. 1935); Morby v. Rogers, 252 P.2d 231 (Utah 1953); Gough v. Shaner, 90 S.E.2d 171 (Va. 1955); Von Saxe v. Barnett, 217 P. 62 (Wash. 1923). *But see* Daun v. Truax, 365 P.2d 407 (Cal. 1961); Sagor v. Joseph Burnett Co., 190 A. 258 (Conn. 1937); Baldwin v. Hosley, 328 S.W.2d 426 (Ky. 1959); Patrican v. Garvey, 190 N.E. 9 (Mass. 1934); Simmons v. Holm, 367 P.2d 368 (Or. 1961); D'Ambrosio v. City of Philadelphia, 47 A.2d 256 (Pa. 1946); Rudes v. Gottschalk, 324 S.W.2d 201 (Tex. 1959). A violation also will be excused if the defendant neither knew nor should have known of the need for action to comply with the statute. *See* Restatement (Second) of Torts § 288A(2)(b) (1965); *see also* Alarid v. Vanier, 327 P.2d 897 (Cal. 1958); Berkovitz v. Am. River Gravel Co., 215 P. 675 (Cal. 1923); McEachen v. Richmond, 310 P.2d 122 (Cal. Dist. Ct. App. 1957); Beezley v. Spiva, 313 S.W.2d 691 (Mo. 1958); Hullander v. McIntyre, 104 N.W.2d 40 (S.D. 1960); Taber v. Smith, 26 S.W.2d 722 (Tex. Civ. App. 1930); Bissell v. Seattle Vancouver Motor Freight, 168 P.2d 390 (Wash. 1946); Brotherton v. Day & Night Fuel Co., 73 P.2d 788 (Wash. 1937). Another reason for excuse may be the party's inability to comply after using reasonable care. *See* Restatement (Second) of Torts § 288A(2)(c) (1965); *see also* Musgrave v. Southern Pac. Co., 68 P.2d 202 (Ariz. 1937); Martin v. Atchison, Topeka & Santa Fe Ry., 141 P. 599 (Kan. 1914); Baldwin v. Washington Motor Coach Co., 82 P.2d 131 (Wash. 1938). Finally, an emergency that is not due to the party's own conduct may also excuse a statutory violation. *See* Restatement (Second) of Torts § 288A(2)(d); *see also* Jolly v. Clemens, 82 P.2d 51 (Cal. Dist. Ct. App. 1938); R. & L. Transfer Co. v. State, 153 A. 87 (Md. 1931); Chase v. Tingdale Bros., 149 N.W. 654 (Minn. 1914); Burlie v. Stephens, 193 P. 684 (Wash. 1920).

53. *See generally* Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 Ind. L. Rev. 781 (1990); David P. Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 Santa

that violation of a statute is not always unreasonable because of differences between judicial standards of reasonableness and legislative criteria for defining statutory conduct.[54] Courts, however, continue to widely accept the negligence per se doctrine.[55]

D. *Defenses to Negligence*

Since the adoption of the negligence standard in tort law, various defenses have been adopted.[56] Both assumption of the risk and contributory negligence address the plaintiff's awareness of danger, but they differ in that assumption of the risk involves a subjective standard whereas contributory negligence involves an objective standard.[57] In recent years, however, most states have moved away from assumption of the risk and contributory negligence, and have adopted comparative fault principles in their place.[58]

1. Assumption of the Risk

Assumption of the risk derives from the ancient maxim "*volenti non fit injuria*," or literally "that to which a person assents is not esteemed in law an injury."[59] The defense of assumption of the risk is available when the plaintiff fully understood the risk of harm caused by the defendant's conduct but nonetheless voluntarily chose to engage in

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Clara L. Rev. 427 (1983); Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 Minn. L. Rev. 361 (1932); Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Colum. L. Rev. 21 (1949); Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 Baylor L. Rev. 109 (1997).

54. *See* Morris, *supra* note 53, at 29; Yowell, *supra* note 53, at 113.

55. *See supra* note 50.

56. Consent serves as a defense to intentional torts. For a discussion of the consent defense, see *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891). In the sports context, the participant may be found to have consented to the contact that resulted in the injury. *See* Ronald A. DiNicola & Scott Mendeloff, *Controlling Violence in Professional Sports: Rule Reform and the Federal Professional Sports Violence Commission*, 21 Duq. L. Rev. 843, 867-68 (1983). Courts commonly distinguish between contact that results from a safety-based rule violation and other types of contact when determining whether there was consent to the contact. *See infra* notes 151-54 and accompanying text.

57. *See, e.g.*, Jay v. Moog Auto., Inc., 652 N.W.2d 872, 880-83 (Neb. 2002) (holding that assumption of the risk applies a subjective standard because it considers the plaintiff's actual comprehension and appreciation of the nature of the danger, and contributory negligence applies an objective standard because it is based on the use of due care); Home v. North Kitsap Sch. Dist., 965 P.2d 1112, 1118-20 (Wash. Ct. App. 1998) (holding that assumption of the risk considers whether the plaintiff in fact understood the risk, whereas contributory negligence considers whether a reasonable person of ordinary prudence would comprehend the risk).

58. *See infra* note 66 and accompanying text.

59. Wood v. Kane Boiler Works, 238 S.W.2d 172, 174 (Tex. 1951); Walsh v. W. Coast Coal Mines, Inc., 197 P.2d 233, 238 (Wash. 1948); *see also* Gover v. Cent. Vt. Ry. Co., 118 A. 874, 877 (Vt. 1922).

the activity.[60] A valid showing of assumption of the risk generally acts as a complete bar to recovery for negligence and strict liability actions.[61]

There are two forms of assumption of the risk: express and implied.[62] Express assumption of the risk involves a written or oral agreement, before the injury, that releases the defendant from liability, and usually bars recovery by the plaintiff.[63] Without an express release, a court may still find that the plaintiff assumed the risks of the activity in which he engaged if he had actual knowledge of the risk, subjectively understood it, and voluntarily proceeded anyway.[64] There are two forms of implied assumption of the risk: primary and secondary.[65] Most courts today, however, reject assumption of the risk in favor of a comparative fault system.[66]

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60. *See* Restatement (Second) of Torts § 496A (1965); *see, e.g.*, Smith v. Seven Springs Farm, Inc., 716 F.2d 1002, 1005 (3d Cir. 1983); Dunshee v. Comfort, 441 So. 2d 75, 78 (La. Ct. App. 1983); Schroyer v. McNeal, 592 A.2d 1119, 1123 (Md. 1991).

61. *See, e.g.*, Lorefice v. Reckson Operating P'ship, 269 A.D.2d 572, 573 (N.Y. App. Div. 2000); Thurmond v. Prince William Prof'l Baseball Club, Inc., 574 S.E.2d 246, 249 (Va. 2003). *But see infra* note 65 and accompanying text, discussing secondary implied assumption of the risk.

62. *See, e.g.*, Knight v. Jewett, 834 P.2d 696, 703 (Cal. 1992); Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1128-29 (La. 1988); Perez v. McConkey, 872 S.W.2d 897, 900 (Tenn. 1994).

63. *See, e.g.*, *Murray*, 521 So. 2d at 1129; Anderson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983). However, express assumption of the risk may not bar recovery if there is a statute or public policy against the plaintiff expressly assuming the risk. *See, e.g.*, Etu v. Fairleigh Dickinson Univ. West Indies Lab., 635 F. Supp. 290, 295 (V.I. 1986); Norris v. ACF Indus., 609 F. Supp. 549, 552 (S.D.W. Va. 1985); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989); Wagenblast v. Odessa Sch. Dist. No. 105-157-166J, 758 P.2d 968, 970, 974 (Wash. 1988). *See generally* John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5 (1961).

64. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts 486-90 (5th ed. 1984); *see also* Restatement (Second) of Torts § 496C (1965).

65. *See, e.g.*, *Knight*, 834 P.2d at 703-04; *Murray*, 521 So. 2d at 1129; *Perez*, 872 S.W.2d at 900. Primary assumption of the risk involves a situation where the defendant did not owe a duty of care to the plaintiff, or the defendant did not breach his duty to the plaintiff. *See, e.g.*, Sklar v. Okemo Mountain, Inc., 877 F. Supp. 85, 87 (D. Conn. 1995); Schmidt v. Youngs, 544 N.W.2d 743, 745 (Mich. Ct. App. 1996). In these cases, the plaintiff's assumption of the risk acts as a complete bar to recovery. *See, e.g.*, Branco v. Kearny Moto Park, Inc., 43 Cal. Rptr. 2d 392, 396 (Cal. Ct. App. 1995). Secondary assumption of the risk acts as an affirmative defense when the defendant did breach a duty of care to the plaintiff. *See, e.g.*, *Sklar*, 877 F. Supp. at 87; Meistrich v. Casino Arena Attractions, Inc., 155 A.2d 90, 93 (N.J. 1959). *See generally* J. Stanley McQuade, *Products Liability—Emerging Consensus and Persisting Problems: An Analytical Review Presenting Some Options*, 25 Campbell L. Rev. 1, 56-57 (2002).

66. *See, e.g.*, Erickson v. Baxter Healthcare, Inc., 151 F. Supp. 2d 952, 971 (N.D. Ill. 2001); Joseph v. State, 26 P.3d 459, 472 (Alaska 2001); Salinas v. Vierstra, 695 P.2d 369, 372-75 (Idaho 1985); Wilson v. Gordon, 354 A.2d 398, 401-03 (Me. 1976); Lewis v. Puget Sound Power & Light Co., 29 P.3d 1028, 1032 (Mont. 2001); Mizushima v. Sunset Ranch, Inc., 737 P.2d 1158, 1161 (Nev. 1987); Iglehart v. Iglehart, 670 N.W.2d 343, 349 (N.D. 2003); Hughes v. Seven Springs Farm, Inc., 762 A.2d 339, 341 (Pa. 2000); Keaton v. Hancock County Bd. of Educ., 119 S.W.3d 218, 224 (Tenn. Ct. App. 2003); *see also* Robinette & Sherland, *supra* note 2, at 43 (noting that forty-six

2. Contributory Negligence

Contributory negligence originated with the English case of *Butterfield v. Forrester*.[67] The defense was premised on the idea that if the plaintiff, himself, was negligent, he could not recover from a negligent defendant because the plaintiff was partially responsible for his own harm.[68] In this analysis, the plaintiff's conduct involved an undue risk of harm to himself, and therefore precluded recovery from another.[69]

Traditionally, contributory negligence served as a complete bar to the plaintiff's recovery.[70] However, three exceptions to contributory negligence evolved in order to limit the "harsh"[71] doctrine: (1) the safety statute exception;[72] (2) the greater-degree-of-blame exception;[73] and (3) the last clear chance doctrine.[74] Although the three exceptions

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jurisdictions currently employ comparative fault principles); *infra* note 82 and accompanying text.

67. 103 Eng. Rep. 926 (K.B. 1809). In *Butterfield*, the defendant negligently left a pole across the highway and plaintiff was injured by it. The plaintiff, however, might have seen and avoided the pole if he was not "riding with great violence." *Id.*

68. *See generally* Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 Cardozo L. Rev. 1693 (1995).

69. *See* Sun Oil Co. v. Seamon, 84 N.W.2d 840, 842 (Mich. 1957).

70. *See* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. Rev. 481, 486 (2002).

71. *See* James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 Envtl. L. 595, 634 n.176 (2003); *see also* Ratlief v. Yokum, 280 S.E.2d 584, 588 (W. Va. 1981); Kenneth S. Abraham, The Forms and Functions of Tort Law 139-43 (1997); Robinette & Sherland, *supra* note 2, at 41-42.

72. The safety statute exception applies where the defendant's negligence consisted of the breach of a statute specifically designed to protect a class of persons unable to protect themselves against defendant's negligence. *See* Abraham, *supra* note 71, at 139; Robinette & Sherland, *supra* note 2, at 41-42. In these cases, the statute is "designed to impose an absolute duty for the protection of a class of persons against definable hazards which they themselves are incapable of avoiding." Gasperino v. Larsen Ford, Inc., 300 F. Supp. 1182, 1189 (S.D.N.Y. 1969). In order to adhere to the purpose of these statutes, courts applying the safety statute exemption do not permit the defense of contributory negligence. *See, e.g.*, *id.*; Tamiami Gun Shop v. Klein, 116 So. 2d 421, 423-24 (Fla. 1959); Tulkku v. Mackworth Rees, 281 N.W.2d 291, 293-94 (Mich. 1979); Koenig v. Patrick Constr. Corp., 83 N.E.2d 133, 134 (N.Y. 1948); Pollard v. Trivia Bldg. Corp., 50 N.E.2d 287, 290 (N.Y. 1943).

73. Under the greater-degree-of-blame exception, if the defendant's conduct was reckless or intentional, and the plaintiff was merely contributorily negligent, then the plaintiff would not be barred from recovery. *See, e.g.*, Alabam Freight Lines v. Phoenix Bakery, 166 P.2d 816, 819 (Ariz. 1946); *Sun Oil*, 84 N.W.2d at 847; Battishill v. Humphreys, 38 N.W. 581, 586 (Mich. 1888); Cook v. Kinzua Pine Mills Co., 293 P.2d 717, 721 (Or. 1956); *see also* Keeton et al., *supra* note 64, § 65. The court in *Sun Oil Co. v. Seamon* explained the distinction, stating that "[w]anton misconduct is a different kind of offense than ordinary negligence, even though it be gross. Fault is involved in both, but in the one the fault of the callous, the brutish, the quasi-criminal, in the other the human frailty of lack of care, of inattention, of diversion." 84 N.W.2d at 849.

74. The last clear chance doctrine states that if the negligent defendant had the

helped to diminish the strict doctrine of contributory negligence, eventually the doctrine faded in most jurisdictions to make way for the modern comparative fault system.[75]

3. Modern Comparative Fault System

In most jurisdictions, the modern comparative fault system has replaced assumption of the risk and contributory negligence in dealing with defenses to negligence.[76] The general concept of comparative fault is that the plaintiff's recovery should be reduced based on the plaintiff's percentage of fault.[77]

The doctrine of comparative fault has its roots in 1860s Georgia.[78] Comparative fault, however, was slow to take hold throughout the rest of the country. In the early twentieth century, after the adoption of the Federal Employers' Liability Act ("FELA"),[79] several states followed Georgia and adopted their own comparative fault statutes.[80]

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last clear chance to avoid harming the plaintiff, then the plaintiff's contributory negligence does not bar recovery. *See, e.g.*, Wash. Metro. Area Transit Auth. v. Young, 731 A.2d 389, 394-95 (D.C. 1999); Daniels v. Bay City Traction & Elec. Co., 107 N.W. 94, 98 (Mich. 1906); Bass v. Johnson, 560 S.E.2d 841, 846 (N.C. Ct. App. 2002); *Ratlief*, 280 S.E.2d at 588; Davies v. Mann, 152 Eng. Rep. 588, 589 (Ex. 1842); *see also* Restatement (Second) of Torts §§ 479-80 (1965); Keeton et al., *supra* note 64, § 66; Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 Yale L.J. 704 (1938); Malcolm M. MacIntyre, *The Rationale of Last Clear Chance*, 53 Harv. L. Rev. 1225 (1940). To satisfy the last clear chance doctrine, the plaintiff must prove that the defendant could have actually avoided injuring the plaintiff, but failed to do so. *See, e.g.*, *Young*, 731 A.2d at 394-95. Thus, the doctrine cannot rest merely on the defendant's initial primary negligence, but there must also be some additional negligence. *See, e.g.*, Wash. Metro. Area Transit Auth. v. Johnson, 699 A.2d 404, 407 (D.C. 1997).

75. *See* Robinette & Sherland, *supra* note 2, at 42.

76. *See supra* note 66.

77. *See* Henderson et al., *supra* note 16, at 417-18. The comparative fault system developed from concepts articulated in ancient Roman and medieval sea law. *See* Ernest A. Turk, *Comparative Negligence on the March*, 28 Chi.-Kent L. Rev. 189, 208, 218 (1950).

78. The Georgia legislature adopted two statutes. *See* 1863 Ga. Laws 2979 (codified at Ga. Code Ann. § 46-8-291 (2000)) (reducing damages for plaintiffs injured by negligent railroads); 1863 Ga. Laws 2914 (current version at Ga. Code Ann. § 51-11-7 (2000)) (if plaintiff's negligence contributed to his injury, the defendant was not relieved from liability in negligence). From those statutes, the Georgia courts developed the doctrine of comparative fault. *See* Robinette & Sherland, *supra* note 2, at 42-43.

79. In 1906, the Federal Employers' Liability Act ("FELA") was adopted, mandating that an employee of an interstate railroad carrier would not be totally barred by his own negligence from an action against his employer, but rather his recovery would be reduced in proportion to his own degree of negligence. *See* Federal Employers' Liability Act, 45 U.S.C. § 53 (2003).

80. *See* Ark. Stat. Ann. §§ 27-1730.1 to .2 (1955) (current version at Ark. Code Ann. § 16-64-122 (Michie Supp. 2003)); Me. Rev. Stat. Ann. tit. 14, § 156 (West 1964); 1910 Miss. Laws 135 (current version at Miss. Code Ann. § 11-7-15 (1972)); 1913 Neb. Laws 124, § 1 (current version at Neb. Rev. Stat. § 25-21,185 (1995)); 1941 S.D. Laws

In the 1960s and 1970s, however, comparative fault took hold and many jurisdictions adopted the doctrine.[81] Today, forty-six jurisdictions employ some form of comparative fault.[82]

There are two distinct types of comparative fault: pure and modified.[83] In a pure comparative fault system, "the plaintiff's negligence is never a complete bar to recovery."[84] The plaintiff's recovery is decreased by the percentage of fault attributed to him, regardless of how high that percentage is.[85] The modified comparative fault system, on the other hand, is grounded in the concept that

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160 (current version at S.D. Codified Laws § 20-9-2 (Michie 1995)); 1931 Wis. Laws 242 (current version at Wis. Stat. Ann. § 895.045 (West 1997)).

81. *See* Victor E. Schwartz, Comparative Negligence 2-3 (3d ed. 1994).

82. *See, e.g.*, Alaska Stat. § 09.17.060 (Michie 2002); Ariz. Rev. Stat. Ann. § 12-2505 (West 2003); Ark. Code Ann. § 16-64-122 (Michie 1987 & Supp. 2003); Colo. Rev. Stat. Ann. § 13-21-111 (West 2003); Conn. Gen. Stat. Ann. § 52- 572h (West 1958 & Supp. 2004); Del. Code Ann. tit. 10, § 8132 (1999); Fla. Stat. Ann. § 768.31(3)(a) (West 1997 & Supp. 2003); Ga. Code Ann. § 51-11-7 (2000 & Supp. 2003); Haw. Rev. Stat. Ann. § 663-31 (Michie 1993 & Supp. 2001); Idaho Code § 6-801 (Michie 1998 & Supp. 2003); Ill. Comp. Stat. Ann. 5/2-111 (West 1992 & Supp. 2003); Ind. Code Ann. § 34-51-2-6 (Michie 1998 & Supp. 2003); Iowa Code Ann. § 668.3 (West 1998); Kan. Stat. Ann. § 60-258a (1994); La. Civ. Code Ann. art. 2323 (West 1997 & Supp. 2004); Me. Rev. Stat. Ann. tit. 14, § 156 (West 2003); Mass. Ann. Laws ch. 231, § 85 (Law. Co-op. 2000 & Supp. 2003); Minn. Stat. Ann. § 604.01 (West 2000); Miss. Code Ann. § 11-7-15 (1999 & Supp. 2003); Mont. Code Ann. § 27-1-702 (2003); Neb. Rev. Stat. § 25-21,185.09 (1995); Nev. Rev. Stat. Ann. § 141.41 (Michie 2002); N.H. Rev. Stat. Ann. § 507:7-d (1995 & Supp. 2003); N.J. Rev. Stat. § 2A:15-5.1 (2000); N.Y. C.P.L.R. 1411 (McKinney 1997 & Supp. 2004); N.D. Cent. Code §§ 32-03.2-02 (1996 & Supp. 2001); Ohio Rev. Code Ann. § 2315.33 (West. Supp. 2003); Okla. Stat. Ann. tit. 23, §§ 13-14 (West 1987 & Supp. 2004); Or. Rev. Stat. § 18.470 (2003); 42 Pa. Cons. Stat. Ann. § 7102 (West 1998 & Supp. 2003); R.I. Gen. Laws § 9-20-4 (1997 & Supp. 2000); S.D. Codified Laws § 20-9-2 (Michie 1995 & Supp. 2003); Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (Vernon 1997 & Supp. 2004); Utah Code Ann. § 78-27-38 (2002); Vt. Stat. Ann. tit. 12, § 1036 (2002); Wash. Rev. Code Ann. § 4.22.005 (West 1988 & Supp. 2004); Wis. Stat. Ann. § 895.045 (West 1997 & Supp. 2003); Wyo. Stat. Ann. § 1-1-109 (Michie 2003); Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973); Hilen v. Hays, 673 S.W.2d 713, 719 (Ky. 1984); Placek v. City of Sterling Heights, 275 N.W.2d 511, 520 (Mich. 1979); Scott v. Rizzo, 634 P.2d 1234, 1241 (N.M. 1981); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 885 (W. Va. 1979). Only Alabama, North Carolina, Maryland, and Virginia have not adopted comparative fault. *See, e.g.*, O'Neil v. Windshire Copeland Assocs., 197 F. Supp. 2d 507, 512 (E.D. Va. 2002); Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993); Harrison v. Montgomery County Bd. of Educ., 456 A.2d 894, 905 (Md. 1983); Corns v. Hall, 435 S.E.2d 88, 90 (N.C. Ct. App. 1993).

83. *See* Robinette & Sherland, *supra* note 2, at 43.

84. Abraham, *supra* note 71, at 145.

85. *See, e.g.*, Alaska Stat. §§ 09.17.040-09.17.900 (Michie 2002); Cal. Civ. Code § 1431.2 (West Supp. 2004); La. Civ. Code Ann. art. 2323 (West 1997); Miss. Code Ann. § 11-7-15 (1999); Mo. Ann. Stat. §§ 537.068, 537.765 (West 2000); N.M. Stat. Ann. §41-3A-1 (Michie 1996); N.Y. C.P.L.R. 1411-1413 (McKinney 1997); R.I. Gen. Laws §§ 9-20-4, 9-20-4.1 (1997); Wash. Rev. Code Ann. §§ 4.22.005-4.22.020 (West 1988); *see also* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 532 P.2d 1226 (Cal. 1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983); Scott v. Rizzo, 634 P.2d 1234 (N.M. 1981).

someone who is more at fault should not be able to recover from someone who is less at fault;[86] and depending on which type of comparative fault system a jurisdiction employs, the plaintiff's award will be barred or reduced.[87]

E. *Sports Torts Cases*

In applying tort law to sports cases in which a participant injures a co-participant, courts have generally recognized three theories of recovery: intent,[88] recklessness,[89] and negligence.[90] Most courts hold

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86. *See generally* John R. Grier, *Rethinking the Treatment of Mitigation of Damages Under the Iowa Comparative Fault Act in Light of* Tanberg v. Ackerman Inv. Co., 77 Iowa L. Rev. 1913 (1992). *See, e.g.*, Rapoza v. Parnell, 924 P.2d 572, 576 (Haw. Ct. App. 1996); Tucker v. Marcus, 418 N.W.2d 818, 824 (Wis. 1988). Varying the rule slightly, some courts hold that a plaintiff who is as equally at fault as the defendant should not be able to recover. *See infra* note 87 (discussing the fifty percent rule).

87. Furthermore, within the universe of modified comparative fault systems, there are two subtypes: the forty-nine percent rule and the fifty percent rule. In jurisdictions following the forty-nine percent rule, if the plaintiff's percentage of fault is less than fifty percent, then comparative fault principles are used and the plaintiff's award is reduced by the percentage of his fault. If the plaintiff's percentage of fault is fifty percent or greater, then contributory negligence principles are used and the plaintiff is barred from recovering any amount. In jurisdictions following the fifty percent rule, if the plaintiff's percentage of fault is fifty percent or less, then comparative fault principles are used. If the plaintiff's percentage of fault is greater than fifty percent, then contributory negligence principles are used. Twelve states follow the forty-nine percent rule. *See* Ariz. Rev. Stat. Ann. §§ 12-2501 to 12-2509 (West 2003); Ark. Code Ann. § 16-64-122 (Michie 1987 & Supp. 2003); Colo. Rev. Stat. Ann. §§ 13-21-111 to 13-21-111.7 (West 2003); Ga. Code Ann. § 46-8-291 (1992), Ga. Code. Ann. §§ 51-11-7, 51-12-31 to 33 (2000); Idaho Code §§ 6-801 to 6-806 (Michie 1998); Kan. Stat. Ann. §§ 60-258a, 60-258b (1994); Me. Rev. Stat. Ann., tit. 14, § 156 (West 2003); Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (1995); N.D. Cent. Code § 32-03.2-02 (1996); McIntyre v. Balentine, 833 S.W.2d 52, 57 (Tenn. 1992); Utah Code Ann. §§ 78-27-37 to 78-27-43 (2002); Bradley v. Appalachian Power Co., 256 S.E.2d 879, 884 (W. Va. 1979). Twenty-one states follow the fifty percent rule. *See* Conn. Gen. Stat. Ann. § 52-572h (West 1991); Del. Code Ann., tit. 10, § 8132 (1999); Haw. Rev. Stat. §§ 663-10.9, 663-31 (1993); 735 Ill. Comp. Stat. Ann. 5/2-1107.1, 5/2-1116 (West 2003); Ind. Code Ann., §§ 34-51-2-5 to 34-51-2-6 (Michie 1998); Iowa Code Ann. §§ 668.1 to 668.10 (West 1998); Mass. Ann. Laws ch. 231, § 85 (Law Co-op 2000); Minn. Stat. Ann. §§ 604.01, 604.02 (West 2000); Mont. Code Ann. §§ 27-1-702, 27-1-703 (2003); Nev. Rev. Stat. Ann. 41.141 (Michie 2002); N.H. Rev. Stat. Ann. § 507:7-d (1997); N.J. Stat. Ann. §§ 2A:15-5.1 to 2A:15-5.3 (West 2000); Ohio Rev. Code Ann. § 2315.19 (Anderson 2001); Okla. Stat. Ann. tit. 23, §§ 12-14 (West 1987); Or. Rev. Stat. §§ 18.470 to 18.510 (2003); Pa. Stat. Ann. tit. 42, § 7102 (West 1998); Nelson v. Concrete Supply Co., 399 S.E.2d 783, 784 (S.C. 1991); Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001, 33.002, 33.003, 33.011, 33.012, 33.013 (Vernon 1997); Vt. Stat. Ann. tit. 12, § 1036 (2002); Wis. Stat. Ann. § 895.045 (West 1997); Wyo. Stat. Ann. § 1-1-109 (Michie 2003).

88. *See, e.g.*, Moser v. Ratinoff, 130 Cal. Rptr. 2d 198, 206 (Ct. App. 2003); Kahn v. E. Side Union High Sch. Dist., 117 Cal. Rptr. 2d 356, 369 (Ct. App. 2002); Griggas v. Clauson, 128 N.E.2d 363, 365 (Ill. App. Ct. 1955); Gyuriak v. Millice, 775 N.E.2d 391, 396 (Ind. Ct. App. 2002).

89. *See infra* Part I.E.1.

90. *See infra* Part I.E.2.

that a defendant's conduct must be at least reckless before the plaintiff can recover for his injuries. Thus, even if negligence is proven, no liability will attach.[91] A minority of courts, however, have imposed a negligence standard in this context.[92]

1. Majority Rule: Recklessness Required

Courts that reject a negligence cause of action in the sports context may do so for various reasons, including public policy and assumption of the risk principles. Public policy rationales, such as the importance of vigorous participation and limiting a flood of litigation, are put forth for requiring an elevated standard of care for reckless or intentional torts.[93] In addition, some courts hold that risks are inherent in the activity and thus participants assume, or consent to, those risks.[94] In some cases, these approaches are inter-related concepts.[95]

a. *Duty*

Jaworski v. Kiernan[96] cogently explains the logic used by many courts that refuse to allow recovery, based on a theory of the appropriate legal duty, for mere negligence where a participant is injured in the sports context.[97] In *Jaworski*, the plaintiff and the defendant were opponents in an adult, co-educational, recreational

91. Cases that reject a negligence standard and call for recklessness as the threshold for tort liability in the sports context include: Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979); Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992); Jaworski v. Kiernan, 696 A.2d 332, 338 (Conn. 1997); Savino v. Robertson, 652 N.E.2d 1240, 1245 (Ill. App. Ct. 1995); Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975); Picou v. Hartford Ins. Co., 558 So. 2d 787, 791 (La. Ct. App. 1990); Kavanagh v. Trs. of Boston Univ., 795 N.E.2d 1170, 1179 (Mass. 2003); Gauvin v. Clark, 537 N.E.2d 94, 98 (Mass. 1989); Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982); Dotzler v. Tuttle, 449 N.W.2d 774, 779 (Neb. 1990); Crawn v. Campo, 643 A.2d 600, 606 (N.J. 1994); Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. Ct. App. 1983); Marchetti v. Kalish, 559 N.E.2d 699, 703 (Ohio 1990); Kiley v. Patterson, 763 A.2d 583, 586 (R.I. 2000); Connell v. Payne, 814 S.W.2d 486, 489 (Tex. App. 1991). Explaining the impact of these cases, the court in *Allen v. Dover Co-Recreational Softball League* stated that "[r]aising the standard to permit recovery only when conduct is reckless or intentional would permit participants to act unreasonably under the circumstances and escape liability for their negligent conduct, thus providing immunity for a defendant's wrongful conduct." 807 A.2d 1274, 1284 (N.H. 2002).

92. *See infra* Part I.E.2.

93. *See infra* Part I.E.1.c.

94. These courts either expressly adopt the defense of assumption of the risk, or use these principles to determine the appropriate legal duty. *See infra* Part I.E.1.b.

95. *See* Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994) (recognizing that when a court raises the standard of care that defines the legal duty owed, it immunizes conduct that would otherwise be considered tortious, and that the court does so only for "important reasons of public policy").

96. 696 A.2d 332 (Conn. 1997).

97. *Id.* at 335-39.

soccer game when the two made contact that resulted in a knee injury.[98] At trial, the jury found that the defendant had violated league safety rules.[99] The jury also found that the defendant's violations were negligent but not reckless.[100] On appeal, the court's consideration was based on what duty of care the defendant owed to the plaintiff.[101] In determining the appropriate legal duty, the court concluded that it must consider:

> (1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.[102]

The court determined that some degree of physical contact is inherent in athletic competition,[103] and stressed the importance of public policy considerations.[104] Further, in holding that at least recklessness, rather than mere negligence, is required to find liability for injuries that occur during an athletic contest,[105] the court considered the previous decisions of *Nabozny v. Barnhill*,[106] *Crawn v. Campo*,[107] and others.[108] Because the jury had found liability based on negligence, but not based on recklessness, the court reversed the judgment below in part, with direction to strike the negligence count

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98. *Id.* at 333.

99. *Id.* at 333-34. One rule that was violated was that "[n]o male player may challenge a female player." *Id.* at 333 n.1.

100. *Id.* at 334.

101. *Id.* at 335-38.

102. *Id.* at 336-37.

103. *Id.* at 337.

104. *Id.* at 337-38.

105. *Id.* at 337.

106. 334 N.E.2d 258 (Ill. App. Ct. 1975). The *Nabozny* court held that:

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

Id. at 260-61. The opinion also suggests that only a reckless disregard of the rules will result in liability. *Id.* at 261. "It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player. . . ." *Id.* For a discussion of the confusion that *Nabozny* has presented for courts and scholars interpreting the decision, see *Lestina v. West Bend Mutual Insurance Co.*, 501 N.W.2d 28, 31 n.6 (Wis. 1993).

107. 643 A.2d 600, 607 (N.J. 1994) (holding, in a case involving injury from a home plate collision in a pick-up softball game, that "the duty of care in establishing liability arising from informal sports activities should be based on a standard that requires, under the circumstances, conduct that is reckless or intentional").

108. *Jaworski*, 696 A.2d at 338 n.11.

of the injured player's complaint.[109] Thus, the court determined that the appropriate legal duty of one participant to another is to refrain from reckless or intentional misconduct.

The Massachusetts Supreme Judicial Court also considered the issue of the legal duty owed to another participant in the sports context in *Gauvin v. Clark*.[110] In *Gauvin*, the defendant violated a safety rule prohibiting "butt-ending"[111] another player in the abdomen with a hockey stick during a college ice hockey game.[112] The court held that violation of a safety rule alone was not enough to impose liability because the appropriate legal duty of care of participants in the sports context is "reckless disregard of safety."[113]

b. *Assumption of the Risk*

In *Knight v. Jewett*,[114] the court considered the viability of assumption of the risk after the adoption of comparative fault principles.[115] In *Knight*, the plaintiff and the defendant were engaged in an informal game of touch football when the defendant ran into the plaintiff during a play, after which the plaintiff requested that the defendant not play so roughly.[116] On the next play, however, when the defendant reached to catch the ball, he collided with the plaintiff, causing injuries to the plaintiff's hand, which ultimately resulted in the amputation of one of her fingers.[117]

The court concluded that with adoption of comparative fault, it is necessary to distinguish between the different types of assumption of

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109. *Id.* at 339.

110. 537 N.E.2d 94 (Mass. 1989).

111. "Butt-ending" involves "taking the end of the stick which does not come into contact with the puck and driving this part of the stick into another player's body." *Id.* at 96.

112. *Id.* at 95.

113. *Id.* at 97 (holding that the trial judge was correct in holding that *Nabozny* requires more than just a safety-rule violation, but that *Nabozny* requires recklessness).

114. 834 P.2d 696 (Cal. 1992).

115. *Id.* at 697; *see also* Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994) (discussing "risk-laden conduct that is inherent in sports and more often than not assumed to be 'part of the game.'"); Turcotte v. Fell, 502 N.E.2d 964, 970 (N.Y. 1986) (holding that as a matter of law a sports participant assumes the risk of negligent injury at the hands of a co-participant); Reddell v. Johnson, 942 P.2d 200, 204-05 (Okla. 1997) (holding that a voluntary participant in BB-gun "war" assumed the risk of being shot in the eye, even though rules prohibited aiming above the waist); Connell v. Payne, 814 S.W.2d 486, 488-89 (Tex. Ct. App. 1991) ("A participant in a competitive contact sport expressly consents to and assumes the risk of the dangerous activity by voluntarily participating in the sport."). *But see* Gauvin v. Clark, 537 N.E.2d 94, 97 n.5 (Mass. 1989) (noting that the Massachusetts legislature eliminated the doctrine of assumption of the risk and adopted comparative fault principles).

116. *Knight*, 834 P.2d at 697.

117. *Id.* at 697-98.

the risk.[118] The court held that primary assumption of the risk survives adoption of comparative fault principles.[119] This consideration, however, "does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk."[120] The court held:

> [A] participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.[121]

Thus, a participant is not in breach of a legal duty by engaging in merely negligent behavior,[122] because primary assumption of risk operates to lower the duty of care that participants owe to each other from ordinary negligence to recklessness.[123]

c. *Public Policy Concerns*

Many courts discuss public policy[124] when determining whether to allow a negligence cause of action in the sports context.[125] There are

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118. *Id.* at 700; *see also supra* Part I.D.1. for a discussion of assumption of the risk.

119. *Knight*, 834 P.2d at 707. In explaining the relationship between primary assumption of the risk and comparative fault, the court stated:

> In "primary assumption of risk" cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles.

Id. at 704. In addition, the court held that in some instances "the careless conduct of others is treated as an 'inherent risk' of a sport," and thus bars recovery by the plaintiff. *Id.* at 708.

120. *Id.* at 709.

121. *Id.* at 711.

122. *Id.* at 712 (finding that the "defendant was, at most, careless or negligent in knocking over plaintiff" and therefore the "defendant's conduct . . . did not breach any legal duty of care owed to plaintiff").

123. *Marchetti v. Kalish* also considered assumption of the risk principles as part of its determination of the appropriate standard required for recovery in recreational and sports activities. 559 N.E.2d 699, 700 (Ohio 1990). In *Marchetti*, a thirteen year old child broke her leg when she was knocked down by another child while they were playing a game of "kick the can." *Id.* at 699. The court held that "before a party may proceed with a cause of action involving injury resulting from a recreational or sports activity, reckless or intentional conduct must exist." *Id.* at 703. The court's rationale for such a standard was based on public policy concerns and assumption of the risk principles. *Id.* The court's public policy concerns included the desire to not limit vigorous participation, the recognition that some "restraints of civilization" must be imposed on the field, and the importance of recognizing the educational benefits of sports participation. *Id.* The court concluded that "where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either 'reckless' or 'intentional.'" *Id.* at 703-04 (citations omitted).

124. The role of public policy in judicial decision making, as well as acceptance of

two main policy reasons put forth by courts that require recklessness as the threshold: (1) promoting vigorous competition and participation;[126] and (2) avoiding a flood of litigation.[127] These concerns are balanced against the recognition that some controls are necessary to protect the players,[128] and the recognition that "some of

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consideration of public implications within the context of private actions, has evolved substantially since the eighteenth century, when the law was generally viewed as being god-given or natural. *See* Rustad & Koenig, *supra* note 11, at 12 (recognizing that in the eighteenth century, during the time of Sir William Blackstone, judges' roles were to be those who "discovered divinely inspired 'oracles of the law'"). Until the early twentieth century, judges were viewed as having a primarily ministerial function. *See* Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 12-38 (1961). In the late nineteenth century, however, with the introduction of American pragmatists such as Oliver Wendell Holmes, Jr., Roscoe Pound, John Dewey, John Chipman Gray, and Felix Cohen, the law began to be viewed as an instrument to serve goals that derive from individual wants and interests. *See* Robert S. Summers, *On Identifying and Reconstructing a General Legal Theory—Some Thoughts Prompted by Professor Moore's Critique*, 69 Cornell L. Rev. 1014, 1016-21 (1984). From this theory grew the legal realist movement of the 1920s and 1930s, in which Jerome Frank, Karl Llewellyn, and others argued that there were inevitable conflicts in the law, and where those conflicts must be resolved, a judge's own personality was the most important influence upon a decision. *See* Jerome Frank, Law and the Modern Mind 100-17 (Stevens & Sons Limited 1949) (1930); Robert J. Steinfeld, Book Review, *Gary Minda, Boycott in America: How Imagination and Ideology Shape the Legal Mind*, 20 L. & Hist. Rev. 437, 437 (2002). Llewellyn later asserted, however, that there were stabilizing factors which minimized the arbitrary and personal element in judicial decision making. *See* Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 4 (7th ed. 1960). More recently, the theories of critical legal studies and law and economics have taken hold. *See* Henderson et al., *supra* note 16, at 172. Critical legal studies, which is grounded in much of what the legal realists argued, asserts that judges make decisions based, in part at least, on their political preferences. *See* Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. Miami L. Rev. 505, 512, 525-26 (1987). Law and economics, which is grounded in the work of Adam Smith and David Hume, asserts that judges are guided not by their political preferences, but rather by a desire to adopt rules that are efficient and fair. *See generally* Izhak Englard, *Law and Economics in American Tort Cases: A Critical Assessment of the Theory's Impact on Courts*, 41 U. Toronto L.J. 359 (1991); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. Chi. L. Rev. 281 (1979); Richard A. Posner, *The Economic Approach to Law*, 53 Tex. L. Rev. 757 (1975).

125. *See, e.g.*, Nabozny v. Barnhill, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975); Gauvin v. Clark, 537 N.E.2d 94, 97 (Mass. 1989); Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982); Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. Ct. App. 1983) (holding that "we think for reasons of public policy the standard of care articulated in *Hackbart* is applicable to [tort] cases" which result from participants engaged in physical athletic activities); *Marchetti*, 559 N.E.2d at 703.

126. *See Gauvin*, 537 N.E.2d at 97; Crawn v. Campo, 643 A.2d 600, 604 (N.J. 1994); *Kabella*, 672 P.2d at 294; *see also* Mark v. Moser, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001) (holding that adoption of the recklessness or intentional conduct standard "preserves the fundamental nature of sports by encouraging, rather than inhibiting, competitive spirit, drive, and strategy").

127. *See, e.g.*, Jaworski v. Kiernan, 696 A.2d 332, 338 (Conn. 1997); *Nabozny*, 334 N.E.2d at 261; *Mark*, 746 N.E.2d at 419.

128. *See Ross*, 637 S.W.2d at 14.

the restraints of civilization must accompany every athlete onto the playing field."[129]

2. Minority Rule: Recovery for Negligence

Some courts allow recovery for injuries that result from negligent conduct in the sports context.[130] Although it is no longer the law in Missouri, *Niemczyk v. Burleson*[131] provides some insight into the rationale of cases upholding a negligence cause of action in the sports context.[132] The *Niemczyk* court held that the finder of fact should consider the following factors in determining breach of a duty: the game involved, the rules that govern the sport, generally accepted customs and practices of the sport, risks inherent in the game, use of protective equipment or uniforms, and circumstances of the particular case including age, skill, status of participants, and knowledge of the rules.[133] In rejecting the argument that the doctrine of assumption of the risk negates actionable negligence in all instances, the court stated that "[c]onsidering the skill of the players, the rules and nature of the particular game, and risks which normally attend it, a participant's conduct may amount to such careless disregard for the safety of others as to create risks not fairly assumed."[134] Thus, a sports participant does not necessarily assume all risks of negligent behavior.[135]

In *Lestina v. West Bend Mutual Insurance Co.*,[136] the court considered a single question of law: "[I]s negligence the standard governing the conduct of participants in recreational team contact sports?"[137] The Wisconsin Supreme Court adopted the *Niemczyk* factors for determining negligence during recreational team contact

129. *Nabozny*, 334 N.E.2d at 260.

130. *See, e.g.*, LaVine v. Clear Creek Skiing Corp., 557 F.2d 730, 735 (10th Cir. 1977); Babych v. McRae, 567 A.2d 1269, 1270 (Conn. Super. Ct. 1989); Duke's GMC, Inc. v. Erskine, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983); Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1043-44 (Nev. 1994); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993).

131. 538 S.W.2d 737 (Mo. Ct. App. 1976).

132. *See Ross*, 637 S.W.2d at 14 (holding that to the extent that *Niemczyk* is inconsistent with the recklessness standard set forth by *Ross*, it should not be followed).

133. *Niemczyk*, 538 S.W.2d at 741-42; *see also Lestina*, 501 N.W.2d at 33. A negligence cause of action in the sports context is no longer viable in Missouri. *See Ross*, 637 S.W.2d at 14. However, *Ross* held that the factors enunciated in *Niemczyk* remain pertinent for determining liability in a recklessness cause of action. *Id.*

134. *Niemczyk*, 538 S.W.2d at 742.

135. *Id. But see* Marchetti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990) (holding that individuals who engage in sports activities assume the ordinary risks of the activity).

136. 501 N.W.2d at 28 (allowing a negligence claim for injuries sustained during adult recreational league soccer match when defendant "slide tackled" plaintiff in violation of league rules).

137. *Id.* at 29-30.

sports.[138] The *Lestina* court also praised the flexibility of the negligence standard,[139] finding that it is "adaptable to a wide range of situations,"[140] thus allowing the fact-finder to determine whether the defendant acted unreasonably.[141] The court expressly noted that the negligence standard would not inhibit active and vigorous participation in sports.[142]

Some courts have made distinctions based on the nature of the sport, distinguishing between contact and noncontact sports.[143] The court in *Oswald v. Township High School District No. 214*[144] held that "participants in bodily contact games such as basketball assume greater risks than do golfers and others involved in non-physical contact sports."[145] The *Oswald* court reasoned that "rule infractions, deliberate or unintentional, are virtually inevitable in contact games . . . [therefore] the imposition of a different standard of conduct is justified where injury results from such contact."[146]

F. *Role of Rules in Sports*

Sports impose their own law, regulating behavior based on a rule book, proscribing certain types of behavior, and imposing penalties for some acts.[147] In sports, participants often make strategic decisions

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138. *Id.* at 33.

139. *Id.*

140. *Id.*

141. *Id.*; *see also* Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1043-44 (Nev. 1994) (holding that maintaining a negligence standard of care avoids confusion in the courts).

142. *Lestina*, 501 N.W.2d at 33.

143. *See, e.g.*, LaVine v. Clear Creek Skiing Corp., 557 F.2d 730 (10th Cir. 1977); Ninio v. Hight, 385 F.2d 350 (10th Cir. 1967); Zurla v. Hydel, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997); Novak v. Virene, 586 N.E.2d 578, 579-80 (Ill. App. Ct. 1991); Keller v. Mols, 509 N.E.2d 584, 586 (Ill. App. Ct. 1987); Ramos v. City of Countryside, 485 N.E.2d 418 (Ill. App. Ct. 1985); Oswald v. Township High Sch. Dist. No. 214, 406 N.E.2d 157, 160 (Ill. App. Ct. 1980); Duke's GMC Inc. v. Erskine, 447 N.E.2d 1118 (Ind. Ct. App. 1983). *But see* Gray v. Giroux, 730 N.E.2d 338 (Mass. App. Ct. 2000) (justifying imposing a standard of recklessness even in non-contact sports); Schick v. Ferolito, 767 A.2d 962, 968 (N.J. 2001) ("We perceive no persuasive reason to apply an artificial distinction between 'contact' and 'noncontact' sports.").

144. 406 N.E.2d at 157.

145. *Id.* at 160.

146. *Id.*

147. In the National Football League, there are several types of penalties, such as an automatic first down, five yard penalty, ten yard penalty, fifteen yard penalty, combination penalties including loss of yardage and loss of down, as well as disqualification. *See* National Football League Rules, *available at* http://ww2.nfl.com/fans/rules/penaltysummaries.html (last visited Apr. 5, 2004). In the National Hockey League, the penalties imposed may be: minor penalties, bench minor penalties, major penalties, misconduct penalties, match penalties, and penalty shots. NHL players may be required to spend a specific amount of time off of the ice during play, or they may suffer a monetary fine or suspension. *See* National Hockey League Rulebook, *available at* http://nhl.com/hockeyu/rulebook/index.html (last visited Apr. 5, 2004).

and intentionally choose to violate a game rule.[148] Just as society's laws are violated regularly, so are sports rules.[149] "Brutality and intimidation beyond the rules are integral parts of strategy."[150]

Many courts use the rules of a game as a guide in determining the appropriate standard of conduct under the law.[151] Rules, as well as customs within the sport, may help a court to determine the appropriate standard of conduct to be expected of participants.[152] In determining the appropriate standard, courts may also use distinctions as to whether a sport's rule is for the purpose of enhancing

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148. As one author noted:

> All sports participants must learn the rules of the game. In order to develop an effective (read "game-winning") strategy, the player must be well acquainted with the formal rule structure of a sport. Without this working knowledge, the player cannot determine which strategic actions are allowable and which violate the rules. But strategy also encompasses using the rules, that is, knowing how to circumvent the rules and still gain a tactical advantage.

C. Antoinette Clarke, *Law and Order On the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 Ariz. St. L.J. 1149, 1163 (2000).

149. *See* Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 Seton Hall J. Sport L. 127, 136 (1996) (recognizing that despite the NFL's adoption of penalties for "roughing the passer" and "roughing the kicker," in order to protect quarterbacks and kickers from excessive violence, the acts of violence on quarterbacks and kickers are still common).

150. *Id.* at 137.

151. *See* Restatement (Second) of Torts § 50 cmt. b (1965); *see also* De Sole v. United States, 947 F.2d 1169, 1172-73, 1178 (4th Cir. 1991); Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 521 (10th Cir. 1979); Tavernier v. Maes, 51 Cal. Rptr. 575, 588 (Cal. Ct. App. 1966); Pfister v. Shusta, 627 N.E.2d 1260, 1262 (Ill. App. Ct. 1994); Nabozny v. Barnhill, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975) (indicating that violation of a soccer safety rule may give rise to liability in tort, but strongly implied that the rule violation must be "reckless"); Duke's GMC, Inc. v. Erskine, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983); Overall v. Kadella, 361 N.W.2d 352, 355 (Mich. Ct. App. 1984) (holding that a hockey fight violated safety rules). *But see* Ordway v. Superior Court, 243 Cal. Rptr. 536, 542-44 (Ct. App. 1988) (finding that a foul in horseracing that was the "equine equivalent of an unsafe lane change" not sufficient to create liability); Gauvin v. Clark, 537 N.E.2d 94, 96-97 (Mass. 1989) (holding that a violation of a hockey safety rule regarding use of stick was insufficient for liability); Turcotte v. Fell, 502 N.E.2d 964, 969-70 (N.Y. 1986) (holding that a jockey's violation of a safety rule did not alone establish tort liability). In one case involving injury during a golf match, the court held that "[t]he recognized rules of a sport are at least an indicia of the standard of care which the players owe each other. While a violation of those rules may not be negligence per se, it may well be evidence of negligence." *Duke's GMC*, 447 N.E.2d at 1124; *see also* Mark M. Rembish, Casenote, *Liability for Personal Injuries Sustained in Sporting Events After* Jaworski v. Kiernan, 18 Quinnipiac L. Rev. 307, 347 n.342 (1998) ("[o]ther factors, such as whether a participant causes an injury by a violation of a safety rule . . . should also be relevant in determining liability").

152. *See Hackbart*, 601 F.2d at 521 (recognizing that rules and customs "are intended to establish reasonable boundaries").

competition or for the participants' safety.[153] For example, courts have held that an individual does not consent to intentional torts that result from contacts prohibited by the safety-based rules of the game.[154]

II. SPORTS TORTS: NEGLIGENCE AND RECKLESSNESS

Courts are presented with an alternative to the majority rule of requiring recklessness, and some adopt a negligence standard. This part examines criticisms of the two standards in the sports context. This part further considers the potential role of negligence per se in a sports injury lawsuit, and describes the role of public policy considerations in courts' decisions as to what standard is appropriate. With these two alternatives in mind, Part III argues that the majority rule is appropriate for professional and college levels, but that a negligence per se rule is appropriate at the high school and recreational league levels.

A. *Rationale for Rejecting the Negligence Standard in Athletic Contests*

Use of the negligence standard in the sports context has been rejected by a majority of courts.[155] Courts have done so for several reasons, including concerns that a negligence standard would infringe on vigorous participation, lead to a flood of litigation, and be applied inconsistently.[156]

Courts have argued that imposing liability for a failure to act reasonably during a sports contest would discourage the vigorous participation of the athletes.[157] Thus, the argument goes, requiring participants to refrain from negligent misconduct would result in their decreased level of competitiveness and enthusiasm for fear that they might injure another participant and be liable in court.[158]

Courts also are concerned about an increase in litigation in this area

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153. *See, e.g., Nabozny*, 334 N.E.2d at 260-61; *Gauvin*, 537 N.E.2d at 95 n.3; Restatement (Second) of Torts § 50 cmt. b (1965).

154. *See Nabozny*, 334 N.E.2d at 260; *see also* Restatement (Second) of Torts § 50 cmt. b:

> 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 such rules.

Id.

155. *See supra* Part I.E.1.

156. *See supra* Part I.E.1.c.

157. *See, e.g.*, Jaworski v. Kiernan, 696 A.2d 332 (Conn. 1997); *Nabozny*, 334 N.E.2d 258; Schick v. Ferolito, 767 A.2d 962 (N.J. 2001); Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983).

158. *See, e.g., Jaworski*, 696 A.2d at 337; *Schick*, 767 A.2d at 966-67.

if a negligence standard were to be adopted.[159] The *Jaworski* court stated the concern this way: "If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted."[160] The court went on to opine that "[t]his should not be encouraged."[161]

In addition, courts have criticized using a negligence standard in the sports context because of the inconsistent application that would necessarily result,[162] expressing concern about "a court's ability to discern adequately what constitutes reasonable conduct under the highly varied circumstances of informal sports activity."[163]

B. *Criticism of the Recklessness Standard*

Courts in a minority of jurisdictions, those which do impose a negligence standard for sports participants, are critical of raising the threshold standard to recklessness.[164] The types of criticism include: (1) the standard should not be different than that which is imposed on society at large;[165] (2) recklessness is insufficient to protect participants from injury;[166] and (3) negligence would not infringe on vigorous participation.[167]

The *Nabozny* court recognized that "some of the restraints of civilization must accompany every athlete onto the playing field."[168] The minority courts, however, disagree with the majority's belief that a recklessness standard is sufficient to do so and assert that the same restraints placed on civilization generally should be present on the playing field.[169] These courts are critical of the use of recklessness as a threshold standard because it requires a greater showing by the

159. *See supra* note 127 and accompanying text. The court in *Crawn v. Campo* noted that "[o]ne might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community's conviviality and cohesion—spurs litigation." 643 A.2d 600, 607 (N.J. 1994).

160. *Jaworski*, 696 A.2d at 338.

161. *Id.*

162. *See, e.g.*, Ritchie-Gamester v. City of Berkley, 597 N.W.2d 517, 525 (Mich. 1999); *Crawn*, 643 A.2d at 607. "[A] legal duty of care based on the standard of what, objectively, an average reasonable person would do under the circumstances is illusory, and is not susceptible to sound and consistent application on a case-by-case basis." *Id.*

163. *Crawn*, 643 A.2d at 607.

164. *See supra* Part I.E.2.

165. *See infra* notes 168-70 and accompanying text.

166. *See infra* notes 171-72 and accompanying text.

167. *See infra* notes 173-75 and accompanying text.

168. Nabozny v. Barnhill, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975).

169. *See, e.g.*, Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1044 (Nev. 1994); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28 (Wis. 1993).

plaintiff to justify an imposition of liability in the sports context than that which is required in society at large.[170]

In *Gauvin*, the court held that "[a]llowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games."[171] The minority courts suggest that a recklessness standard is insufficient to adequately protect participants from injury, and that a negligence standard would, appropriately, afford more protection.[172]

Finally, some courts reject the notion that imposition of a negligence standard would infringe on vigorous participation.[173] These courts urge that negligence "is sufficiently flexible to permit . . . 'vigorous competition.'"[174] Thus, negligence would accomplish both increased protection from injury and continued competition.[175]

C. *Safety Rules and Negligence Per Se*

Courts often use a sport's safety rules in determining the appropriate standard of care or the expectations of the participants.[176] While some courts have suggested the possible use of negligence per se in this field of tort law,[177] none have done so as yet.[178] Courts

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170. *Lestina*, 501 N.W.2d at 33 ("We see no need for the court to adopt a recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient."); *see also* Pfister v. Shusta 657 N.E.2d 1013, 1019-20 (Ill. 1995) (Harrison, J., dissenting); *Auckenthaler*, 877 P.2d at 1044 ("This approach is straightforward and avoids the confusion related to tinkering with standards of care and defining what types of activities qualify for the differing legal treatment. At a practical level, this court avoids creating a wilderness of confusing and disjunctive precedent in this area of the law."); Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants be Required to be Reasonable?*, 5 Seton Hall J. Sport L. 253, 270 (1995) (recognizing that "[i]n almost every area of our lives we are exposed to liability if we act in a negligent manner and cause harm to others").

171. Gauvin v. Clark, 537 N.E.2d 94, 97 (Mass. 1989) (citation omitted).

172. *See Pfister*, 657 N.E.2d at 1019-20 (Harrison, J., dissenting).

173. *Lestina*, 501 N.W.2d at 33 ("We do not agree that the application of the negligence standard would have this effect [of discouraging participation]."). The *Auckenthaler* court also rejected the notion that imposition of a negligence standard would result in a flood of litigation. *Auckenthaler*, 877 P.2d at 1044; *see also* Hana R. Miura, Note, Lestina v. West Bend Mutual Insurance Co.: *Widening the Court as a Playing Field for Negligent Participants in Recreational Team Contact Sports*, 1994 Wis. L. Rev. 1005, 1020 (1994) ("Even if the court in *Lestina* had explicitly held that a safety rule violation would give rise to negligence per se, vigorous participation in contact sports would still have continued as it does in other jurisdictions.").

174. *Lestina*, 501 N.W.2d at 33.

175. *See Pfister*, 657 N.E.2d at 1020 (Harrison, J., dissenting) ("Negligence is no more a necessary part of vigorous play than is intentional misconduct, and injuries that occur as a result of ordinary negligence are no more to be countenanced than are injuries that occur as a result of either intentional or willful and wanton misconduct.").

176. *See supra* Part I.F.

177. Duke's GMC, Inc. v. Erskine, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983) ("The recognized rules of a sport are at least an indicia of the standard of care which

consider the foreseeability of the players' injuries as an important factor in determining the appropriate standard.[179] The safety rules of the game may be clear evidence of what the players foresee.[180] Thus, negligence per se may have an appropriate place in the field of sports-injury cases.

Adopting a sport's safety rules as the sole factor in determining the standard of care, however, may be problematic. Injuries often result from actions that are not violations of safety rules, or violative of any rules at all.[181] Thus, a scheme which uses the safety rules as the guide may fail to address these incidents. Furthermore, rule violations are often "part of the game,"[182] and an accepted element of competition,[183] so some argue that such violations should not rightfully be the subject of lawsuits.[184] Finally, if courts adopted the negligence per se standard for safety rule violations, sports leagues may be inclined to play with only a limited list of rules in order to protect their participants from liability, leading to less protection both on the field and in court.[185]

D. *Public Policy Issues in Sports-Injury Cases*

In general, courts today are more inclined to look toward policy considerations during adjudication than they were hundreds of years ago.[186] Particularly in the realm of sports-injury cases, courts have considered broader policy concerns in determining the appropriate standard that one participant owes to another participant.[187] Courts and commentators have mentioned the importance of considering various public policy considerations when determining the appropriate standard,[188] including economic consequences,[189] the

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the players owe each other. While a violation of those rules may not be negligence per se, it may well be evidence of negligence."); *see also* Mark v. Moser, 746 N.E.2d 410, 419-20 (Ind. Ct. App. 2001) (rejecting use of a per se rule for reckless violations of safety rules).

178. *See* Miura, *supra* note 173, at 1005 (recognizing the reluctance of most courts to predicate liability solely upon a violation of a safety rule).

179. *See, e.g.*, Jaworski v. Kiernan, 696 A.2d 332, 336 (Conn. 1997); *Mark*, 746 N.E.2d at 410; Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986).

180. *See generally* Miura, *supra* note 173.

181. *See generally id. See, e.g.*, Knight v. Jewett, 834 P.2d 696 (Cal. 1992); Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983).

182. *Mark*, 746 N.E.2d at 419 (quotation marks omitted); *see also Jaworski*, 696 A.2d at 337 ("[I]t is reasonable to assume that the competitive spirit of the participants will result in some rules violations and injuries. That is why there are penalty boxes, foul shots, free kicks, and yellow cards."); Crawn v. Campo, 643 A.2d 600 (N.J. 1994).

183. *See Jaworski*, 696 A.2d at 337.

184. *See id.*; *Crawn*, 643 A.2d at 600.

185. *See* Miura, *supra* note 173, at 1020.

186. *See supra* note 124.

187. *See supra* Part I.E.1.c.

188. *See, e.g.*, Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976); *Crawn*,

participant's purpose of playing,[190] the experience level and age of the participants,[191] the impact of role models on younger players,[192] and the importance of maintaining competition.[193]

Several commentators have asserted that the economic circumstances of a participant is a significant factor that may affect the standard that is used. Such financial considerations include the participant's earning of a salary or insurance coverage,[194] as well as the financial impact that a potential injury may have on the participant.[195]

Commentators also recognize that younger athletes seek to mimic professional athletes who are their role models.[196] Some assert that this dynamic should be considered in determining the appropriate standard.[197]

One policy consideration that courts have considered is the participant's general purpose for playing the sport. In *Niemczyk*, the court stated that one factor to be considered in determining the appropriate standard was the participant's status as an amateur or professional, an issue which is linked to the participant's purpose of playing.[198] In addition, the *Crawn* court, quoting the court below,

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643 A.2d at 600; Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28 (Wis. 1993); Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. Miami Ent. & Sports L. Rev. 191, 225 (1990); Rembish, *supra* note 151, at 342; Ian M. Burnstein, Note, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. Det. Mercy L. Rev. 993, 1015 (1994); Kevin A. Fritz, Note, *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 Cardozo Arts & Ent. L.J. 189, 195-96 (2002).

189. *See infra* notes 194-95 and accompanying text.

190. *See infra* notes 198-99 and accompanying text.

191. *See infra* notes 200-01 and accompanying text.

192. *See infra* notes 196-97 and accompanying text.

193. *See infra* notes 202-03 and accompanying text.

194. *See* Burnstein, *supra* note 188, at 1015 (arguing that one difference between professional and amateur sports participants that should be addressed in determining the appropriate duty owed to co-participants is that professionals participate to make a living and amateurs do not).

195. *See* Lazaroff, *supra* note 188, at 225 ("Young sports participants from less-than-affluent backgrounds may not be able to afford accident and health care insurance to cover medical expenses and loss of future earnings.... Sports should enable people of all backgrounds and circumstances to compete and interact; economic barriers need not prevent or frustrate this valuable participation."); Rembish, *supra* note 151, at 342 (citing the different financial circumstances of professional athletes as opposed to amateur athletes as one factor in determining whether negligence or recklessness is the better rule).

196. *See* Fritz, *supra* note 188, at 195-96; Lazaroff, *supra* note 188, at 219, 225.

197. *See* Fritz, *supra* note 188, at 195-96 (discussing the impact of violence by professional athletes, who are treated as heroes by America's youth, on determining an appropriate civil or criminal liability scheme); Lazaroff, *supra* note 188, at 219, 225.

198. Niemczyk v. Burleson, 538 S.W.2d 737, 741 (Mo. Ct. App. 1976).

noted that "the ultimate purpose of the game" was one factor that may be considered.[199]

Courts also commonly consider the experience level and age of the participant. One of the *Niemczyk* factors—factors which have been adopted by other courts as well[200]—asserts that courts should consider the age, skill, and status of participants, as well as their knowledge of the rules, in determining the appropriate standard.[201]

In addition, courts often stress maintaining participation and competition as an important factor to be considered in determining the appropriate standard that one participant owes to another participant.[202] Courts are concerned that excessive tort liability may result in decreased participation in sports.[203]

III. ADOPTION OF A NEGLIGENCE STANDARD BASED ON THE LEVEL OF PLAY

Part II demonstrated that there is support for both the recklessness approach and the negligence approach in cases of sports participant injuries, and that public policy concerns are an important element of this discussion. In light of this split of authority, Part III presents an approach that applies the appropriate standard based on an in-depth analysis of the policy concerns. In cases that involve sports participant injuries, courts have determined the appropriate minimum standard to be imposed based on public policy concerns.[204] After a more careful study of the public policy concerns that arise in this area,[205] the courts' determinations of the appropriate standard of care should be reexamined. Because the public policy concerns that are pertinent in this area differ depending on the level of play at which the participants are competing, courts should determine what the appropriate standard of care is at each level of play.

This part evaluates the public policy issues that arise in sports and how they differ depending on the level of play. After this examination, this part argues that participants in professional and college sports should be held to the majority rule that the minimum

199. Crawn v. Campo, 643 A.2d 600, 606 n.1 (N.J. 1994); *see also* Nabozny v. Barnhill, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975).

200. *See supra* notes 133, 138 and accompanying text.

201. *See Niemczyk*, 538 S.W.2d at 741-42; *see also* Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993).

202. *See, e.g.*, Stimson v. Carlson, 14 Cal. Rptr. 2d 670, 673 (Ct. App. 1992); Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994); Kabella v. Bouschelle, 672 P.2d 290 (N.M. Ct. App. 1983); *see also* Brendon D. Miller, Hoke v. Cullinan*: Recklessness as the Standard for Recreational Sports Injuries*, 23 N. Ky. L. Rev. 409, 410 (1996).

203. *See* Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831, 833-34 (La. Ct. App. 1961) (expressing fear that increased imposition of liability will deter amateurs from participating in sports).

204. *See supra* notes 124-29 and accompanying text.

205. *See infra* Part III.A.

standard for tort liability for injuries suffered during athletic contests should be recklessness. Thus, professional and college sports participants should not be liable for negligently violating safety rules. Public policy indicates, however, that high school and recreational league sports differ in significant ways from college and professional league sports such that courts should break from the current majority rule in cases involving high school and recreational league participants. A per se rule for negligently violating a sport's safety rules should be imposed at the high school and recreational league levels.

A. *Public Policy Issues in Sports*

Courts consider broad policy concerns when determining the appropriate standard in sports injury cases.[206] Many courts stress the importance of maintaining vigorous participation and avoiding a flood of litigation.[207] Courts and commentators also have stated the importance of other public policy concerns that should be addressed.[208] Public policy issues that arise in sports, and should be considered by courts in determining the appropriate standard, include: economic considerations,[209] the participants' general purpose for playing,[210] the experience level and age of the participants,[211] the impact of role models,[212] and the importance of maintaining competition.[213] Although courts and commentators have referred to the value of these considerations in determining the appropriate standard,[214] a more complete study of the policy considerations is warranted.

1. Economics: Insurance and Other Financial Concerns

Great economic disparities and varying economic concerns emerge within sports depending on whether the sporting event is at the professional, college,[215] high school, or recreational league[216] level.

206. *See supra* Part II.D.
207. *See supra* notes 126-27 and accompanying text.
208. *See supra* Part II.D.
209. *See infra* Part III.A.1.
210. *See infra* Part III.A.2.
211. *See infra* Part III.A.3.
212. *See infra* Part III.A.4.
213. *See infra* Part III.A.5.
214. *See supra* Part II.D.
215. When dealing with college athletes, for the purposes of this Note it should be assumed that only intercollegiate athletes are being discussed. This does not include intramural, interfraternity or other informal types of athletics which may be prevalent on college campuses. However, such activities are generally most analogous to recreational league sports and should be considered as such when determining whether to impose a negligence standard in these instances.
216. Recreational leagues come in many forms. Some recreational leagues are for

When an individual is injured in an athletic contest, immediate medical bills and potential long-term care costs can arise.[217] Furthermore, the injured athlete may not be able to work or support himself in the future because of the injury, and therefore may not be able to personally fund the costs that arise due to the injury.[218] Insurance is one way to pay the high cost of medical care, but many sports participants lack insurance coverage.[219] As the tort system is in place, at least in part, to address the costs of injuries,[220] these practical financial concerns must be considered in assessing when and how to impose tort liability.

Professional athletes generally are able to bear the cost of injuries that result from sports participation because they receive salaries—often very substantial salaries—for their participation.[221] Professionals may also continue to be paid even if their injury is career-ending.[222] Furthermore, professional athletes likely have insurance coverage[223] and teams often employ their own physician to provide medical care to the athletes.[224] In addition, teams are sometimes required to pay not only for their team physician, but also for a second opinion from a medical specialist.[225] Finally, professional athletes often have unions and agents to bargain with leagues or

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children, some are for adults. For the purposes of this Note, recreational leagues may be considered any league which is not affiliated with a school and is for the purposes of athletic enjoyment and education. This definition includes adult and youth recreational leagues.

217. *See generally* Carlsen & Walker, *supra* note 5, at 436.

218. *See* Keith M. Harrison, *Law, Order, and the Consent Defense*, 12 St. Louis U. Pub. L. Rev. 477, 480 n.13 (1993) (recognizing that, according to some sources, the cost of sports injuries in the United States is more than $40 billion each year).

219. *See infra* note 230.

220. *See supra* note 2 and accompanying text.

221. Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986) ("[A] professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for salary, than is an amateur.").

222. The Major League Baseball Collective Bargaining Agreement states that a player's "failure to render his services" because of an injury is entitled to the balance of the full salary for the year in which his injury was sustained. *See* Major League Baseball Collective Bargaining Agreement, Article IX, § E (2003-06), *available at* http://us.i1.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf.

223. *See, e.g.*, National Football League Players Association, Player Benefits (National Football Players Association website stating that "the entire cost of all medical benefits for players and their families is paid"), *available at* http://www.nflpa.org/Members/main.asp?subPage=Player+Benefits (last visited Apr. 5, 2004); National Basketball Players Association, About the NBPA (stating that one of its main functions is to "[m]onitor and negotiate the administration of retirement and insurance benefits"), *available at* http://www.nbpa.com/aboutus/ (last visited Apr. 5, 2004).

224. *See, e.g.*, Major League Baseball, Collective Bargaining Agreement, Article XIII, § D (2003-06), *available at* http://us.i1.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf.

225. *See id.*

governing bodies on their behalf, giving them leverage to obtain greater benefits, salaries, or on-field protections.[226]

Although college athletes do not receive a salary for participating in athletic contests, there are other institutional financial protections in place should injuries occur. The National Collegiate Athletic Association ("NCAA")[227] sponsors a Catastrophic Injury Insurance Program which provides insurance for student-athletes that are injured during an intercollegiate athletic event.[228] The NCAA also sponsors Exceptional Student-Athlete Disability Insurance which provides insurance coverage for individual athletes to protect against loss of future potential earnings as a professional athlete that results from injury that occurs during the individual's college athletic career.[229]

High school athletes are afforded far less protection. While many high school athletes may be covered by their family's insurance plan, many undoubtedly are not covered.[230] It is an important social goal to encourage individuals from all backgrounds to participate in athletics;[231] to limit participation to only those whose families can afford insurance would undermine that goal.[232] High school athletes are not paid to participate in athletics.[233] Furthermore, high school athletes who suffer an injury on the field are injured at an earlier stage in their life, and therefore a serious injury is likely to affect their

226. For a discussion of the role of unions and agents in professional sports, see Paul C. Weiler & Gary R. Roberts, Sports and the Law: Text, Cases, Problems 238-388 (2d ed. 1998).

227. The NCAA governs intercollegiate athletics among approximately 1200 colleges and universities. *See* NCAA, *available at* http://www.ncaa.org (last visited Apr. 5, 2004). This constitutes a large portion of American colleges and universities taking part in intercollegiate athletics and therefore serves as a relevant guide for what takes place at the college level of play. It should be noted, however, that the National Association of Intercollegiate Athletics (NAIA) also serves as the governing body for intercollegiate athletics among approximately 360 colleges and universities. *See* NAIA, *available at* http://www.naia.org (last visited Apr. 5, 2004). In addition, the National Junior College Athletic Association (NJCAA) governs athletics at the junior college level for over 500 member schools. NJCAA also provides insurance to member schools through the NJCAA Insurance Plan. *See* NJCAA, *available at* http://www.njcaa.org (last visited Apr. 5, 2004).

228. NCAA, Catastrophic Injury Insurance Program (2003-04), *available at* http://www.ncaa.org/insurance/catpolicy03-04.pdf.

229. NCAA, Student-Athlete Insurance Programs, *available at* http://www1.ncaa.org/membership/insurance/index.html (last visited Apr. 5, 2004).

230. Approximately 43 million Americans have no health insurance coverage. *See* Sharona Hoffman, *Unmanaged Care: Towards Moral Fairness in Health Care Coverage*, 78 Ind. L.J. 659, 661 (2003).

231. *See supra* Part I.E.1.c.

232. *See* Lazaroff, *supra* note 188, at 225-26.

233. *See* Dean Robert P. Garbarino, *So You Want to be a Sports Lawyer, or is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 Vill. Sports & Ent. L.J. 11, 22 (1994).

earnings over a longer period than if a professional athlete were injured.[234]

Economic concerns about injuries that result from participation in recreational league sports are more akin to high school sports than to other levels. Whether children or adults are participating, the participants receive no salary for their participation, and may well have no insurance coverage.[235]

2. Purpose of Playing: Education vs. Entertainment

Another important consideration is the purpose of playing the sport. Often, higher levels of organized play exist primarily for entertainment and commercial purposes, while lower levels of play more likely focus on educational purposes.[236]

In the professional sports context, there may be various purposes for playing. Professional sports are a form of entertainment. Much like a film or a play, spectators flock to professional sports venues to be entertained by professional athletes.[237] Part of what makes professional sports entertaining is the violence and danger that often takes place.[238] In addition, professional sports are a commercial enterprise, intended to make money for the owners, sponsors, television networks, and other investors.[239] Spectators are likely to pay more money to watch an exciting, vigorous athletic contest.[240]

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234. The National Federation of State High School Associations (NFHS) is the administrative organization for high school extracurricular activities, which brings together individual state high school associations. *See* National Federation of State High School Associations, *available at* http://www.nfhs.org/about.htm (last visited Apr. 5, 2004).

235. *See supra* notes 230, 233 and accompanying text.

236. *Compare infra* notes 237-46 and accompanying text *with infra* notes 247-53 and accompanying text.

237. For a discussion of the entertainment value of professional sports, see Robert E. Fraley & F. Russell Harwell, *The Sports Lawyer's Duty to Avoid Differing Interests: A Practical Guide to Responsible Representation*, 11 Hastings Comm. & Ent. L.J. 165, 166-67 (1989).

238. A 1995 Los Angeles Raiders advertisement for football season tickets is one example of institutional encouragement of violence on the field. The advertisement reads: "Why schmooze clients at a restaurant when you can treat them to unspeakable acts of cruelty?" Los Angeles Raiders, *Adweek*, Oct. 2, 1995.

239. Revenues in the professional context are evidenced by the fact that, as of 2000, average ticket prices for NBA games were $51, $49 in the NFL, $48 in the NHL, and $17 in MLB. *See* Paul C. Weiler & Gary R. Roberts, 2001 Supplement to Sports and the Law: Text, Cases, Problems 56 (2001). Professional sports' television revenue also demonstrates the enormous monetary and entertainment value of professional sports: In 1998, the NFL's television contracts totaled $2.2 billion annually, the NBA's generated $660 million annually, MLB's generated $350 million annually, and the NHL's generated $45 million annually. *See* Weiler & Roberts, *supra* note 226, at 389.

240. *See, e.g.*, Bradley C. Nielsen, Note, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 Iowa L. Rev. 681, 687 (1989) (recognizing that spectators increasingly demand violence).

Finally, professional sports serve as the occupation of the individual athletes who receive payment for playing.[241] Professional athletes' large salaries are due in part to the violent nature of sports and the risks that the individual assumes by participating.[242]

College athletics presents a hybrid of professional and high school athletics. There is great disparity among competition at the collegiate level,[243] so generalizations about college sports is a challenge. Some intercollegiate competitions are similar to the high school level of play and some are more like a professional contest. College athletics are similar to high school athletics in that participation in sports is part of the educational process.[244] However, college athletics may be more like professional sports when, as is commonly the case, another purpose of the college sports program is to provide entertainment value as well as commercial value to the school, sponsors, television networks, and college towns.[245] Despite a stated educational purpose,

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241. In 2000, the average NBA player earned $3.5 million, the average MLB player earned $1.9 million, the average NHL player earned $1.4 million, and the average NFL player earned $1.1 million. *See* Weiler & Roberts, *supra* note 239, at 30.

242. Due to the amount that professional athletes are paid today, "teams may argue that increased salaries justify the risks of injury." *See* Sigmund J. Solares, *Preventing Medical Malpractice of Team Physicians in Professional Sports: A Call for the Players Unions to Hire the Team Physicians in Professional Sports*, 4 Sports Law. J. 235, 237 (1997).

243. Member schools of the NCAA are divided between three divisions: Division I, Division II, and Division III. *See* NCAA, *available at* http://www.ncaasports.com/schools (last visited Apr. 5, 2004). In addition, NAIA member schools and junior colleges participate in intercollegiate athletics. *See* NAIA, *available at* http://www.naia.org (last visited Apr. 5, 2004); NJCAA, *available at* http://www.njcaa.org (last visited Apr. 5, 2004).

244. The NCAA's website lists one of its purposes as being: "To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit." NCAA, Purposes of the NCAA, *available at* http://www.ncaa.org/about/purposes.html (last visited Apr. 5, 2004). It goes on to state that "[t]he NCAA strives to maintain intercollegiate athletics as an integral part of the educational program." *Id. But see infra* note 245.

245. "With the constant revenue coming from major network television contracts and the equipment and apparel contracts with such companies as Reebok and Nike, 'big-time college sports today more closely resemble the commercialized model appropriate to professional sports than they do to the academic model.'" Sarah Lemons, *"Voluntary" Practices: The Last Gasp of Big-Time College Football and the NCAA*, 5 Vand. J. Ent. L. & Prac., Winter 2002, at 12, 20 (2002) (quoting Knight Foundation Commission on Intercollegiate Athletics Report (June 2001), *available at* http://www.ncaa.org/databases/knight_commission/2001_report)); *see also* Timothy Davis, *A Model of Institutional Governance for Intercollegiate Athletics*, 1995 Wis. L. Rev. 599, 602 (1995) (discussing "[t]he commercialized nature of big-time intercollegiate athletics." (citation omitted)). An understanding of college sports entertainment and commercial value can be gained from the fact that CBS contracted to pay the NCAA $6.2 billion to broadcast its annual March basketball tournament for eleven years, and that college football receives over $100 million a year for the rights to broadcast its football championship series. Additionally, the average annual revenue of a Division I-A college sports school was $22 million in 1999. *See* Weiler & Roberts, *supra* note 239, at 101-02.

the entertainment and commercial value are central features of college athletics.[246]

The purpose of high school athletic competition also may be a hybrid of entertainment and education. Some communities may find that high school football games provide the main weekend entertainment for the town throughout the fall, suggesting that there is great entertainment value even at the high school level. Overall, however, high school athletics are primarily focused on an educational purpose.[247] Participation in sports at an early age provides lessons in teamwork and leadership that are valuable throughout life.[248] Most states mandate physical education as part of the high school curriculum, including gym class and athletic team participation,[249] further suggesting that the primary focus is educational.

Recreational leagues focus on education through teaching sports and encouraging exercise in both youths and adults.[250] Much like high school athletics, recreational league sports foster sportsmanship and other team values.[251] Recreational leagues often accept all individuals who sign up for competition, not limiting based on athletic ability or

246. *See* Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 Loy. L.A. L. Rev. 1213, 1248-49 (1993) (recognizing that the NCAA and its member schools focus on commercial entertainment of big-time college sports, and not education).

247. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 299 (2001) (holding that "[i]nterscholastic [high school] athletics obviously play an integral part in the public education of Tennessee"); *see also* NFHS (citing the ability of high school sports participation to educate through promoting citizenship and developing positive character), *available at* http://www.nfhs.org/scriptcontent/va_custom/va_cm/contentpagedisplay.cfm?content_id=112 (last visited Apr. 5, 2004). This may be further evidenced by the structure of many high school athletic teams which may include a varsity, junior varsity, and freshmen team, allowing for training at different levels and a structure for development and learning throughout high school.

248. *See, e.g.*, Sandison v. Mich. High Sch. Athletic Ass'n, Inc., 863 F. Supp. 483, 489 (E.D. Mich. 1994), *rev'd in part*, 64 F.3d 1026 (6th Cir. 1995) (holding that plaintiffs' participation in high school cross-country and track is an integral part of their education).

249. For examples of state statutes requiring physical education for high school students, see Cal. Educ. Code § 51222(a) (West 1989); Conn. Gen. Stat. Ann. § 10-16b(a) (West 2002); Fla. Stat. Ann. § 232.246(3)(j) (West 1998); N.Y. Educ. Law § 803 (McKinney 2000); Okla. Stat. Ann. tit. 70, § 11-103 (West 1998); S.C. Code Ann. § 59-29-80 (Law Co-op 2004); Tex. Educ. Code Ann. § 28.002(a)(2)(C) (Vernon 1996); Wash. Rev. Code. Ann. § 28A.230.040-050 (West 1997).

250. *See* National Alliance for Youth Sports, Mission & History, *available at* http://www.nays.org/IntMain.cfm?Page=79&Cat=1 (last visited Apr. 5, 2004); *see also* Schick v. Ferolito, 767 A.2d 962 (N.J. 2001); Crawn v. Campo, 643 A.2d 600 (N.J. 1994).

251. *See, e.g.*, National Alliance for Youth Sports, Mission & History (citing the important impact that sports has on children's development), *available at* http://www.nays.org/IntMain.cfm?Page=79&Cat=1 (last visited Apr. 5, 2004); American Youth Soccer Organization, About AYSO ("[O]ur program is designed to instill good sportsmanship."), *available at* http://soccer.org/About/Philosophies/ (last visited Apr. 5, 2004).

talent,[252] indicating that the primary purpose is to encourage participation and learning.[253]

3. Individual Experience: Athletic Experience and Age

As individuals advance beyond recreational leagues and high school sports to play in college and professional sports, they have more athletic experience, and a greater understanding of the risks associated with the sport. Recreational league participants, whether youths or adults, often participate to learn about the sport, which puts them at risk for not fully understanding the inherent dangers.[254] Similarly, high school athletes are likely novices and not able to fully understand the dangers that accompany the sport. College athletes participating on an intercollegiate team are extremely likely to have participated in the sport before.[255] Professional athletes have substantial experience in their sport, thus ensuring that they have an understanding of the risks that are associated with participation in that sport.

The age of the athlete is also an important consideration that distinguishes the various levels of play. Professional and college athletes are older and more physically mature than high school and youth recreational league athletes. The younger and less physically mature participant may be more at risk for injury than the older and more developed athlete.[256] Younger athletes, however, may be less able to control their own bodies, less able to assess the risks that they

252. *See, e.g.*, Little League, Inc., Structure of Little League Baseball, Incorporated (mandating that "[t]he Little League philosophy does not permit any eligible candidate to be turned away"), *available at* http://www.littleleague.org/about/structure.asp (last visited Apr. 5, 2004); American Youth Soccer Organization, About AYSO (stating that two of its primary organization philosophies are that everyone plays and that there be open registration: "[i]nterest and enthusiasm are the only criteria for playing"), *available at* http://soccer.org/About/Philosophies/ (last visited Apr. 5, 2004); Hudson Soccer Association, Adult Recreational Soccer Programs (stating that all skill levels are welcome in adult recreational soccer league), *available at* http://www.hudsonsoccer.com/Adult%20Recreational.htm (last visited Apr. 5, 2004).

253. *See, e.g.*, Pop Warner, Pop Warner Overview (stating that the emphasis on education was incorporated into the original name of the corporation, the Pop Warner Little Scholars), *available at* http://www.popwarner.com/history/pop.asp?lable=story (last visited Apr. 5, 2004).

254. *See supra* note 252 and accompanying text.

255. *See, e.g.*, James L. Shulman & William G. Bowen, The Game of Life 58 (2001) (citing the increase in recruitment of athletes for college admission). The increase in athlete recruitment suggests that those who are participating have high school athletic experience and are knowledgeable about the game.

256. *See* American Academy of Pediatrics, Organized Sports for Children and Preadolescents (2001) (stating that "the younger the participant, the greater the concern about safety"), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;107/6/1459.pdf.

may impose, and therefore, less culpable when they do cause an injury.[257]

4. Impact of Role Models

The violence in high school and recreational league sports may be encouraged by the actions of professional and college athletes, for younger athletes may emulate their heroes.[258] Children admire these athletes as heroes, a circumstance of American society which courts must recognize.[259] Allowing a more violent professional game may have an impact on lower levels of play.[260] One author notes that "to the extent professional and college athletes act as role models for younger participants, the sanctioning of unnecessary or excessive violence may encourage similar actions in the sandlot or schoolyard."[261]

5. Competition Without Fear of Liability

Participation in sports provides many benefits and should not be curtailed because of excessive fear of liability.[262] "Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation . . . ."[263] If participants are fearful

257. *See, e.g.*, Benitez v. New York City Bd. of Educ., 541 N.E.2d 29, 33 (N.Y. 1989). Younger athletes also may not make the best decisions concerning when to play and how much to exert themselves, making for a more dangerous situation and greater likelihood of injury. *See* Matthew J. Mitten, *Amateur Athletes With Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 Neb. L. Rev. 987, 994 (1992) ("Young athletes . . . tend to believe they are immortal and do not always make thoughtful decisions consistent with their long-term best health." (citation omitted)).

258. For a discussion of the impact professional athletes' role as heroes has on advertising, see Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 Marq. Sports L.J. 23, 23 (1999) ("Our infatuation with our favorite sports heroes is so strong that many advertisers pay professional athletes millions of dollars in order to entice more people to buy their products.").

259. One example from American popular culture is the Gatorade advertisements of the 1990s in which individuals spoke of their desire to "be like Mike," in referring to basketball great Michael Jordan; *see also* Fritz, *supra* note 188, at 195 n.54 (citing Mike Mooneyham, *Bad Behavior Teaches Kids Wrong Lesson*, Charleston Post and Courier, Aug. 24, 2000, at 1 (noting that misbehaving athletes have become heroes to youths)).

260. Fritz, *supra* note 188, at 195-96 ("If excessive violence is prevalent in professional sports, a child may think that it is acceptable to utilize similar aggression while participating in Little League Baseball or Pee Wee Football." (citation omitted)).

261. Lazaroff, *supra* note 188, at 219.

262. *See, e.g.*, Stimson v. Carlson, 14 Cal. Rptr. 2d 670, 673 (Ct. App. 1992); Schick v. Ferolito, 767 A.2d 962, 974 (N.J. 2001); Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994).

263. Ross v. Clouser, 637 S.W.2d 11, 14 (Mo. 1982).

of tort liability they might limit their participation.[264] Vigorous competition is an important element of successful sports participation.[265] Participation in athletics is an important element of societal behavior.[266]

B. *Professional and College Sports*

Professional and college athletes should not be held to a negligence standard of care in following safety rules.[267] The financial safeguards in place, particularly at the professional level,[268] but also in large part at the college level,[269] indicate that an injured athlete at these levels would not pose a burden to society. Furthermore, the participants generally are adults,[270] very experienced and knowledgeable about the sport in which they are participating; therefore there is little need for the courts to offer them protection. Finally, the entertainment value of professional and college athletics is enormous[271] and the negligent acts that occur within the game are arguably integral to that value.[272] Thus, the enjoyment of spectators may be diminished if a negligence duty were imposed at the professional and college levels, imperiling the economics on which these industries are grounded.

Professional athletes who are usually adults with experience in the sport are in an excellent position to understand the risks involved in

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264. *See, e.g.*, Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831, 833-34 (La. Ct. App. 1961) (expressing fear that increased imposition of liability will deter amateurs from participating in sports (quoting the trial court)).

265. *See* Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. Ct. App. 1983) ("Vigorous and active participation in sporting events should not be chilled by the threat of litigation."); *see also* Miller, *supra* note 202, at 410.

266. *See* Michael D. Erickson, Note, *Upon Further Review . . . When it Comes to Tax-Exempt, Stadium Finance Reform, Stop Cheering for the Popular Proposals and Adopt Simple Reform*, 21 Va. Tax Rev. 603, 635 (2002) (stating that the importance of sports in American society is evidenced by statistics which show that on a given weekend 110 million Americans go to church and 125 million watch NFL football); *see also* Stimson v. Carlson, 14 Cal. Rptr. 2d 670, 673 (Ct. App. 1992) ("[P]articipation in amateur athletics is a socially desirable activity that improves the mental and physical well-being of its participants."); Mark v. Moser, 746 N.E.2d 410, 419 (Ind. Ct. App. 2001) ("[M]ore Americans than ever before 'have joined recreational softball, basketball, football [and] other types of sports leagues,' and there has also been a dramatic increase in participation in high school and college organized sports."); Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994) (holding that "informal athletic and recreational sports activities are quite important, as evidenced by their universal popularity in all walks and in all stages of life").

267. *See* Turcotte v. Fell, 502 N.E.2d 964, 970 (N.Y. 1986) ("[A] professional clearly understands the usual incidents of competition resulting from carelessness, particularly those which result from the customarily accepted method of playing the sport, and accepts them. They are within the known, apparent and foreseeable dangers of the sport and not actionable. . . .").

268. *See supra* notes 221-26 and accompanying text.

269. *See supra* notes 227-29 and accompanying text.

270. *See supra* Part III.A.3.

271. *See supra* notes 237-46 and accompanying text.

272. *See supra* note 240 and accompanying text.

these sporting events.[273] Further, they are being paid—usually handsomely—to engage in the activity, and they generally have health insurance.[274] Professional athletes have protections in the form of bargaining power for their services through professional agents, as well as, in some instances, unions to advocate on their behalf and protect their interests.[275] Thus, professional athletes are not likely to become a burden on the public if they suffer a severe injury. Additionally, a central purpose of professional athletics is entertainment, which derives, in part, from vigorous participation.[276] An athlete who is concerned that he may be held liable for failing to use due care, as defined by a jury consisting of non-athletes, may be unwilling to vigorously participate, thus diminishing the entertainment value of the product.

College athletics present a variety of hybrid situations that often resemble both professional and high school athletics. However, several factors indicate that a negligence standard should not be imposed at the college level. The NCAA has a central purpose of regulating and controlling intercollegiate athletics.[277] Furthermore, the NCAA provides insurance for individual athletes, which covers both the expenses of injuries sustained and the loss of potential future earnings.[278] The age of college athletes suggests that they are more likely to adequately understand the risks that accompany sports participation than their younger counterparts.[279] College sporting events serve as an important entertainment venue in American society.[280] Thus, if negligence liability is imposed at the college level, and participants no longer vigorously participate, the enjoyment of the spectators would also be diminished. Although it is true that professional and college athletes are heroes to younger athletes and their behavior may be mimicked by them,[281] the desire to impose negligence liability for that reason is outweighed by the financial and institutional protections,[282] the entertainment value of sports at these levels,[283] and the age of the participants.[284]

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273. *See supra* Part III.A.3.
274. *See supra* notes 221-26 and accompanying text.
275. *See supra* note 226 and accompanying text.
276. *See supra* notes 237-42 and accompanying text.
277. *See* NCAA, 2003-04 NCAA Division I Bylaws (listing extensive constitution and bylaws of the association), *available at* http://www.ncaa.org/library/membership/division_i_manual/2003-04/2003-04_d1_manual.pdf.
278. *See supra* notes 228-29 and accompanying text.
279. *See supra* notes 256-57 and accompanying text.
280. *See supra* notes 245-46 and accompanying text.
281. *See supra* Part III.A.4.
282. *See supra* Part III.A.1.
283. *See supra* Part III.A.2.
284. *See supra* Part III.A.3.

C. *High School and Recreational Sports*

In order to protect participants from undue physical and financial injury, and to ensure that the goals of high school and recreational league sports are met, high school and recreational league participants must be required to act reasonably.[285] Just as individuals in everyday life are liable for their negligent acts,[286] so should high school and recreational league athletes. The educational purpose of the game at these levels suggests that violence within the game should be scaled-back to allow individuals to learn through sports participation, while limiting injury to these participants.[287] The educational purpose,[288] as well as the lack of financial safeguards,[289] and the age and experience level that often accompany these levels of play,[290] indicate that courts must impose a duty to act reasonably.

Not only should high school and recreational league sports participants have a duty to act reasonably, but a safety rule violation should be deemed negligence per se.[291] Just as the law presumes that reasonable persons do not violate the law,[292] so should the law suppose that reasonable high school and recreational league sports participants do not violate safety rules. The negligence per se rule would eliminate the complicated nature of determining what is "reasonable under the circumstances."[293] The foreseeability of an injury and the expectations of the players may vary from sport to sport and from league to league.[294] Thus, the safety rules which govern play provide effective guidelines for courts to determine what injuries the participants foresee, as well as what should be expected by the participants.

Under this regime, courts would need to determine the following: a) whether the violated rule should be classified as a "safety" rule; b) whether the injured party was part of the class of people that the rule was designed to protect; and c) whether the injury was the type that the rule was designed to prevent.[295] Adoption of a negligence per se rule would prevent participants from brushing aside safety regulations,[296] and would return the focus of high school and

285. *See supra* Part III.A.
286. *See supra* Part I.A.
287. *See supra* notes 247-53 and accompanying text.
288. *See supra* notes 247-53 and accompanying text.
289. *See supra* notes 230-35 and accompanying text.
290. *See supra* Part III.A.3.
291. *See supra* Part I.C.
292. *See supra* note 44 and accompanying text.
293. *See supra* Part I.C.
294. *See supra* notes 162-63 and accompanying text; *see, e.g.*, Crawn v. Campo, 643 A.2d 600, 607 (N.J. 1994) (recognizing the difficulty of a subjective inquiry and in determining players' expectations); *see also* Lazaroff, *supra* note 188, at 215-16.
295. *See supra* Part I.C.
296. *See supra* note 48 and accompanying text.

recreational league sports to education and fun, without excessive violence.[297] In addition, the imposition of a negligence per se rule would provide added incentive for leagues to make sure that their participants understand the rules, so that the participants follow the rules and avoid liability.

Adoption of the negligence per se rule is not excessive; application of this rule should be limited to safety regulations, which a) have the purpose of protecting the participants, and b) do not include those rules which are in place to encourage the competitiveness of the game.[298] Undoubtedly, some injuries occur from conduct that was not a safety rule violation.[299] Although the negligence per se rule for safety rule violations would not be useful in such instances, its adoption would not necessarily preclude liability. The courts should deal with such instances on a case-by-case basis to determine whether a negligent act took place, as well as whether any appropriate defenses or comparative fault principles should apply.[300]

Critics of the use of the negligence per se rule in sports argue that leagues will reduce the number of rules in order to limit the potential liability of their participants.[301] If leagues took such action, however, they may expose the league itself to liability for failing to put adequate rules in place for the protection of participants.[302] Furthermore, such a proposition assumes that leagues are more concerned with liability in court than they are with immediate protection on the field.[303] Moreover, if leagues did reduce the number of rules, courts would still be free to assess negligence on a case-by-case basis. Thus, leagues that reduce the number of rules would not insulate their participants from liability and could be placing participants in a more dangerous situation on the field.

Critics of the negligence per se rule in general have been concerned about handing over too much authority to the rule-makers.[304] In the sports context, however, the rule-makers are those administering the league play and therefore are likely to be in the best position to understand appropriate conduct within the game.

Several factors dictate that high school sports participants are different than professional and college sports participants and should

297. *See supra* Part III.A.
298. *See supra* note 154.
299. *See supra* note 181 and accompanying text.
300. *See supra* Part I.D.
301. *See supra* note 185 and accompanying text.
302. *See, e.g.*, Schultz v. Foster-Glocester Reg'l Sch. Dist., 755 A.2d 153 (R.I. 2000); *see also* Daniel Nestel, *"Batter Up!": Are Youth Baseball Leagues Overlooking the Safety of Their Players?*, 4 Seton Hall J. Sport L. 77 (1994).
303. If leagues do focus on adequate safety rules, as well as adequate instruction, liability in court may be less of an issue because there may be less injuries.
304. *See supra* note 53 and accompanying text.

have a duty to refrain from negligently violating safety rules.[305] Courts should have serious concerns about the burden on society that severely injured, uninsured high school athletes would create if they were unable to seek redress for their harms in court.[306] In addition, high school athletics are primarily a part of the educational process;[307] therefore a safer and less violent atmosphere should be encouraged. Although it is possible that high school athletics are more violent because individuals are emulating professional and college athletes,[308] that does not excuse negligence acts and make them reasonable.[309] The prospect of these younger, less mature individuals being subjected to unreasonable, violent behavior is so grave that a duty to act reasonably should be imposed. Negligence liability provides an important additional incentive for these young athletes to carefully consider the risks associated with the sport.[310] While it is important to encourage people to get involved in sports and not be paralyzed by fear of liability,[311] it is also important for courts to provide safeguards for youths.[312]

Recreational league sports are more analogous to high school athletics than professional athletics.[313] Recreational leagues generally focus on fun, exercise, and learning.[314] Careless violence has no place in a recreational league athletic contest, and the immunity that should protect professional athletes has no place in these leagues. Because recreational leagues generally accept participants at any skill level,[315] an ordinary negligence standard must be imposed to protect recreational league participants.

CONCLUSION

An organized structure of tort liability for sports injuries based on the level of play is essential to encourage athletic participation, to protect against injuries, and to provide fair redress for harms. The level at which an athletic competition is played greatly impacts the purpose, the risks imposed, and the effect of an injury on society. These policy concerns dictate that the participants' duty to each other

305. *See supra* Part III.A.
306. *See supra* notes 230-34 and accompanying text.
307. *See supra* notes 247-49 and accompanying text.
308. *See supra* Part III.A.4.
309. *See supra* Part I.D. for a discussion of the defenses to negligence.
310. "The potential threat of liability for damages can have a significant deterrent effect and private civil actions are an important mechanism for societal control of human conduct." Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 357 (D. Colo. 1977), *rev'd*, 601 F.2d 516 (10th Cir. 1979).
311. *See supra* note 126 and accompanying text.
312. *See supra* note 128 and accompanying text.
313. *See supra* Part III.A.
314. *See supra* notes 250-53 and accompanying text.
315. *See supra* note 252 and accompanying text.

should be based on the level of play and that only professional and college athletes should be immunized from negligence liability. To honor the educational goals of high school and recreational league sports, to protect participants from injury, and to prevent severe financial burdens from being placed on society, high school and recreational league participants must be required to act reasonably; thus, the negligence per se rule should be imposed. Despite concerns of many courts, negligence liability at the high school and recreational league levels will not inhibit vigorous participation, but rather will only serve to enhance the experience of participants and to further the educational goals that are paramount at these levels of play. Sports are a valuable element of American society, but participants should not be immune from responsibility for the result of their actions simply because they have stepped within the boundaries of a game. However, the sports context presents a unique set of challenges for the courts, and a balancing of factors is necessary. When liability is required to further the goals of society, the sport, and the participants, individuals must be held responsible inside the lines.